

Dead Letter Law Arising from Strategic Choices:  
The Difficulty of Achieving Accountability for the *Jus in Bello*  
Rules on Proportionality and Precautions in Attack

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as a thesis for the degree of  
Doctor of Philosophy in Strategy & Security  
In September 2017

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## Abstract

The *jus in bello* proportionality rule establishes an upper boundary on how much collateral damage combatants can cause whilst striking a lawful target and its associated rule on precautions in attack compels them to take all feasible measures to properly understand the situation on the ground and to mitigate civilian harm. Proportionality and precautions in attack have been codified in API for over forty years, but in that time, it has been difficult to hold troops and their leaders accountable for breaches of these rules. In this study, I examine several reasons for why these rules have been difficult to apply *ex post* by considering the strategic motivations of state officials and prosecutors. Specifically, I propose a game-theoretic model which describes the decisions that state officials and prosecutors have historically made, and I explore what changes to this model would prompt these actors to behave differently. The model was developed using insights gained from legal case studies, archival research and a series of interviews with relevant actors. It suggests, *inter alia*, that to induce state officials to support a stricter liability standard for unlawful attacks, they must either ascribe much more value to legitimacy than to the success of future military operations, or they must perceive the success of future military operations to be unaffected by the possibility of losing criminal or civil adjudication. State officials may perceive losing a civil case based on state liability as being less likely to affect the success of future military operations compared with criminal liability against individual troops. Therefore, state officials may be inclined to support a stricter civil liability standard, if they believed it would help the state to secure greater legitimacy.

## Table of Contents

<b>Front Matter</b> .....	2
<b>Chapter 1: Introduction</b> .....	9
Civilians Caught in the Crosshairs .....	11
The Value of Accountability .....	17
Objective of Thesis .....	25
Relevant Literature and Methods .....	26
Structure .....	34
<b>Chapter 2: A Review of the Law of Proportionality and Precautions in Attack</b> .....	40
A Brief History of Distinction, Proportionality, and Precautions in Attack Prior to the Additional Protocols to the Geneva Conventions of 1949 .....	40
The Principle of Distinction .....	51
The LOAC Rule on Proportionality in Attack .....	53
The LOAC Rule on Precautions in Attack .....	57
The Rules of Proportionality and Precautions in International Criminal Law .....	64
The Rules of Proportionality and Precautions in International Case Law ..	72
The Rules of Proportionality and Precautions in Domestic Case Law .....	80
Non-Judicial Responses to Credible Allegations of Proportionality or Precautions Violations .....	91
Conclusions .....	109
<b>Chapter 3: The Difficulty of Achieving Accountability for the <i>Jus in Bello</i> Rules on Proportionality and Precautions in Attack</b> .....	111
Weighing Incommensurables .....	111
LOAC as a Civil Regulatory Norm versus ICL as a Criminal Accountability Mechanism .....	114
Mens Rea and the Limits of Liability in LOAC versus ICL .....	117
The Reasonable Military Commander Test .....	121
Flexibility and the Value of Vagueness in the Law .....	126
An Impossible Evidentiary Burden .....	131
Conclusions .....	137

<b>Chapter 4: Thinking Strategically About the Law</b> .....	139
Rationalist Apologetics.....	141
Actors, Their Preferences and the Strategic Environment .....	145
Strategic Models of LOAC Compliance.....	147
Strategic Models of Court Actors .....	152
The Basic Model of Prosecutorial Strategy .....	160
Empirical Support for Strategic Treaty Writing .....	163
Conclusions .....	166
<b>Chapter 5: State and Court Interests</b> .....	169
Defining State Officials & Their Motivation.....	169
State Negotiating Position at the CDDH .....	179
State Negotiating Position at the Rome Conference.....	185
Defining Court Officials .....	189
Prosecutorial Motivation.....	191
Prosecutor’s Discretion in Case Selection .....	193
Strategic Deference in International Courts .....	196
Conclusions .....	202
<b>Chapter 6: A Model of State Official and Prosecutor Interaction</b> .....	204
The Model.....	205
The Indictment Subgames .....	212
Solving the Complete Game .....	216
Changing the Equilibrium.....	217
Conclusions .....	224
<b>Chapter 7: The Proportionality Rule: Effective Accountability Mechanism or Dead Letter Law?</b> .....	226
Putting Pressure on the Courts.....	230
Weighing Incommensurables versus Assessing Attack Precautions .....	232
Transparency .....	238
Reconsidering Assumptions Relating to Civilian Casualty Mitigation and Military Effectiveness .....	242

Civil versus Criminal Accountability .....	245
Contribution to the Strategic-Choice Approach Literature.....	252
Limitations of the Model .....	253
<b>Chapter 8: Conclusions</b> .....	<b>258</b>
<b>Bibliography</b> .....	<b>267</b>

## Table of Figures

Figure 1: Factors of compliance .....	17
Figure 2: Breakdown of participant backgrounds .....	30
Figure 3: Notations table .....	206
Figure 4: Game tree of an interaction between a state official and a prosecutor with player payoffs .....	209
Figure 5: Substitute values .....	214
Figure 6: Game tree showing numeric payoffs based on the substituted values .....	215
Figure 7: Summary of findings.....	224

## Table of Abbreviations

API	Additional Protocol I to the Geneva Conventions of 1949
APII	Additional Protocol I to the Geneva Conventions of 1949
APs	The Additional Protocols to the Geneva Conventions of 1949 (Protocols I & II)
ATJ	Andean Tribunal of Justice
ATT	Arms Trade Treaty
CCW	Certain Conventional Weapons Convention
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts
CENTCOM	(US) Central Command
CIHL	customary international humanitarian law
CJEU	Court of Justice for the European Union
DoD	(US) Department of Defense
ECtHR	European Court of Human Rights
EOC	Elements of Crimes
FFA	Fact-Finding Assessment
FRG	Federal Republic of Germany
GFC	ground forces commander
HPCR	(Harvard) Humanitarian Policy and Conflict Research Program
HRO	human rights organisations
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTs	International courts/tribunals (used to refer to international courts generally rather than a particular court)
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Force
IGO	inter-governmental organisation
IHFFC	International Humanitarian Fact-Finding Commission

IHL	international humanitarian law
IIIM	International, Impartial and Independent Mechanism
IR	international relations
IS	Islamic State group
JWT	Just War Theory/Tradition
L&E	law & economics
LOAC	law of armed conflict
LTTE	Tamil Tigers group
MAG	(Israeli) Military Advocate General
MOD	(UK) Ministry of Defence
MSF	<i>Medecins sans Frontières</i> /Doctors without Borders
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
NIAC	non-international armed conflict
NMT	Nuremberg Military Tribunal
OTP	Office of the Prosecutor (n.b. used by both the ICC and the ICTY)
PID	positive identification
PrepCom	Preparatory Commission
RS	Rome Statute of the International Criminal Court
TTPs	tactics, techniques & procedures
UCMJ	Uniform Code of Military Justice
UK	United Kingdom
UN	United Nations
UNHRC	UN Human Rights Council
US	United States

## Chapter 1 Introduction

Balance is an intrinsic feature of the international law of armed conflict (LOAC).<sup>1</sup> From classical times to today, one can trace the trajectory of a debate between the proponents of restraint in warfare<sup>2</sup> and those who adopt the logic of *kriegsraison*.<sup>3</sup> In the modern era, states have categorically rejected *kriegsraison* in favour of an equilibrium between the competing requirements of humanity and military necessity in warfare.<sup>4</sup> However, there exists an uneasy tension between these two demands throughout the entire corpus of LOAC.<sup>5</sup> Nowhere is this more apparent than with the *jus in bello* proportionality rule, which requires combatants to abandon any attacks which are expected to cause excessive collateral damage against civilians and civilian objects compared with the anticipated military advantage of the attack.<sup>6</sup> The effectiveness of proportionality as a legal rule depends upon how textual ambiguities in the law are resolved in practice. In the abstract, the proportionality rule appeals to a

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<sup>1</sup>In this text, I use the term 'law of armed conflict' (LOAC). Other texts in this field may use 'international humanitarian law' (IHL) or 'laws of war' (LOW) to describe essentially the same corpus of law. Solis provides a more complete breakdown of the three names for this common set of laws: Gary Solis, *The Law of Armed Conflict* (Cambridge UP 2010), 18-24. I chose to use LOAC because it accurately describes when the law applies, but remains agnostic as to the law's intent.

<sup>2</sup> Long before the proportionality rule was codified in Additional Protocol I to the Geneva Conventions of 1949 (API), Just War Theory/Tradition (JWT) still influenced the conduct of hostilities in the West. The most cited contemporary account of proportionality in JWT can be found in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2nd edn, Basic Books 1992), 129-133, 151-159.

<sup>3</sup>Cicero's oft quoted phrase '*Silent enim leges inter arma*' ('laws are silent when arms are raised') has been the rallying cry for those in favour of unrestricted warfare. Marcus T. Cicero, *Oration for Titus Annius Milo in the Orations of Marcus Tullius Cicero*, vol III (C.D. Yonge tr, Bell & Sons 1905). Later, in 19<sup>th</sup> Century Prussia, military theorists including the famed strategist Carl von Clausewitz echoed this idea that there need not be any restraint in warfare: 'Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany [war] without essentially impairing its power. Violence, that is to say, physical force (for there is no moral force without the conception of States and Law), is therefore the MEANS; the compulsory submission of the enemy to our will is the ultimate object.' Carl Von Clausewitz, *On War* (J. J. Graham tr, 1874) 1. The doctrine of *Kriegsraison* which developed in this milieu held that military necessity must override the laws and customs of warfare. Solis presents a sobering account of an early twentieth century text which shows the seductive logic behind *Kriegsraison*: 'By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them'. Solis, 265.

<sup>4</sup> Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of Intl Law 796, 798.

<sup>5</sup> Schmitt puts it well when he states that: 'Every one of its [LOAC's] rules constitutes a dialectical compromise between these two opposing forces' *ibid*, 798.

<sup>6</sup> Schmitt claims that: 'The most conspicuous balancing appears in the principle of proportionality... Even minor collateral damage might bar an otherwise lawful attack if the military advantage that accrues to the attacker is slight, whereas a great deal of collateral damage might be justified if the corresponding military advantage is considerable.' *ibid*, 804-805.

utilitarian logic that many would find intuitive; however, it is difficult to operationalise in such a way that protects non-combatants whilst also allowing attackers to plan and execute operations under the proverbial 'fog of war'. There is no cold calculation that one can perform to ensure that an attacker has complied with the rule because the two values that are being weighed are essentially incommensurable<sup>7</sup> (e.g. one cannot merely state that five civilian lives are worth killing an enemy commander). Furthermore, under the stresses of combat, information about the overall military advantage or collateral damage of an attack might be unreliable or non-existent. Nevertheless, to ensure that commanders base their decision to attack on the best information available to them, the *jus in bello* precautions rule stipulates that combatants must take all feasible precautions to understand the nature of a target and to use weapons and methods of attack that will cause the least amount of civilian harm. The application of these rules has historically been left to the good-faith judgement of those who plan and execute attacks, which may help to prevent collateral damage *ex ante*, but it has been difficult to achieve accountability for violations of these rules *ex post*.

Despite being fundamental tenants of LOAC, the rules on proportionality and precautions in attack remain elusive concepts for courts to apply in a robust way. For this project, I have decided to focus on these two rules, because they are at the vanishing point<sup>8</sup> of modern LOAC and international criminal law (ICL), particularly for major powers like the United States (US) and the United Kingdom (UK). Other battlefield outrages, such as directly killing a small number of civilians or taking their property,<sup>9</sup> can land the perpetrator in prison

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<sup>7</sup> William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102; Robert D Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality' 6 *Harv Nat'l Sec J* 299, 307; Michael Schmitt, 'The Principle of Discrimination in 21st Century Warfare' (1999) 2 *Yale Human Rights and Development Journal* 143, 157.

<sup>8</sup> The international legal scholar, Hersch Lauterpacht, was sceptical of the efficacy of international law, generally and the law of war, in particular, and famously stated: 'In all these matters the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.' Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *Brit YB of Int'l L* 360, 381-382.

<sup>9</sup> See Ch 2 at note 319.

(either at the hands of the state's military legal system<sup>10</sup> or at an international court). However, the collateral damage caused during an airstrike or an artillery barrage is regularly dismissed as merely the unfortunate consequences of war, even when the civilian loss of life is extensive.<sup>11</sup>

### *Civilians Caught in the Crosshairs*

The costs of war for civilians are set to become ever higher as more fighting takes place in cities. This has led International Committee of the Red Cross (ICRC) President Peter Maurer to warn that when combatants use high-explosive weaponry in urban environments, the results are not merely unfortunate, but utterly catastrophic:

For centuries, wars were predominantly fought across vast battlefields, pitting thousands of men, large army corps and heavy weaponry against each other in open fields. Cities could be besieged or sacked but fighting rarely took place on the streets. Today's armed conflicts look quite different: city centers and residential areas have become the battlefields of our time... In their urban operations, armed forces have to take into account the vulnerability of large numbers of people due to their dependence on urban services and the intricacy and interconnectedness of these essential services. They must avoid or minimize harm to civilians, including in their choice of means and methods of attack. In addition to the high risk of incidental civilian death, injury and disability, heavy explosive weapons tend to cause extensive damage to critical civilian infrastructure, triggering debilitating 'domino effects' on interconnected essential services such as health care, water and electricity supply systems.<sup>12</sup>

The modern framework for the *jus in bello* principle of distinction and its rules on proportionality and precautions in attack were negotiated, in part, to avoid the sort of devastation that was wrought upon civilians during the Second World War.<sup>13</sup> Nevertheless, civilians are still bearing much of the brunt of modern military operations. Even when governments are ostensibly committed to fighting according to international law, their troops seem unable to rout the enemy without simultaneously causing extensive civilian harm. In the most

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<sup>10</sup> Eugene Fidell, 'U.S. Military Justice and "Operational Mishaps": A Primer' (*Just Security*, 24 April 2017) accessed 4 July 2017.

<sup>11</sup> 'In the view of many soldiers, because collateral damage is considered inevitable, concern for collateral damage should not get in the way of force protection or accomplishing the mission. Lieutenant Colonel Nathan Sassaman lost respect for a commander who refused to use all artillery power available to him because the Colonel "feared the collateral damage that might result from such an action." Sassaman reasoned: "Well, collateral damage is one of the costs of war. You try to minimize it, of course, but it's going to happen. War is imprecise and unpredictable. It is, in a word, terrible. If you aren't willing to accept collateral damage as a cost of doing battle, then you shouldn't engage the military in the first place' Neta Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (Oxford UP 2013), 5.

<sup>12</sup> Peter Maurer, 'War in Cities: What Is at Stake?' (War in Cities, Geneva, 4 April 2017).

<sup>13</sup> See Ch 2 at note 131.

recent example of such a Pyrrhic victory, the liberation of Mosul from Islamic State (IS) has left the city in ruins. During the final stages of the battle, between February and June 2017, military operations claimed the lives of roughly 5,800 civilians.<sup>14</sup> As US Army Major John Spencer noted, the only way to truly minimise civilian casualties would have been to fight room-to-room through the city:

To be clear, Mosul was not a battle fought by the U.S. military. But the Iraqi forces who undertook this urban fight did so with U.S. advice, training and tools — including advanced surveillance technology and firepower — and their performance offers illustrative lessons about the limits of the methods and capabilities available for urban combat... For the U.S. military, there are basically two approaches to fighting in cities. The first can in part be traced to the 1972 failed rescue of the Israeli Olympians taken hostage in Munich. After that, specialized hostage rescue and close-quarter battle tactics were perfected by counterterrorism units and special operations forces and then passed to general purpose military forces. These “enter and clear a room” tactics are practiced religiously and are heavily dependent on actionable intelligence — in other words, knowing what target to attack.<sup>15</sup>

However, given how deeply IS troops embedded themselves into the civilian population in Mosul, and given the limited toolkit available to the pro-Iraqi Government forces, he believed the city needed to be razed in order to win it back:

The second approach is outright destruction. With roots traced to tactics like ancient siege warfare, U.S. forces will isolate all or part of a city and either control access to exhaust the supplies, support, or morale of its opponents until they surrender or move to clear every structure, building and room with maximum firepower, until all enemy personnel are found and killed. Often, this includes attempting to remove civilians so even more destruction can be employed, as U.S. forces did when they routed over a thousand insurgents in the 2004 Second Battle of Fallujah. But these approaches are on extreme ends of a spectrum with little in the middle: soldiers have few options between a five-ounce round and a five-hundred-pound bomb. They can't see inside buildings, target specific individuals fortified within dense urban terrain, separate civilians from enemy combatants, or do anything other than destroy with weapons and techniques designed for fighting major armies on the plains of Eastern Europe or in some future war with peer militaries. The military has very few of what it calls nonlethal — or even less destructive but more effective — tools.<sup>16</sup>

By not adopting the sort of tactics and weaponry needed to minimise collateral damage, the pro-Government forces, including those parts of the US military that have participated in the campaign, have left themselves open to

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<sup>14</sup> *At Any Cost: The Civilian Catastrophe in West Mosul, Iraq* (Amnesty International, 2017), 5, 24.

<sup>15</sup> John Spencer, 'Why America Is Destroying Iraqi Cities to Save Them' (2017) <<http://nationalinterest.org/feature/why-america-destroying-iraqi-cities-save-them-22024>> accessed 5 September 2017.

<sup>16</sup> *Ibid.*

accusations that they fired indiscriminately, disproportionately, or without first exhausting all feasible precautions to spare the civilian population.<sup>17</sup>

The Battle of Mosul joins a long list of recent campaigns in which human rights organisations (HROs) and inter-governmental organisations (IGOs) have criticised states over how they employ air power. For instance, recent US-led Coalition operations against IS in Syria, have provoked condemnation for both the high numbers of civilian deaths generally,<sup>18</sup> and for particular high-casualty strikes.<sup>19</sup> Moreover, it is not just the HROs that are concerned about collateral damage in contemporary military operations. Amid worries that the Trump Administration may have loosened the Obama-era policy restraints governing the use of force in situations where civilians could be hurt or killed, 30 former US flag officers and policy officials wrote an open letter to Defense Secretary James Mattis urging him to keep in place those policy restraints and their associated oversight mechanisms.<sup>20</sup> To be sure, their concerns were more grounded in counterinsurgency strategy than humanitarianism, *per se*, but the document calls into question the tactical and strategic necessity of conducting operations in such a way as to produce large numbers of civilian casualties. In response, US military commanders and spokespeople argue, in an appeal to *kriegsraison*, that such collateral damage is necessary and that it is in the best

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<sup>17</sup> Amnesty International investigators documented 45 specific attacks in which they believed pro-government forces had committed a violation of LOAC as it applies to targeting. *At Any Cost: The Civilian Catastrophe in West Mosul, Iraq*, 27.

<sup>18</sup> 'Large numbers of civilian casualties from coalition actions have been reported in local outlets and by Syrian monitoring organizations since well before the official start of operations inside Raqqa itself. In the three months leading up to June, Airwars researchers estimated that more than 700 civilians were likely killed by coalition strikes as the Syrian Democratic Forces surrounded the city. Airwars currently assesses that more than 5,100 civilians have likely been killed in coalition actions in both Iraq and Syria since 2014.' Samuel Oakford, 'The U.S. Is in Denial About the Civilians It's Killing in Syria' *Foreign Policy* (1 September 2017) <<http://foreignpolicy.com/2017/08/31/the-u-s-is-in-denial-about-the-civilians-its-killing-in-syria/amp/>>. See also, Sarah Almukhtar, 'U.S. Airstrikes on Isis Have Killed Hundreds, Maybe Thousands of Civilians' *New York Times* (New York, 25 May 2017) <<https://www.nytimes.com/interactive/2017/05/25/world/middleeast/airstrikes-iraq-syria-civilian-casualties.html>> .

<sup>19</sup> For example, Human Rights Watch claimed that US forces had failed to take all feasible precautions to properly identify a mosque in al-Jina before attacking it and killed 37 civilians *Attack on the Omar Ibn Al-Khatab Mosque: US Authorities' Failure to Take Adequate Precautions* (Human Rights Watch, 2017). Moreover, the New York Times and the Syrian Observatory for Human Rights reported that a US attack on a school in Mansoura killed more than 30. Anne Barnard, 'U.S. Airstrike in Syria Is Said to Kill Dozens of Civilians' *New York Times* (22 March 2017) <<https://www.nytimes.com/2017/03/22/world/middleeast/syria-us-airstrike.html>> ; '33 Civilian Victims Are Killed in a New Massacre Committed by the International Coalition's Warplanes in Al-Raqqah' (*Syrian Observatory for Human Rights*, 22 March 2017) <<http://www.syriahr.com/en/?p=63281>> accessed 5 September 2017.

<sup>20</sup> Rand Beers et al., *Principles to Guide U.S. Counterterrorism use of Force Policies* (2017).

interests of the civilians living in cities like Raqqa for the Coalition to fight hard to end the conflict as quickly as possible, rather than taking greater care during targeting: 'Any pause in operations will only give ISIS more time to build up their defences and thus put more civilians in harm's way... What is more, it will further reinforce ISIS's tactic of using civilians as human shields.'<sup>21</sup> Even if the Trump Administration, generally, is comfortable with accepting large numbers of civilian casualties as a matter of course,<sup>22</sup> Mattis's rhetoric suggests that the Department of Defense (DoD) is sensitive to charges from outside organisations that the US is not taking collateral damage seriously:

There has been no military in the world's history that has paid more attention to limiting civilian casualties and the deaths of innocents on the battlefield than the coalition military... We're not the perfect guys... We can make a mistake, and in this kind of warfare, tragedy will happen. But we are the good guys, and the innocent people on the battlefield know the difference.<sup>23</sup>

Nevertheless, in this frame, extensive collateral damage is still seen as an acceptable, if unfortunate, part of warfare rather than an indication that there has been a breakdown in the state's responsibility to ensure that its attacks are proportionate.

To better understand why states can claim that civilian casualties are merely 'the price of doing business', Neta Crawford argued that it can be helpful to first tease apart the different ways that collateral damage can occur during military operations. Firstly, there is the truly unforeseen collateral damage which one cannot reliably predict or feasibly mitigate. However, such accidents are relatively rare and most collateral damage is foreseeable, if not directly intended.<sup>24</sup> This includes the second way that collateral damage can occur, which is when the damage is foreseeable and intended, but is considered proportionate (or at least not excessive) when compared to the military advantage to be gained from launching the strike. This is the type of damage

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<sup>21</sup> Scrocca in Oakford.

<sup>22</sup> 'That's why we will also expand authority for American armed forces to target the terrorists and criminal networks that sow violence and chaos throughout Afghanistan. These killers need to know they have nowhere to hide, that no place is beyond the reach of American might and American arms. Retribution will be fast and powerful, as we lift restrictions and expand authorities in the field. We're already seeing dramatic results in the campaign to defeat ISIS, including the liberation of Mosul in Iraq.' 'Full Transcript and Video: Trump's Speech on Afghanistan' *The New York Times* (21 August 2017) <<https://www.nytimes.com/2017/08/21/world/asia/trump-speech-afghanistan.html>> .

<sup>23</sup> Mattis in Oakford.

<sup>24</sup> Crawford, 29.

that has historically been excused by doctrine of double effect in the Just War Tradition (JWT).<sup>25</sup> Under its LOAC incarnation, the commander is justified in killing civilians and damaging civilian property if the anticipated military advantage to be gained from hitting the target is high enough. However, as mentioned earlier, it is not clear how commanders are meant to compare military advantage and collateral damage and, in practice, they are given a great deal of discretion to decide for themselves how to weigh those two values. Finally, some of the collateral damage that states claim is accidental or proportionate is actually the result of systemic organisational biases or practices which the state could change, but is either unwilling or unable to address.<sup>26</sup> That is, some human or mechanical ‘errors’ in combat occur with such a frequency that the risk of certain operations or weapons causing unwanted civilian casualties can be known on the aggregate, even if the collateral damage caused during any *individual* operation looks accidental or proportionate when viewed in isolation.<sup>27</sup> In this third type of collateral damage, what Eugene Fidell would call ‘operational offenses’,<sup>28</sup> it is difficult to identify anyone within the organisation who intended to cause excessive civilian casualties, but the damage nevertheless occurred because of acts or omissions by multiple decision makers in the kill chain.<sup>29</sup>

The first type of collateral damage is not a crime, because the criminal law principle of *mens rea*<sup>30</sup> would normally preclude responsibility for unforeseeable accidents:

In order to satisfy rule of law standards, an offense must have a (subjective) *mens rea* requirement in order to alert [the perpetrator] to the fact that he is about to violate the law: some element of *mens rea* is needed in order to give fair warning, which would be

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<sup>25</sup> Walzer, 153.

<sup>26</sup> Crawford, 7.

<sup>27</sup> *Ibid*, 8.

<sup>28</sup> Fidell categorises LOAC violations into ‘battlefield outrages’ and ‘operational offenses’ to describe the difference between those violations that arise out of malice and are usually *mala in se* and those: ‘acts or omissions that are committed in the course of an approved and by hypothesis approvable military mission. These are missions that, in some sense, have gone awry.’ Fidell.

<sup>29</sup> Additionally, Rebecca Crootof argues that in the future, automation will likely add another layer of complexity to targeting that will make it even more difficult to identify a single person who is responsible for the sort of operational breakdowns that lead to unintended collateral damage. See generally, Rebecca Crootof, ‘Accountability for Autonomous Weapons’ (2016) 164 U Penn L R 1347.

<sup>30</sup> *Mens rea* describes ‘criminal intent or recklessness... [and] is the second of two essential elements of every crime at common law, the other being the *actus reus* [criminal act]’. Bryan Garner (ed) *Black’s Law Dictionary* (8 edn, West 2004), 1006.

absent if offences could be committed accidentally. The principle of autonomy may be interpreted as taking the point further, arguing that the incidence and degree of criminal liability should reflect the choices made by the individual.<sup>31</sup>

For the second and third types of collateral damage, it is theoretically possible to hold either the state or its agents legally accountable for attacks where the commander knew the strike would cause excessive collateral damage but proceeded with it anyways, and for attacks where those in the kill chain failed to take all feasible precautions to verify the target or to minimise civilian collateral damage when they were setting up the strike. However, as I will discuss in greater detail in Chapters 2 and 3, there are a number of difficulties with prosecuting or litigating cases involving proportionality or precautions in attack. For instance, since an investigator cannot know what was in the mind of a suspect commander without privileged access to the attacking force's facilities or classified information, it is extraordinarily difficult to prove that they had the requisite *mens rea* needed to support a conviction, even for a charge based on recklessness. Similarly, there have only been a few civil law cases where these rules were invoked as more than mere *orbiter dicta*, and none have ever found a state or its agents to be in violation of these rules despite there being no shortage of potential cases where shelling or airstrikes have caused extensive collateral damage.

Although it has always been possible for civilians to be killed in the field, it is becoming more likely that they will be caught up in the fighting as the rate of urbanisation across the world increases and more battles take place in cities. Civilians will suffer in large numbers unless states adjust their weaponry and tactics, techniques and procedures (TTPs) to minimise collateral damage. This is not merely a moral appeal, but one that is required by the law of armed conflict and international criminal law rules on proportionality and precautions in attack. However, in the absence of a meaningful accountability regime to compel the state to adopt less harmful practices, there is no reason for state leaders or commanders to see even large numbers of civilian casualties as anything other than the unfortunate, but bearable, cost of war.

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<sup>31</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford UP 2013), 74.

## *The Value of Accountability*

To be sure, *ex post* accountability mechanisms are not the only way to ensure compliance with the rules on proportionality and precautions in attack. Rather, they are part of a compliance architecture which also includes less instrumental ways of ensuring that combatants follow the law, as shown in Figure 1:

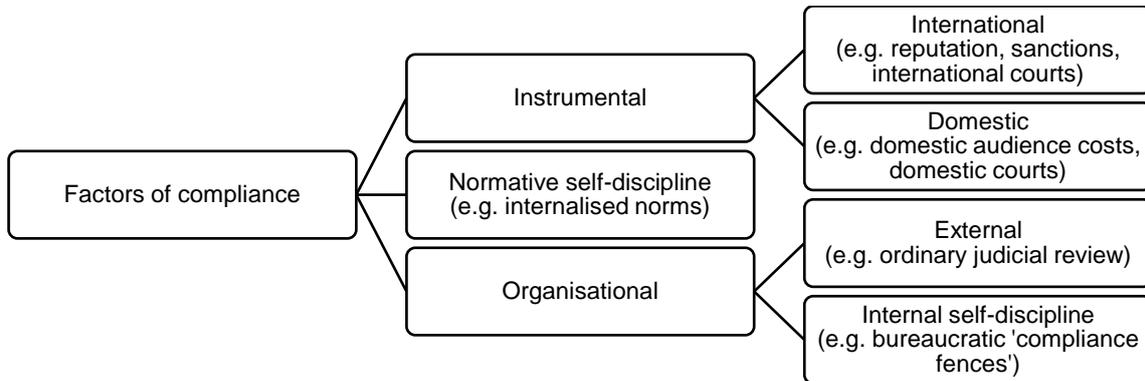


Figure 1: Factors of compliance<sup>32</sup>

Every major LOAC treaty made since the Geneva Conventions of 1949 includes an article that obligates states to disseminate the contents of the treaty as widely as possible.<sup>33</sup> Indeed, as I will discuss at greater length in Chapter 2, the specific provisions stipulated by the proportionality and precautions rules have made their way into the military manuals of most states, even those that have not signed on to Additional Protocol I to the Geneva Convention of 1949 (API) or the Rome Statute. It has historically been assumed that educating the civilian population and military forces about the contents of LOAC would bring about a significant change in the behaviour of troops in the field.<sup>34</sup> However, insights from social psychology and empirical studies on LOAC compliance suggest that, while it is not difficult to teach combatants about the content of the law, it is

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<sup>32</sup> Adapted from Fernando Nuñez-Mietz, 'Lawyering Compliance with International Law: Legal Advisors in the "War on Terror"' (2016) 1 *European J of International Security* 215, 217. Nuñez-Mietz did not see the courts as being a part of 'instrumental' compliance, but rather as an organisational check in the form of judicial review. However, I make a distinction between the cost-free notion of having a law or executive order struck down by the courts versus criminal sanctions or civil litigation against the state or its agents, which do impose instrumental costs to the state for non-compliance.

<sup>33</sup> For example, see API Articles 83 and 87(2), and CCW Article 6. For a more comprehensive list, see Elizabeth Bates, 'Towards Effective Military Training in International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 795, 796.

<sup>34</sup> *Ibid.*, 796-797.

difficult to get them to internalise it in a way that promotes normative self-discipline. For example, as Elizabeth Bates reveals:

The 2004 Roots of Behaviour in War Study surveyed former fighters in Bosnia-Herzegovina, Colombia, the Republic of the Congo (Congo-Brazzaville) and Georgia for the ICRC, and found no positive correlation between moral disengagement and ignorance of the law: attitudes associated with a risk of violations were held by some fighters who had a good knowledge of the law. The research indicated that fighters' willingness to disregard IHL is linked to moral disengagement, which has two dimensions: (i) the justification of violations by a fighter's own group (which in turn correlates with group cohesion), and (ii) the dehumanizing of the enemy. The authors found that "[w]hat counts is esteem for their comrades, defence of their collective reputation and desire to contribute to the success of the group". This creates a tendency to "abdicate responsibility ... induced chiefly by group conformity and obedience to orders".<sup>35</sup>

Inculcating a respect for LOAC often runs counter to other goals that the state has for military training, which involve making combatants obedient to superiors, part of a cohesive fighting unit, and willing to aggressively engage the enemy.<sup>36</sup> Though states can take steps to integrate LOAC training with other drills and exercises, oftentimes commanders perceive LOAC training as competing with other operational priorities.<sup>37</sup> Since the major LOAC treaties allow the states to interpret the dissemination requirements as they see fit, it is reasonable to assume that for many troops, this training requirement is seen as secondary to practicing their primary mission. Sanctions for LOAC violations signal the fact that compliance with the law is not merely a suggestion, but rather a moral imperative and accountability mechanisms can, therefore, bolster the effectiveness of other training-based measures aimed at helping troops internalise the norms that the law is meant to uphold.<sup>38</sup>

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<sup>35</sup> Ibid, 808.

<sup>36</sup> Ibid, 797.

<sup>37</sup> Ibid, 805-806.

<sup>38</sup> 'The power of sanctions to incur moral norms greatly adds to the preventive function that sanctions have. After all, people are motivated to see themselves as moral beings and act in ways that are consistent with this self-view (Aquino and Reed 2002; Blasi 1983, 1984). So, if a sanction creates the idea that it is immoral to engage in certain behavior, people will abstain from this behavior. Moreover, sanctions that succeed in conveying a moral norm may be more impervious to suboptimal enforcement. After all, it is usually infeasible and undesired to monitor people's behavior for a 100 % [of the time]. However, people who feel bounded by moral norms are not influenced by such instrumental reasons (Kroneberg et al. 2010 ; Wenzel 2004 ). So, if a sanction evokes moral reasons to show the desired behavior, people are likely to adhere to the rules even when the chances that they will be caught if they do not, are small (Mulder and Nelissen 2010)' Laetitia Mulder, 'When Sanctions Convey Moral Norms' [2016] Eur J Law & Econ 1, 7.

Another *ex ante* compliance measure enshrined in API is the requirement for states to provide commanders with legal advisors.<sup>39</sup> When legal advisors are deeply embedded in the military decision-making process, their presence can keep the constraints of LOAC in the forefront of the commander's mind. In this way, military legal advisors act as an institutional barrier which keeps commanders from committing LOAC violations even in the absence of an internalised predilection to follow the law or instrumental compliance mechanisms, such as criminal sanctions.<sup>40</sup> In his study of how the 'lawyerisation' of the US defence community created a 'compliance fence' around President George W. Bush's War Council, Fernando Nuñez-Mietz claimed that after the administration's harsh detainee interrogation program came to light, lawyers at multiple levels of government were able to use their legal advice to moderate the effects of the policy and eventually to return the US government to compliance with the law:

Legal advisers, occupying different legal offices integrated with equally decentralised policy bureaus, were consulted before decisions were made and their approval was sought by policymakers at all times. Legal advice functioned as a required authorisation for action. So much so that the bulk of the interrogation programme was based on the legal advisers' input, particularly on that issued from [the Department of Justice Office of Legal Counsel]. It is quite safe to conclude that the programme would have been different if the legal input had been different. In Goldsmith's words: 'The lawyers weren't necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security. But the lawyers ... seemed to "own" issues that had profound national security and political and diplomatic consequences. They [and, after October 2003, we] dominated discussions on detention, military commissions, interrogation, GTMO [Guantanamo Bay], and many other controversial terrorism policies.'<sup>41</sup>

Even though Nuñez-Mietz argued that the presence of embedded legal advisors had a constraining effect on decision makers, he suggested that compliance

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<sup>39</sup>API Article 82 states that: 'The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.' Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>40</sup> Nuñez-Mietz, 216-217. C.f. Bates who, in responding to another scholar, posits: 'Dickinson argues that the "commingling" of JAG [Judge Advocate General/US legal advisor] officers and soldiers is consistent with organizational theory and promotes compliance. This is despite the massacre at Haditha, where twenty-four civilians were killed by US Marines, and JAG officers did not report violations. Arguably, Dickinson's optimism about the potential of the JAG Corps as agents of compliance does not engage sufficiently with the institutional failings revealed by the Haditha massacre'. Bates, 806. However, Nuñez-Mietz does concede that the strength of the compliance fencing depends upon the quality of the legal advisors, themselves.

<sup>41</sup> Nuñez-Mietz, 233.

fencing could work in concert with other, more instrumental ways of ensuring compliance with the law.<sup>42</sup> It may be true that by lawyerising certain military functions, such as targeting, one should expect to see a greater degree of compliance with the rules on proportionality and precautions in attack on the aggregate, but without an accountability mechanism to undergird this system of self-discipline, the effectiveness of institutional ‘compliance fences’ depends upon the professional integrity of the legal advisors. In the absence of such a mechanism, an unscrupulous legal advisor may advise commanders that they could violate these rules with impunity, or worse, they may advise commanders to pass off more serious violations of LOAC, such as direct or indiscriminate attacks against the civilian population, as violations of these ‘fuzzier’ rules, thereby escaping legal sanctions for their actions. Ideally, other military legal advisors should move to correct errant ones, but if the entire corps of advisors is trained to see the proportionality rule as permitting excessive collateral damage (so long as it isn’t ‘clearly excessive’) or that merely taking a few precautions is enough to have ‘ticked the box’ for precautions in attack, then instrumental accountability measures could prove to be a necessary condition for compliance when the institutional safeguards prove insufficient to prevent unlawful attacks. Indeed, the empirical record supports the use of instrumental compliance, both generally in the criminal justice literature and specifically, in the case of international justice mechanisms. For instance, Hyeran Jo and Beth Simmons argue that the ICC regime imposes practical (e.g. jail time or travel restrictions) and social costs for committing violations of ICL<sup>43</sup> and that these costs likely constrain the behaviour of government leaders either directly, or by mobilising domestic-level actors to hem in the criminal leader.<sup>44</sup> In their study of the ICC regime’s influence on state behaviour, Jo and Simmons have shown that there is, indeed, a significant negative correlation between intentional

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<sup>42</sup> Ibid, 237.

<sup>43</sup> ‘Recognizing this complementary relationship between formal prosecution and informal compliance pressures, we argue that the ICC’s influence may go well beyond the common assertion that the institution has no teeth. There are multiple mechanisms – legal and social, international and domestic – associated with the ICC’s authority that can potentially deter law violation in countries prone to civil violence.’ Hyeran Jo and Beth Simmons, ‘Can the International Criminal Court Deter Atrocity’ (2016) 70 *International Organization* 443, 444.

<sup>44</sup> Ibid, 444.

civilian killing by government actors and a state's ratification of the Rome Statute, its adoption of domestic legislation based on the Rome Statute, or a prior ICC investigation of its state officials.<sup>45</sup> Therefore, even when the enforcement mechanism is imperfect as it is with the ICC,<sup>46</sup> compliance can still be induced by forcing decision makers to consider that there are costs to committing ICL violations. Moreover, they found that this effect was amplified when the court was able to engage with human rights groups at the sub-state level or enlist the support of other actors in the international community to pressure state actors by tying promises of aid to good behaviour on the battlefield.<sup>47</sup> Jo and Simmons do note, however, that the strength of instrumental compliance is not dependent so much on the severity of the punishment as it is on the likelihood that the would-be criminal could be indicted or convicted for committing a crime.<sup>48</sup>

Finally, formal accountability mechanisms can also support the regulatory function of the law by providing commanders and their legal advisors with a body of case law to support their decision-making processes *ex ante*. The value of the evolutionary nature of the common law has been challenged recently on the grounds that it is not as economically efficient as early law and economics (L&E) theorists had suggested.<sup>49</sup> However, regardless of whether precedents in case law are more or less socially optimal than statute-based law, the clarifying function of precedent can help to 'pin down' some of the vagueness in the law by forcing legal professionals to grapple with how to apply abstract law to concrete situations. This dearth of case law for violations of

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<sup>45</sup> Ibid, 462.

<sup>46</sup> 'We are under no illusions that the International Criminal Court has positive impacts in all cases. These are average results, based on imperfectly measured exposures to prosecutorial and social risks and costs. Our theory as well as empirical analysis of prosecutorial deterrence is probabilistic, not deterministic. It is easy to point to conflicts that the ICC has not solved. The Bemba trial in relation to the situation in the Central African Republic did not stop violence by the Seleka faction, which reminds us that the ICC cannot solve deep-rooted social problems in a short period of time. However, the OTP prioritizes cases where violations are "grave" and these are precisely cases where violence is prone to recur. ICC situations are some of the most protracted cases of conflict in the world—a fact that makes the modest positive consequences we document all the more remarkable'. Ibid, 470.

<sup>47</sup> Ibid, 469.

<sup>48</sup> Ibid, 447.

<sup>49</sup> See generally, Ben Depoorter and Paul Rubin, 'Judge-Made Law and the Common Law Process' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics*, vol 3: Public Law and Legal Institutions (Oxford UP 2017). Interview with Former ICTY Official (18 Mar 2016).

proportionality and precautions in attack was cited by one International Criminal Tribunal for the Former Yugoslavia (ICTY) official as the reason why it has been so difficult to determine what manner of strikes actually run afoul of the rules (either *ex ante* or *ex post*) when compared with similarly vague standards in law:

I mean you've got people involved in car accidents and stuff like that — negligence cases — all the time. Now, negligence is no more clear-cut a concept than proportionality, but what you got are thousands and thousands of car accident cases and courts saying: 'oh yeah, I hit the left fender — that's negligent' or 'you just sort of scraped the backend or something — no that's fine'. You've got the relatively abstract concept clarified by a lot of decisions concerning particular-fact situations. Now, you don't have that where proportionality is involved or, at the very least, you don't have it in unclassified material.<sup>50</sup>

Of course, states may have their own internal collateral damage assessment procedures and processes to learn from previous violations.<sup>51</sup> However, the value of case law is that the adversarial nature of court proceedings<sup>52</sup> takes into account, not only the military's assessment of an incident, but also that of the victims of a strike. Therefore, the lessons learned from case law ought to provide a richer and more transparent set of case studies regarding what conduct could be considered unlawful in a given situation than internal organisational processes alone.

Even if formal sanctions did fail to deter future atrocities, an effective accountability mechanism for violations of the rules on proportionality and precautions in attack would also serve the cause of justice for the victims of errant attacks. Much ink has been spilled over whether peace or justice should take priority in end-of-conflict reconciliation efforts, and without diving too deeply into that debate, recent evidence from conflicts in which the ICC has intervened suggest that this might be a false dichotomy. Rather, it seems to be possible to achieve accountability for LOAC violations in tandem with other political initiatives aimed at ending a conflict or rebuilding civil society *post bellum*.<sup>53</sup>

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<sup>50</sup> Interview with Former ICTY Official.

<sup>51</sup> For example, see Appendix E, 4(d)(2)(j) of JP 2-01.1, which states that the Command Battle Damage Assessment Cell must conduct preliminary collateral damage inquiries after a potential LOAC violation and should recommend changes to current operations, if needed. *US Joint Tactics, Techniques, and Procedures for Intelligence Support to Targeting* (JP 2-011, 2003).

<sup>52</sup> Admittedly, I am focusing on a unique feature of common law jurisdictions here which may not have as much utility in states that use continental law.

<sup>53</sup> Jo and Simmons, 445.

Indeed, there is value in granting civilians redress for disproportionate or sloppy strikes either during or after a conflict, even if the accountability regime fails to deter future violations. If the victims of unlawful attacks believe that their grievances have been dealt with in satisfactory manner, there is less chance they will feel compelled to seek vengeance for such incidents by other means.<sup>54</sup> Furthermore, there is less opportunity for unlawful attacks to become rallying points for opposition propaganda and attackers will have more credibility when they claim that the collateral damage from other strikes was necessary or accidental.<sup>55</sup>

When applied consistently, a robust accountability regime can also encourage support for the rule of law more generally.<sup>56</sup> Jane Stromseth cautions, though, that the impact of an accountability regime on support for the rule of law is moderated by whether the particular mechanism used is seen by relevant audiences as just, and by whether the mechanism is properly resourced.<sup>57</sup> Her findings echoed an earlier point made by Robert Cryer, who claimed the inverse: that *selectivity* in an accountability regime can erode faith in the rule of law.<sup>58</sup> The selective application of the law can come about in two ways. Firstly, representatives of powerful countries can lobby for certain violations of LOAC to carry criminal sanctions and for other violations to not be punished. Moreover, the structure of an accountability regime, such as the rules

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<sup>54</sup> Jane Stromseth, 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?' (2007) 38 Geo J Intl L 251, 263.

<sup>55</sup> *Insurgencies and Countering Insurgencies* (US Army Field Manual 3-24, 2014), Ch 13, 15.

<sup>56</sup> 'Accountability proceedings – particularly trials but also truth commissions – aim to demonstrate that atrocities are unacceptable, condemned, and not to be repeated. They aim to substantiate concretely, and to demonstrate, a norm of accountability. If the proceedings that lead to conviction for major offenses – or the reconciliation rituals for lesser offenses – are widely viewed as fair and legitimate, they are more likely to demonstrate credibly that previous patterns of impunity have been rejected, that law can be fair, and that political position or economic clout does not immunize a person from accountability.' Stromseth, 263.

<sup>57</sup> *Ibid*, 320.

<sup>58</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge UP 2005), 191. Furthermore, Cherif Bassiouni recognised that the selective enforcement of LOAC between state and non-state actors could erode legitimacy for the state during non-international armed conflict: 'The underpinnings of enforcement are the likely expectations of prosecution, the relatively swift adjudication, the knowledge of a significant penalty in case of guilt, the equal application of law and its consistent (as opposed to occasional) application... This means that enforcement should be applied in the same way to state actors and to non-state actors and also applied to all perpetrators. Without these characters, enforcement becomes selective and loses much of its legitimacy. In fact, it becomes counter-productive if it is used only against non-state actors. Consistency is related to the issue of legitimacy, but is also necessary as a norm-reinforcing mechanism.' C. Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98 J of Crim L & Criminology 711, 798.

of evidence or court procedures, can create a secondary level of selectivity by influencing which violations are ultimately investigated, tried and punished.<sup>59</sup> Charges of hypocrisy will undermine the legitimacy of enforcement mechanisms for LOAC violations writ-large if such mechanisms are seen to only apply to the vanquished foes of Western-style democracies and not their own troops.<sup>60</sup> If the violation is meant to be dealt with at the domestic level, then the state's failure to apply the law to its own forces can lead both the victims of errant strikes and elements of the state's own civil society to lose faith in that state's commitment to justice. If the violation is meant to be dealt with at the international level, then the failure of international institutions to address all violations of international criminal law allows critics to claim that international justice is merely a neo-colonial project that powerful Western states inflict upon weaker ones to exercise control over their internal affairs.<sup>61</sup> Therefore, selective enforcement of the law can blur the boundary between law and politics<sup>62</sup> and it invites critics to challenge the purported universality of the principles which the law is meant to uphold. Furthermore, when only certain types of violations or certain classes of criminals become the subject of an accountability regime, it also makes variations of the *tu quoque* defence<sup>63</sup> more convincing, if not in court, then at least in the public discourse.<sup>64</sup> Western powers, such as the US and the UK, rely heavily on the use of air power for their military operations and are, therefore, going to be more likely to run afoul of those provisions in the law

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<sup>59</sup> Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 191.

<sup>60</sup> 'Alfred Rubin makes the point pithily: "[u]nless the law can be seen to apply to George Bush (who ordered the invasion of Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait) . . . it will seem hypocritical again." In a similar key, Ian Brownlie has recently lamented: "political considerations, power and patronage will continue to determine who is tried for international crimes and who not." What these critiques share is an ideal of legitimacy and the rule of law.' *ibid*, 194.

<sup>61</sup> When discussing an attempt by Kenyan politicians to deflect pressure from the International Criminal Court away from those responsible for post-election violence in 2007, Geoffrey Lugano claimed that: 'Essentially, the Jubilee Alliance linked the ICC intervention to the re-emergence of the western domination of Africans (through targeting their leaders while ignoring other serious conflicts) and therefore the need for Kenyans to safeguard their sovereignty. In this regard, statements by western envoys were reframed as undue external interference in domestic affairs, and, by default, support of their main rival – Odinga. Specifically, the statement from the US assistant secretary of state was problematic given that the USA is not a party to the Rome Statute, commits atrocities globally and was demanding Kenyans' fidelity to the ICC.' Geoffrey Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya' (2017) 11 *Intl J of Transitional Justice* 9, 24.

<sup>62</sup> Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 196.

<sup>63</sup> The *tu quoque* defence, or arguing that the prosecuting country has also committed violations, is not normally considered a valid defence. *Ibid*, 199.

<sup>64</sup> *Ibid*, 199-202.

pertaining to air and missile warfare, compared with less developed states or armed groups. By ensuring accountability for violations of the rules of proportionality and precautions in attack, sceptical audiences will see that the *jus in bello* applies equally to weak and powerful actors alike.

Therefore, accountability for violations of the rules on proportionality and precautions in attack is desirable for four reasons. Firstly, it acts as an outer wall against misconduct when institutional ‘compliance fences’ break down. Secondly, the case law from criminal or civil adjudication supports the regulatory function of proportionality and precautions in attack by providing commanders and their legal advisors with concrete examples of behaviours and decisions that have crossed the line. Thirdly, it offers the victims of errant attacks a sense that justice has been served and gives them formal recognition of the harm that had been done to them, quenching the thirst for extra-judicial vengeance. Finally, it should increase support for the rule of law more generally, since the subject of the law will include both the sort of violations committed by weak actors as well as those committed by more powerful actors.

#### *Objective of Thesis*

Modern military operations have the potential to inflict catastrophic damage to civilian population, particularly in urban environments. Recognising this, the states have come to adopt a set of rules for targeting that have a basis in both conventional and customary LOAC, and a subset of these rules has also made its way into ICL. However, even though the black-letter text of the law suggests that combatants are prohibited from launching attacks that are disproportionate or recklessly lacking in precautions, and even though there are several layers of accountability mechanisms which could theoretically issue sanctions to those who violate the law, there have not yet been any criminal convictions, nor any successful civil suits against the state for violations of these rules.

The objective of this study is to uncover why it has been so difficult to achieve accountability for violations of the *jus in bello* rules on proportionality and precautions in attack. To understand why these rules have not been successfully adjudicated despite the large number of possible cases from which courts could choose, one must look at how the law was formed and how certain

features of a particular accountability mechanism allow cases to be dropped before they ever go to trial. Only by understanding this interaction will it be possible to then evaluate what manner of intervention might bring about more successful prosecutions or civil litigation.

### *Relevant Literature and Methods*

To this end, I shall be engaging with two bodies of literature. The first part of this study will include a positivist/doctrinal<sup>65</sup> analysis of the *jus in bello* rules on proportionality and precautions in attack. In it, I shall trace the development of the law to show how these rules are understood to function as a matter of *lex lata*. I shall then explore the arguments made by legal scholars and practitioners pertaining to why it seems so difficult to achieve accountability for these rules, both on the merits and procedurally. The second part of the study will examine the literature on international law from the strategic-choice perspective in international relations (IR). This perspective borrows heavily from the sort of rationalist modelling used in economics; specifically, practitioners working from this perspective use game theory to simplify the logic of a particular strategic interaction of interest. Therefore, this study will follow the sort of interdisciplinary approach and methodology commonly used in the field of law and international relations,<sup>66</sup> with some overlap with the field of law and economics.<sup>67</sup>

On the face of it, an interdisciplinary approach to a topic seems to be a more thorough way to explore a given phenomenon than sticking to one approach. However, one must proceed carefully with such an enquiry since

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<sup>65</sup> 'Legal positivism is related to broader theoretical perspectives of positivism which hold that human knowledge is based upon that which can be experienced through the senses or through empirical observation. Law is thus the observable phenomenon of legislation, custom, adjudication by courts and other legal institutions. Legal positivism is, therefore, suited to research questions concerning the description and explanation of law as it is, including the analysis of (complex) legal texts to determine their meaning... However, it is a prequel to, rather than a substitute for, the making of statements about what the law ought to be. So, for example, law and economics approaches tend to adopt a positivist approach to identifying the law, prior to critiquing it from the point of view of efficiency.' Robert Cryer *et al.*, *Research Methodologies in Eu and International Law* (Hart 2011), 38.

<sup>66</sup> 'Law and international relations (IR) or law and political science approaches to the study of EU or international law seek to bring together understandings of the EU or international order as a *legal* system and as a *political* system.' [emphasis in original] *ibid*, 78.

<sup>67</sup> 'There are two different strands to law and economics approaches. The first seeks to explain current law on the basis that it reflects economic thinking. This can be very controversial, as well as counterfactual, in particular where attempts are made to explain areas such as criminal law this way... The second type of law and economics approach seeks to make proposals for the improvement of the law to make it, in some way more efficient.' *ibid*, 84.

each discipline has a particular historical development and epistemology. Therefore, before embarking upon on such a project, it is helpful to make explicit some of the implicit features of each discipline which may not be immediately apparent to practitioners of the other. As Gráinne de Búrca noted:

To the political scientist, legal scholarship often appears to be arid, technical, atheoretical... full of unstated or unproven assumptions, lacking empirical support, and seemingly disinterested in the actual dynamics of political and social change. To the lawyer, political science scholarship often appears to be obsessed with methodology, jargonistic and — in particular when it engages with law — remarkably banal, in that pages are spent demonstrating a proposition which lawyers take to be axiomatic (such as ‘courts matter’ or ‘judges have some autonomy’).<sup>68</sup>

Therefore, in order to avoid confusion, I believe it is necessary to describe upfront how I intend to use each perspective to answer the main research question and why the methods I have used are appropriate for this enquiry.

To uncover what sort of accountability is possible for disproportionate or sloppy strikes, it is important to first establish how the law frames these actions. Although military and civilian leaders must obey a constellation of different legal requirements,<sup>69</sup> there are two main bodies of law that describe what is expected of commanders and their troops when they plan and launch attacks. Firstly, LOAC describes a regulatory-focused<sup>70</sup> set of rules that are meant to be binding upon states, but includes instructions for individual actors like commanders and mission planners. Although it can and has been invoked in civil and criminal adjudication, the primary role of LOAC is to guide the actions of combatants *ex ante*, rather than to hold them to account after the fact. The secondary body of law that I will examine for this project is ICL, which includes the more serious violations of LOAC and has been designed from the outset as a way to hold leaders accountable for committing atrocious acts. Both of these two bodies of law have also made their way into the domestic law of several states, either in whole or in part.<sup>71</sup> To determine the state of the law in both instances, I will look at the text of the major LOAC and ICL treaties along with the relevant state practice and *opinio juris* for the customary versions of these rules. Finally, I will examine how international and domestic courts have applied these rules to

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<sup>68</sup> Gráinne de Búrca in *ibid*, 77.

<sup>69</sup> Collectively known as *opslaw*.

<sup>70</sup> See Ch 3 at note 374.

<sup>71</sup> See generally, Ch 2.

actual cases and I will discuss how these rules have been invoked by government departments and HROs outside of the courtroom. It is necessary to map out the contours of the legal universe in this way because if there is no plausible interpretation of the law that allows for sanctions based on violations of proportionality or precautions in attack, then the answer to the research question becomes quite simple: it is difficult to achieve accountability for these rules simply because the law does not allow for it.

If, on the other hand, the law does permit legal adjudication based on these rules, and the adjudication is either consistently dismissed or always resolved in favour of the state or individual who ordered an attack, then the tools of the social sciences are well-suited to explain the difference between how the law was designed to operate according to the positivist perspective and how it actually operates 'on the ground'. Certainly, there is much to glean from the writings of legal scholars, which reveal how the law interacts with technical elements of court procedure, such as the Rule of Lenity, to prevent prosecutions. However, in this study I have also conducted some primary research on the extra-legal factors which may explain the gap between how the law should theoretically function as a matter of doctrine and how it actually functions in practice. Specifically, I propose a game theoretical model that takes into account the strategic motivations of state officials who have the authority to set policy on LOAC and prosecutors who have the authority to indict leaders for war crimes.

To determine the beliefs and motivations of these two groups of actors, I conducted a series of semi-structured interviews<sup>72</sup> in the summer and autumn of 2016.<sup>73</sup> For my interviews of state officials, I chose to focus on members of the

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<sup>72</sup> As a researcher who has conducted over a hundred interviews of business leaders, William Harvey cautions against making interviews with elite participants too structured: 'It is generally advised, for example, to avoid asking elites closed-ended questions because they do not like to be confined to a restricted set of answers: "Elites especially – but other highly educated people as well – do not like being put in the straightjacket of close-ended questions. They prefer to articulate their views, explaining why they think what they think"'. William Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11 *Qualitative Research* 431, 434.

<sup>73</sup> Jeffrey Frieden cautions that determining actors' preferences through observation can be problematic if not done properly. The danger lies in using state official's behaviour to explain their preferences and then using those preferences to then explain the very same behaviours that were used to uncover the preferences in the first place. This sort of tautological reasoning does not reveal anything interesting about

US and UK defence communities as these two states, in particular, employ air power on a large scale. Therefore, since these states would likely have some experience in dealing with issues regarding the application of proportionality and precautions in attack, their officials would have been briefed to negotiate for a different position at international LOAC conferences than officials from states which do not rely heavily on air power. Furthermore, defence communities are notoriously closed-off and difficult to access without prior connection or extensive coordination,<sup>74</sup> so I did not attempt to interview state officials from states with which I did not already have a connection. Even within the US and UK defence communities, there are several gatekeepers who must be consulted before one can recruit participants for a study.<sup>75</sup> From my previous career as a behavioural scientist working for the US Air Force, I knew that all research materials also needed to be approved by the participant's public affairs office, so they could be screened for classified or other sensitive information. Whilst these hurdles are not insurmountable, the coordination needed to overcome them often takes months and could theoretically affect the candour of the participants, since they would know that the information provided would be subject to screening after the fact. I managed to avoid becoming entangled in these additional review processes by speaking with retired officials. However, not knowing what rules are in place in other jurisdictions, I was hesitant to interview defence officials in other countries, because I did not want to run afoul of similar review procedures. Though my model of state official and prosecutor interaction was based on the assumption that the term 'state official' referred to

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the strategic interaction. Moreover, an actor's behaviour in a strategic interaction is necessarily moderated by what other actors are doing. Therefore, it is difficult to tell if an individual behaved the way they did because they wanted to achieve the outcome that happened in reality, or if they were forced to settle for that outcome because they believed it was the best they could do for themselves, given the situation. Jeffrey Frieden, 'Actors and Preferences in International Relations' in David Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999), 57-61. In my study, I attempt to circumvent this problem by speaking with the actors directly, rather than trying to infer their position from public statements alone. Furthermore, I have done some archival research to uncover the confidential diplomatic conference preparation documents that state officials would have used to communicate their private position on LOAC issues to other members of their negotiating team. These techniques should help me to avoid the pitfalls of trying to infer the actor's preferences from their historical behaviour.

<sup>74</sup> I had discovered this for myself whilst unsuccessfully trying to get a hold of a judgement for my literature review from a Polish court-martial relating to an attack on Nangar Khel in Afghanistan.

<sup>75</sup> In the UK, for instance, the Ministry of Defence Research Ethics Committee requires researchers to undergo a secondary ethics review process in addition to the usual university-level ethics review.

a state official from a liberal democratic state, in Chapter 7, I consider how well the model’s conclusions hold up when the ‘state official’ is instead, a member of an illiberal regime.

For the prosecutor’s perspective, I interviewed several officials from various international tribunals/courts (ICTs). Finally, to broaden the experience base of my subject pool, I decided to speak with two war crimes investigators, a military commander, and a military judge. Most of the participants were retired, which I believed would make them more likely to speak freely about their thoughts on the law and their experiences applying precautions or proportionality in their professional careers.

Admittedly, linguistic barriers also affected my choice of interview participants. Though I speak some French, it would not have been to the level needed to engage with high-ranking officials either in government or the courts, so I was limited to speaking with participants who likewise spoke English. This heavy focus on how the rules on proportionality and precautions are understood within the Anglosphere certainly affects the generalisability of the study. However, for the purposes of building a strategic model of state official and prosecutor interaction, so long as this bias is made clear as a built-in assumption of the model, it should not affect the logic of the underlying strategic interaction, nor the model’s conclusions.

Because of the elite nature of the participants,<sup>76</sup> I was only able to interview 13 individuals. The participant backgrounds included the following:

<b>Background</b>	<b>No. of Participants</b>
International Tribunal/Court Official (Prosecutor’s Office)	2
International Tribunal Defence Counsel	1
State Official	4
International Court Official & State Official	1
International Court Official & UN War Crimes Investigator	1
Military Judge	1
Commander (Flag Officer)	1
HRO or UN War Crimes Investigator	2

Figure 2: Breakdown of participant backgrounds

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<sup>76</sup> I consider my participants elites not necessarily because of their rank (although many of my participants have attained high-level positions in government or the judiciary), but because they have a level of expertise in the application of international law that is not widely shared by other government officials, investigators, or legal professionals.

With the exception of the participant's general background information, the interviews were anonymised by default. A few participants asked to go 'on the record', so their names will be listed along with their background when cited. The interviews typically lasted between 45 minutes and an hour, though the longest lasted 90 minutes<sup>77</sup> and included a mix of face-to-face and telephone interviews. I recorded and transcribed<sup>78</sup> all of the interviews except for one where both the primary and backup recorders failed and I had to rely on my interview notes.<sup>79</sup> I recruited the participants via LinkedIn or by email and chose them based either on their reputation for having experience with the proportionality rule, or by 'snowballing', a practice whereby one participant recommends who ought to be the next participant.<sup>80</sup>

The interviews were tailored to the background of the individual participant, but many of the questions covered the same broad themes, for example:

- Would you say that the crime of disproportionate attack is difficult to prosecute? Why?
- Is it easier to prosecute proportionality offenses in national or international courts? Why?
- What do you think is the relationship between proportionality and precautions in attack?

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<sup>77</sup> This timeframe is considered best practice for elite interviews as Harvey explains: 'Ostrander (1993) found that her interviews typically lasted an hour and a half. Stephens (2007) also found that an average interview lasted the same amount of time, but the length varied significantly from one interview to another, from nearly three hours to less than one hour. My own experience is that interviews with elite subjects were significantly shorter and often around 45 minutes in length. Surprisingly, there was no significant difference in the length of my average face-to-face interview and my average telephone interview... A large number of them also asked, when I was in the process of trying to gain access, how long the interview would take and at the time I judged that I would face a number of refusals to participate if I asked for more than one hour. Conti and O'Neil's (2007: 71) experience of a government official beginning an interview by saying "What can I tell you in 45 minutes?" is from my experience a typical attitude that many elites adopt in terms of time. Thus, although interviewing elites will vary in length, it is important to strike the right optimistic/realistic balance in order to achieve the best quality data from the most feasible amount of time. In short, asking for too much time might lead to respondents refusing to participate, but asking for too little time might lead to serious limitations in the quality and quantity of data provided by respondents.' Harvey, 436.

<sup>78</sup> I transcribed the interviews myself since my ethics approval from the University of Exeter required that the participants be anonymised and their responses held in confidence unless they specified otherwise.

<sup>79</sup> This was Interview with Former US Policy Official & ICTR Official .

<sup>80</sup> As a testament to how small this community is, many of my participants recommended that I speak with the person who had recommended them (since the participants were anonymised, any particular interviewee did not know who I had already spoken with).

- Do you think that the proportionality rule is vague? Why/why not? If so, how might that affect prosecutorial strategy in a court case involving the rule?
- Does the concept of a ‘reasonable military commander’<sup>81</sup> help prosecutors, investigators and justices think about the right way to weigh military advantage and civilian casualties? Why/why not?

Rather than asking about what their motivations were directly, I primed the participants to think about the political difficulties involving the rules on precautions and proportionality up front in my introductory statement. This proved to be quite helpful because it allowed the participant to discuss their beliefs and motivations more organically than I think they would have done had I asked more pointed questions about the economic utility of different courses of action. To be sure, if I felt that the participant was comfortable discussing their motivations, then I would ask follow-up questions to identify what they might be, but as a rule, I steered away from any line of questioning that could be seen as calling into question the participant’s professional ethics. Though most lawyers would admit that extra-legal factors play a role in the operation of the legal system in an abstract sense, many would take issue with the idea that such a base concept as economic utility might have played a role in their own decision-making process as it relates to the law.<sup>82</sup>

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<sup>81</sup> The ‘reasonable military commander’ test was developed by a committee set up by the ICTY to examine the legality of NATO’s bombing campaign during the Kosovo War. Attacks are presumed to be lawful if a reasonable commander, in the position of the accused, would have made the same decision to attack. See Ch 2 at note 227.

<sup>82</sup> This point was raised by my upgrade panel and the literature on legal ethics confirms that lawyers often experience a tension between what they feel is morally right and what is demanded of a legal professional. For example, W. Bradley Wendel remarks: ‘The central question for legal ethics is how a lawyer can justify doing an act that, if performed outside the context of a professional role, would call for moral condemnation. Charles Fried famously started his defense of the lawyer’s role by asking, “Can a good lawyer be a good person?”... Until about the 1970’s, there were few systematic attempts to answer this question, at least until the publication of Richard Wasserstrom’s paper, *Lawyers as Professionals: Some Moral Issues* which set the terms of the debate for the next 30 years. Wasserstrom made role-differentiated morality central to legal ethics. Professional roles create a kind of separate moral universe, he argued, in which a person occupying that role may, or must, put aside considerations that would otherwise be relevant if not decisive in practical deliberation.’ W. Bradley Wendel, ‘The Limits of Positivist Legal Ethics: A Brief History, a Critique and a Return to Foundations’ (2017) 30 *Canadian J of L & Jurisprudence* 443, 445. Though the sort of issues I discussed in my interviews with my participants would not be the same as those faced by, say, a defence attorney, they do share a similar tension between a person’s professional ethics and what is right from an institutional or state-centric point of view. For instance, it might be legally possible and in the interests of justice for the ICC Prosecutor to issue an indictment of a state leader for an air campaign that resulted in serious ICL violations. However, if the state

In addition to these interviews, I also visited the US National Archives in College Park, MD and the UK National Archives in Kew to find any preparation documents that might have been used by these counties' respective delegations to the 1974-78 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH).<sup>83</sup> These documents tended to be confidential and they listed the negotiating positions that the delegates should take and sometimes even explained why the delegates should argue for certain positions. I deemed that these preparation documents would yield an even more candid view of what state officials wanted out of the negotiations than even the *travaux* documents or the commentaries for the conference since the statements made by state officials at the conference necessarily had to consider the positions of the other delegations. These preparatory documents, on the other hand, could lay out what the state's goals were without alienating other negotiating partners or announcing something that, in the context of what other delegations had said, would be deemed unreasonable.

To reach my conclusions about how the law functions on the ground and about what motivates state actors and prosecutors, I used a thematic analysis to uncover commonalities in what my participants said in the interview transcripts or what I had found in the archival material.<sup>84</sup> I had a good idea of

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leader is powerful enough to marginalise the court by choking off its funding or turning global public opinion against the court's work, then the Prosecutor may choose not to issue an indictment. If she were asked to explain her decision, though, the Prosecutor would likely ground her choice in a point of law, rather than citing the institutional concerns. To suggest otherwise could not only come across as accusing her of lying, but it would be tantamount to accusing her of betraying her role as a prosecutor. Therefore, it is important to make sure that any line of questioning that veers into these sorts of issues is handled delicately and respects the participants' lived experience and professional judgement.

<sup>83</sup> Other scholars refer to this series of conferences by its French acronym, CDDH, which stands for *conférence diplomatique sur la ... droit ... humanitaire*.

<sup>84</sup> Thematic analysis involves coding one's data by theme and constantly re-evaluating the themes based on each new document that one analyses. If one finds certain codes reappearing across several documents, then those themes are given greater weight in the analysis. As Alan Bryman puts it: 'An emphasis on repetition is probably one of the most common criteria for establishing that a pattern within the data warrants being considered a theme. Repetition may refer to recurrence within a data source (for example, an interview transcript or document) or, as is more often the case, across data sources (for example, a corpus of interview transcripts or documents). However, repetition *per se* is an insufficient criterion for something to warrant being labelled a theme. Most importantly, it must be relevant to the investigation's research questions or research focus. In other words, simply because quite a large number of people who have been interviewed say much the same thing does not mean it warrants being considered a theme. The identification of a theme is a stage or two further on from coding data in terms of initial or open codes (Braun and Clarke 2006). It requires the researcher to reflect on the initial codes that

the broad themes that were in the data from having transcribed the interviews, but to formalise the process of coding, I used NVivo 10. The data from these coded statements were used throughout the thesis, but when combined with other secondary sources, they allowed me to describe the motivations of state officials and prosecutors more accurately than relying on the secondary sources alone. With these motivations, I was then able to construct a game theoretical model of the interaction between state actors and prosecutors and to understand the likely outcomes of counterfactual situations which might arise if the strategic environment were different.

### *Structure*

In Chapter 2, I shall introduce the principle of distinction and then trace how the *jus in bello* rules on proportionality and precautions in attack have developed in both treaty-based and customary LOAC. I shall then describe how proportionality was criminalised in Additional Protocol I, the Rome Statute (RS), and in customary international law. Finally, I shall examine those judicial decisions where either proportionality or precautions in attack were specifically mentioned and a few cases where there were credible allegations of a violation of these rules, but no judicial action was taken to address them.

In Chapter 3, I shall present the major arguments from legal experts regarding why it is difficult to achieve accountability for the rules on proportionality and precautions in attack. The most commonly offered explanation is that the proportionality rule forces combatants to weigh up values which are essentially incommensurable. Since there is no straightforward way to relate military advantage to civilian life and property, it makes sense that courts would have difficulty holding someone to account for violating the rule. The only widely agreed-upon way for courts to consider if collateral damage is excessive is to ask whether a 'reasonable military commander' in the same position of the accused would think it to be so. However, invoking the opinion of a hypothetical 'reasonable military commander' merely substitutes one vague

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have been generated and to gain a sense of the continuities and linkages between them.' Alan Bryman, *Social Research Methods* (4th edn, Oxford UP 2012), 580.

concept for another and courts often defer to the subjective opinion of the military commander who is in the dock, rather than clarifying what behaviour would be considered reasonable or unreasonable. Moreover, customary international law admits recklessness as an acceptable *mens rea* for the crime of indiscriminate or disproportionate attack, but the Rome Statute definition of the crime requires direct intent and under the Statute, it is unclear how (or even if) a precautions violation would give rise to criminal sanctions. All of these issues make it difficult for a commander to ever be held liable for an alleged violation of these rules. Furthermore, the evidentiary challenges facing investigators or prosecutors are legion. Even if investigators could prove that the accused launched an attack and it caused extensive collateral damage, they would still need access to the operations centre or classified war logs to prove that the commander had the requisite intent needed to secure a conviction. Therefore, it is not surprising that no case of a precautions violation, let alone a proportionality violation has ever been successfully adjudicated.

Chapter 4 introduces the strategic-choice perspective in international relations and I offer this perspective as a complementary way to understand why there have been no successful prosecutions of the rules on proportionality or precautions in attack. As a rational-choice approach to understanding political phenomena, the perspective has the strength of simplifying complex interactions by focusing on only those variables which are necessary to understand a particular interaction under study. This leads to more parsimonious models of the world, but also involves a certain amount of abstraction about the phenomena that is under study which might limit its generalisability. Nevertheless, such models allow researchers to explore the logic of a particular strategic interaction in an explicit and rigorous manner. Insights from this perspective have already revealed the conditions under which state officials might intentionally write treaties with vague language in order to preserve their strategic flexibility. Furthermore, there is a small, but growing literature from the strategic-choice perspective that is concerned with how various state and non-state actors make decisions either according to international law, or in the shadow of it. Although this literature has tended to

emphasize reciprocity as the key to creating a self-enforcing LOAC regime, researchers are beginning to apply the tools of this perspective — game theory and empirical testing — to strategic interactions involving international courts as well. However, these other studies have tended to focus on how a court constrains or otherwise affects the behaviour of state actors, rather than the other way around and although there is a body of literature that describes how courts are affected by state actors, these studies have taken place at the domestic level and have not yet been shown to apply to international courts. This study could, therefore, contribute to the scholarship on strategic-choice modelling by showing that this same approach can also be used to model how state and court actors influence the decision-making process of one another at either the domestic or international level.

In Chapter 5, I examine the motivations of state officials and prosecutors in detail. For the purposes of my analysis, I define state officials narrowly as those government actors who come from states that employ air power regularly and have the ability to set state policy on matters pertaining to LOAC or ICL. Using the data gathered during my interviews and in my archival research, I argue that state officials have historically expressed a clear preference for commanders to not be held liable for collateral damage and have tended to argue for a weak accountability architecture for violations of the rules governing proportionality and precautions in attack. The preference for a weak liability regime for these rules (as compared to a strict one) is stable and has not changed much over the past 40 years, despite the usual political turnover in democratic systems of government. Furthermore, I define prosecutors as those judicial actors who have the discretion to bring war crimes cases to trial or to drop them. Although I have focused on the role of international prosecutors while building my model, the definition of ‘prosecutor’ could also include those working at the domestic-level as well. For the prosecutor’s motivation, I claim that they are mainly concerned with whether they believe it is possible to obtain a conviction for a particular case. Prosecutors gain legitimacy for both their office and for the court when their cases end with convictions and they lose legitimacy when their cases end with acquittals. The historical record already

includes cases where prosecutors have used their discretion to avoid cases where the likelihood of prosecution is low because of extra-judicial factors. The most famous example was the ICTY prosecutor's decision not to formally investigate or prosecute North Atlantic Treaty Organisation (NATO) troops for several airstrikes which had resulted in extensive collateral damage.

Once the motivations of the actors are known, it is then possible to start building a model of the interaction between state officials and prosecutors. In Chapter 6, I model this interaction as a three-level game of perfect information where the state official makes the first move. The game is an abstraction of the more complex set of interactions that occur between state officials and prosecutors in reality, but it is designed to demonstrate the strategic logic that is at play, rather than document every detail of the interaction. I begin by having the state official decide whether to lobby for a strong or weak liability regime for violations of proportionality and precautions in attack at international conferences (and in official state interpretations of customary international law). Then, the prosecutor, knowing which liability regime is in effect, can choose to indict or not indict a commander suspected of committing a violation of one of these rules. If the prosecutor chooses not to indict, then the game ends. If they do issue an indictment, the state official can decide to either cooperate with the prosecutor, or not to cooperate. Each path through the resultant decision tree produces a set of payoffs for the prosecutor and the state official. Once I have described the path through the decision tree that describes what has actually occurred in the historical examples I presented in previous Chapters, I shall also describe the payoffs for the counterfactual situations. Finally, I shall consider how the payoff structure would have to change to incentivise the actors to trace a new path through the decision tree.

Using the insights gained from following the logic of the model, in Chapter 7, I explore the viability of various proposals to encourage better accountability for proportionality and precautions in attack. On the one hand, merely adding more specificity to the law without changing the underlying strategic dynamics will not accomplish much and there is a danger that any greater specificity will be resolved in favour of the attacker, which would make it

more difficult to try cases involving these rules. Furthermore, it would deny human rights organisations a powerful tool to hold governments to account in the court of public opinion. Likewise, merely putting pressure on courts to try more cases will end up being counterproductive since it may encourage more prosecutions, but it will not increase the number of convictions if states do not also agree to a stricter liability regime for civilian casualties. If prosecutors keep bringing violations of proportionality or precautions to trial and the commanders are consistently acquitted, it does nothing to serve the interests of justice for the victims of errant attacks and it will decrease the public's support for the prosecutor generally since it will appear as if they are unjustly targeting commanders for causing lawful collateral damage.

Interestingly, the model predicts that state officials will generally be willing to cooperate with prosecutors if they believe that doing so will enhance their legitimacy. Therefore, they might be receptive to a proposal by Aaron Fellmeth for states to create a transparency regime requiring them to share 'behind the scenes' information about any attack which resulted in civilian collateral damage. Such a regime could be structured like the Organisation for the Prohibition of Chemical Weapons, and could promote the mission of prosecutors by providing them with open-source information regarding the commander's criminal intent. However, such a scheme would be utterly dependent on states being willing to adopt the regime in good faith.

Another proposed solution that could actually alter the strategic dynamics of this game is to place a greater emphasis on achieving accountability for errant strikes by exposing the state to civil litigation based on the LOAC rules for proportionality and precautions in attack, rather than relying on the criminal provisions for accountability. The state should not perceive civil cases to be as much of a threat to the success of future military operations as criminal prosecutions, because commanders do not have to fear being held personally responsible for making the wrong call. Thus, there will not be the same chilling effect on the commander's discretion as there would be under an individual criminal liability regime. Nevertheless, civil litigation should still deter violations, in general, since the state will be incentivised to update their tactics, techniques,

and procedures based on the results of the legal suits. Moreover, the victims and their families will still be able to achieve an official acknowledgement that a strike was wrong. Civil litigation may even take public pressure off the state to submit its troops to criminal prosecution for cases that lie on the margins of the criminal provision. Finally, human rights organisations could help to encourage prosecutions by challenging some of the assumptions held by state officials regarding the necessity of causing collateral damage. The reason that state officials are loathe to endorse a strict liability regime for the rules on proportionality and precautions in attack is, in part, because they believe it will affect the success of future military operations. If it can be reliably shown that the state can achieve its goals and maintain force protection without causing civilian casualties, then state officials may be more receptive to tightening up the liability regime for these rules.

In Chapter 8, I summarise the main points of my argument and briefly consider the limitations of this approach. Having already analysed the implications of the model for the legal literature in Chapter 7, I devote part of Chapter 8 to a discussion of how my findings also contribute to the literature on the strategic choice perspective in international relations. Lastly, I consider the opportunities for future research in this field.

## Chapter 2

### A Review of the Law of Proportionality and Precautions in Attack

The content of the law on proportionality and precautions in attack has been shaped to some extent by the crucible of history. The same proscription — exposing civilians and civilian objects to more risk of destruction than is demanded by militarily necessary — has been expressed differently as it has developed from an ethical norm to a regulatory norm to a criminal norm. The wording of each iteration of the norm has affected the parameters of what strategic actions are available to actors who are making decisions either according to the law or in the shadow of it. Therefore, in order to assess how difficult it is to achieve accountability for violations of the rules on proportionality and precautions in attack, or indeed, the principle of distinction more generally, it will be helpful to first flesh out these rules as they have been defined in the law of armed conflict, in international criminal law, and through their application by the courts in case law.

#### *A Brief History of Distinction, Proportionality, and Precautions in Attack Prior to the Additional Protocols to the Geneva Conventions of 1949*

One of the touchstones for the modern conception of the law of armed conflict is the 1863 Lieber Code, which guided the conduct of Union Forces during the US Civil War. In Article 15 of the Code, soldiers were informed that '[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies and other persons whose destruction is incidentally unavoidable in the armed contests of the war'.<sup>85</sup> There was no call for a specific balancing test to determine what constituted 'incidentally unavoidable' loss of life nor was there a list of precautions to be taken to mitigate it, but Article 44 did compel troops to not engage in *wanton* violence under pain of death.<sup>86</sup> Therefore, from these two rules, there is a clear requirement for troops to ensure that their actions have some grounding in military necessity. During and after the war, the Lieber Code would form the basis for thousands of war crimes trials against both sides of the

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<sup>85</sup> Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare', 95.

<sup>86</sup> General Orders 100 - Instructions for the Government of Armies of the United States in the Field.

war.<sup>87</sup> However, most of the trials dealt with the prosecution of spies and irregular fighters<sup>88</sup> and even in a clear case of wanton destruction, the burning of Chambersburg, the Confederate generals who ordered and carried out the attack managed to escape prosecution.<sup>89</sup>

Although the Lieber Code was written as a set of orders for US troops, it was later adopted by the armed forces of several other nations<sup>90</sup> and the Russian Diplomat Friedrich Martins claimed that the Code had been the blueprint for The Hague Peace Conferences, which built a set of international regulations regarding the conduct of war.<sup>91</sup> In Article 25 of the 1907 Hague Convention IV for land warfare, it was made clear that: '[t]he attack or bombardment, by whatever means of towns, villages, dwellings or buildings which are undefended is prohibited.'<sup>92</sup> There was no corresponding appeal to military necessity. Similarly, in Article 1 of Hague Convention IX for littoral attack, the state parties agreed that: 'the bombardment by naval forces of undefended ports towns, villages, dwellings or buildings is forbidden.'<sup>93</sup> However, in Article 2 of the same treaty, the state parties conceded that there are some towns which might require bombardment on the grounds of military necessity:

The commander of a naval force may destroy... [towns which harbour military works or materiel that is important to enemy naval forces] with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. *He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.* If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph I, and that the

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<sup>87</sup> John Witt, *Lincoln's Code* (Free Press 2012), 286; Detlev F Vagts, 'Military Commissions: The Forgotten Reconstruction Chapter' 23 *Am U Int'l L Rev* 231, 239.

<sup>88</sup> Vagts, 239.

<sup>89</sup> Witt, 303. Neither were Union generals charged for similar acts.

<sup>90</sup> 'General Orders No. 100 inspired imitators all across Europe. Bluntschli's work appeared in 1866 in Prussia. Military manuals on the laws of war followed in the Netherlands (1871), France (1877), Serbia (1879), Spain (1882), Portugal (1890), Great Britain (1894), and Italy (1896). Russia had a law of war manual in place by the time of the Russo-Turkish War of 1877–78. As the distinguished English jurist Henry Sumner Maine said, Lieber had set an example of "the formation of a practical Manual" that could be adapted to suit "the officers of each nation." *ibid*, 343. See also: Solis, 40; Michael Newton and Larry May, *Proportionality in International Law* (Oxford UP 2014), 109.

<sup>91</sup> Witt, 352.

<sup>92</sup> William H Boothby, *The Law of Targeting* (Kindle edn, Oxford University Press 2012) 21.

<sup>93</sup> Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War.

commander shall take all due measures in order that the town may suffer as little harm as possible.<sup>94</sup> [emphasis added]

In the *Proceedings of the Hague Peace Conferences*, the state delegations explained that although the general prohibition against attacking undefended towns was adopted from Article 25 of the land warfare regulations, exceptions were needed because naval warfare, unlike land warfare, often necessitates bombardment from a distance:

Indeed, whilst in land warfare the belligerent will have the opportunity of taking possession of an undefended place and, without having recourse to bombardment, of proceeding to any destruction there that may serve his military operations, the commander of naval forces will sometimes be obliged, under certain conditions, to destroy with artillery, if all other means are lacking, enemy structures serving military ends, when he has not at his disposal a sufficient landing force or when he is obliged to withdraw speedily....<sup>95</sup>

The law on littoral attack, therefore, required some flexibility since it was difficult to bombard military objectives in a town without inflicting some collateral damage on civilians and civilian objects. However, in Article 2 the commander and the local authorities are given precautionary tasks that they needed take to mitigate the possibility of collateral damage. Firstly, the commander must give notice and some time to comply with his demands to destroy military works and the local authorities must then take it upon themselves to actually destroy them. In fact, in the draft version of Article 2, responsibility for any collateral damage was placed on the inhabitants of the town for failing to comply with the demands of the attacker. It was an amendment by the Belgian delegation that changed the wording of the Article to merely say that the commander would not need to accept responsibility for any unavoidable damage from the attack.<sup>96</sup> Although

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<sup>94</sup> Ibid.

<sup>95</sup> , *The Proceedings of the Hague Peace Conferences: Translations of the Official Texts*, vol III (James Scott ed, Oxford UP 1921), 346.

<sup>96</sup> Ibid, 350-351. A perennial question in the application of the proportionality rule is: how much responsibility should the attacker bear for avoiding collateral damage versus how much responsibility should the defender bear for keeping the civilian population away from military objectives? Hays Parks states that Article 2 had merely codified the existing custom that commanders would not be held liable for the collateral effects of bombardment if the appropriate prerequisite measures had been taken and furthermore argues that at this time, collateral damage was seen as the 'costs of war' for a defending party and there was not the same emphasis on the attacker's responsibility to limit collateral damage. W Hays Parks, 'Air War and the Law of War' 32 Air Force L Rev 1, 18. Even if this were the case before the adoption of Convention IX, the black-letter text of this treaty implores the commander to take 'all due measures' to reduce the harm to the civilian population, so clearly there was a shift in thinking about the relative responsibilities of the attacking versus the defending parties. However, the issue is far from settled; for an overview of the modern debate of defender responsibility, see Chapter 9 of Newton and May's *Proportionality in International Law*.

this change was uncontroversial, a far more polemic addition to the rule was the final sentence which allows commanders to circumvent their prerequisite duties in times of extreme military necessity.

The ‘immediate action’ amendment added by the French delegation gave commanders some latitude in deciding if it is necessary to bombard military objects in an undefended town without notifying the local authorities or giving them time to destroy the military objects themselves. Representing the Belgian delegation, the jurist Jules van den Heuvel voiced concern over the French amendment, claiming that it fundamentally undermined the effectiveness of the Article:

In effect it is equivalent to saying that whenever a commander of naval forces deems himself pressed by circumstances he may accord no delay; the words ‘imperious necessities’ make him the judge of the situation and ‘of immediate action’ permit him to dispense with any delay and even with any summons.<sup>97</sup>

In response to this criticism, Ernest Mason Satow from the British Delegation appealed to the inherent honour of the military profession:

[I]t certainly will not occur to any of the members of this assembly who are acquainted with the spirit animating naval officers that a commander can profit by the provision now under discussion to abuse the latitude left to him and thus ignore the superior considerations of humanity.<sup>98</sup>

This statement was met with repeated applause<sup>99</sup> — the tacit assumption being that military professionals will, of course, act reasonably if they are given some *in extremis* leeway to act in contravention of the rules.

In the aftermath of the First World War, both military experts and jurists became aware of the destructive capacity of a new means of warfare: air power.<sup>100</sup> As a way to regulate the conduct of air warfare, the 1922 Draft Hague Rules of Aerial Warfare sought to reconcile the competing requirements of military necessity and humanity in a way that is similar to how proportionality is envisaged today:

Article 24(3). The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases

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<sup>97</sup> Ibid, 349.

<sup>98</sup> Ibid, 350.

<sup>99</sup> Ibid, 350.

<sup>100</sup> Boothby, 21.

where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment. (4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, and villages, dwellings or buildings is legitimate provided there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.<sup>101;102</sup>

Since the draft document that was never adopted by the states, The Hague Air Rules have never constituted international law, but they do show how concerned the international legal community was at this time with the consequences of aerial bombardment on the civilian population. The rules were doomed to failure as a treaty, because as Hays Parks argues, Article 24 placed a radically stronger responsibility for the attacker than had previous rules, which split responsibility for collateral damage between the attacker and the defender. Indeed, this disparity worried contemporary air power theorists, such as Hugh Trenchard who feared that it would invite defenders to commingle military objectives in civilian areas as a way to keep them safe from attack:

As regards the question of legality, no authority would contend it is unlawful to bomb military objectives, wherever situated. . . Such objectives may be situated in centres of population in which their destruction from the Air will result in casualties also to the neighbouring civilian population, in the same way as the long-range bombardment of a defended coastal town by a naval force results also in the incidental destruction of civilian life and property. The fact that air attack may have that result is no reason for regarding the bombing as illegitimate provided all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city, which would, in effect, become neutral territory—a position which the opposing belligerent would never accept.<sup>103</sup>

The entire premise of civilian immunity from attack, let alone any discussion of proportionality became severely eroded during the inter-war years as air power theorists began to see not just military works in civilian areas, but rather the

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<sup>101</sup> The Hague Rules of Air Warfare.

<sup>102</sup> Even closer still were the US Army and Navy's working definitions of this rule drafted before the Commission of Jurists met: 'The draft U.S. Army rules provided in part: "In conducting a bombardment [by air], the obligation of a belligerent is discharged if due care is exercised not to injure objects which happen to be in the vicinity of the permitted target...." The U.S. Navy rules stated: "Injuries to non-combatants and to places excluded [by the rules] which is incidental to legitimate bombardment can not be regarded as unlawful, but it shall be the duty of the belligerent conducting a bombardment to exercise due care to confine the injury as much as possible to the objectives not prohibited.'" Parks, 27. There are two important developments here: firstly, as Parks notes, one can see the shift from collateral damage being primarily the responsibility of the defender to it becoming the attacker's responsibility; secondly, that both rules include the requirement for the attacker to take precautions to ensure that only the lawful target is bombarded.

<sup>103</sup> Ibid, 35.

civilian population itself as an important enemy centre of gravity. Reminiscent of earlier appeals to *Kreigsraison*, weakening civilian morale through aerial bombardment was seen as an acceptable strategy to win wars as quickly as possible.<sup>104</sup> As a final attempt to regulate air warfare in the inter-war years, the League of Nations adopted a non-binding resolution in 1938 to ensure that bombardment from the air at the very least complied with the following rules:

1. It is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. 2. Targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. 3. Reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.<sup>105</sup>

Given the indiscriminate nature of the aerial campaigns during the Second World War and the utter devastation wrought by air power upon the civilian populations of cities such as Dresden, Tokyo, Hiroshima and Nagasaki (among others),<sup>106</sup> the authors of the Air Rules and those who pushed for the League of Nations resolution were prescient in their concerns about disproportionate bombardments, but utterly powerless to do anything about them.

Furthermore, the lack of any explicit references to discrimination or proportionality in attack at the Nuremberg or Tokyo Tribunals<sup>107</sup> suggests that these principles were not viewed as *opinio juris*<sup>108</sup> by the victors of the Second World War.<sup>109</sup> Indeed, state practice during the war seemed to be in complete

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<sup>104</sup> The influential air power theorist Giulio Douhet was one such proponent of unrestricted air warfare: 'We dare not wait for the enemy to begin using the so-called inhuman weapons banned by treaties before we feel justified in doing the same... Owing to extreme necessity, all contenders must use all means without hesitation, whether or not they are forbidden by treaties, which after all are nothing but scraps of paper compared to the tragedy that would follow'. Douhet in Jefferson Reynolds, 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground' (2005) 56 *The Air Force Law Review* 1, 12.

<sup>105</sup> Parks, 36. Again, one can see the dual requirement to not only avoid indiscriminate attacks, but to take precautions to avoid them.

<sup>106</sup> The fire bombings of Dresden and Tokyo killed over 50,000 people and 20,000 people respectively, while the nuclear bombings of Hiroshima and Nagasaki combined killed between 105,000 and 120,000 people. Reynolds, 13-15.

<sup>107</sup> Fenrick reviewed the fifteen volume Law Reports of Trials of War Criminals for the United Nations War Crimes Commission and could find no references that were directly relevant to the principle of proportionality. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare', 112.

<sup>108</sup> In addition to treaty-based conventional law, states are also obliged to follow customary international law. This branch of law is based on two factors: how states see their obligations under the law (*opinio juris sive necessitates* or simply *opinio juris*) and how they behave in the face of the law (evidence of state practice). Malcolm N. Shaw, *International Law* (6th edn, Cambridge UP 2008).

<sup>109</sup> The Nuremberg Tribunals did not allow defendants to excuse their actions by claiming that the allied forces had committed the same crime. J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law - Practice*, vol 2 (Cambridge UP 2005), 3194. Therefore, it seems more likely that the

contravention of them.<sup>110</sup> However, Article 6(b) of the Nuremberg Charter<sup>111</sup> did acknowledge that it was a crime to engage in the 'wanton destruction of cities, towns or villages or devastation not justified by military necessity'<sup>112</sup> and judges were able to expound upon the relationship between military necessity and the destruction of civilian life and property in the Nuremberg Military Tribunal (NMT) *Hostages case (US v. List et al.)*:

Military necessity ... permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.<sup>113</sup>

During that case, the tribunal reviewed the actions of General Lothar Rendulic, a German commander who ordered the destruction of civilian property and the forced evacuation of Finmark, Norway.<sup>114</sup> To justify what had amounted to a scorched-earth policy, Rendulic argued that, in the wake of the German withdrawal from Finmark, the Soviets might have used the facilities and supplies left behind to bolster their advance into Norway. Hence, there was a reasonable connection between his actions and the military necessity of denying the enemy logistical support for an attack. However, the Soviets never advanced as far as he had feared, so in hindsight, the destruction appeared wanton. Recognising

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absence of the proportionality principle at Nuremberg and Tokyo reflected a genuine belief on the part of the victors that there was no customary proportionality principle in effect during the Second World War, rather than a belief that the defendants might use the *tu quoque* (you as well) defense to escape conviction. Moreover, the Chief Counsel for the Nuremberg Trials, Telford Taylor claimed: 'If the first badly bombed cities - Warsaw, Rotterdam, Belgrade, and London - suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations.' Taylor in Parks, 37.

<sup>110</sup> 'The situation altered radically already during the First World War as a result of the increased range of artillery and the arrival of the first aerial bombardments from aircraft or airships. However, it was above all the development of weaponry after this conflict and its use during the Second World War which radically changed the situation. As a result the customary rule was affected to such an extent that one might have wondered whether it still existed.' Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Christophe Swinarski Yves Sandoz, Bruno Zimmermann ed, Martinus Nijhoff 1987), 598.

<sup>111</sup> This was the legal instrument that established the International Military Tribunal (and was later used by the subsequent Nuremberg Military Trials -- NMT).

<sup>112</sup> Charter of the International Military Tribunal (Nuremberg).

<sup>113</sup> *United States v. List et al.* in Reynolds, 15-16.

<sup>114</sup> Solis, 265. See also Parks, 3.

the situation as Rendulic had seen it, the tribunal adopted what would later become known as the 'Rendulic rule'<sup>115</sup>:

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.<sup>116</sup>

In using a decision-centric, rather than an effects-centric point of view to assess the military necessity of Rendulic's campaign, the judges acquitted Rendulic of the charges pertaining to his conduct in Finmark (although he was given lengthy prison sentences for other crimes). This case, in particular, has left its mark on the development of the law pertaining to distinction, proportionality and attack precautions because it highlights the difficulty of determining whether an attack is lawful based solely on its outcome. Rather, the information reasonably known to the accused at the time of the attack and their *mens rea* are also needed to determine if the action was criminal.

Despite the suffering that was inflicted upon civilian populations by essentially unrestricted aerial warfare, distinction, proportionality, and precautions in attack were not mentioned in the 1949 Geneva Conventions. Article 50 had listed 'wilful killing... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' as a grave breach of the convention, but there was no mention of necessary precautions to be taken in attack or of the need for a specific balancing test to weigh military necessity against humanitarian concerns.<sup>117</sup>

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<sup>115</sup> It is now known that when fact finders are asked to judge what a reasonable person would do in tort cases, they are susceptible to psychological effects, such as hindsight bias, and similarly have difficulty assessing which precautionary measures would have been reasonable to take at the time a decision was made. Jennifer Robbennolt and Valerie Hans, *The Psychology of Tort Law* (NYU Press 2016), 51-55. The Rendulic Rule draws attention to the fact that decision makers are not omniscient and often cannot know the outcomes of their decisions with certainty and it has been invoked by both courts and commentators alike to describe the limits of looking at what a reasonable military commander might do in hindsight. For example, see: Walter Huffman, 'Margin of Error Potential Pitfalls of the Ruling in the Prosecutor V. Ante Gotovina' (2012) 211 *Military Law Review* 1, 25; *Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign against the Federal Republic of Yugoslavia* (International Criminal Tribunal for Yugoslavia 2000), para 23.

<sup>116</sup> *United States v. List et al.* in Solis 289.

<sup>117</sup> *The Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1949). Article 50, like Article 6(b) the Nuremberg Charter did not require combatants to follow the proportionality principle as much as it prohibited combatants from causing wanton destruction. There is an implicit proportionality test involved with deciding how much military necessity keeps an attack from becoming wanton, but the

Therefore, immediately following the war there likely was not a basis for these principles in custom, nor in treaty-based international law.

By the mid-1950s, there was a growing consensus within the International Committee of the Red Cross (ICRC) that more needed to be done to protect civilians during armed conflict. In 1956, at the Nineteenth International Conference of the Red Cross, the ICRC presented a series of draft rules which included two Articles directly pertaining to distinction, proportionality and precautions in attack:

Article 8. The person responsible for ordering or launching an attack shall, first of all: (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified. When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population: (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9 is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated: (c) whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter.

Article 9. All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum. In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked. The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.<sup>118</sup>

If adopted, these draft rules would have represented a significant change in the law regulating the conduct of hostilities. Unlike the prohibition against 'wanton destruction' codified in the Nuremberg Charter, it was not enough for a

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lack of a corresponding rule for precautions in attack suggests that the margin of reasonable conduct under this rule was much wider than the modern conception of proportionality. Indeed, commentators, such as Bothe likewise believe that there was no substantive case law regarding the principle of discrimination during this period: 'The definition of war crimes in the Statute of the International Military Tribunal is based on the assumption that the rule of distinction was applicable... But neither the judgment of the International Military Tribunal nor the judgments of the American military courts really address the principle of distinction as a limitation on the choice of targets for bombardments. Furthermore, there was a kind of resounding silence of states in relation to that rule.' Bothe in Andru E. Wall (ed) *International Law Studies: Legal and Ethical Lessons of Nato's Kosovo Campaign*, vol 78 (U.S. Naval War College 2002), 174. In modern LOAC, proportionality is treated as a subset of discrimination (that is to say that disproportionate attacks are treated as indiscriminate attacks). If the courts were silent on the issue of discrimination in attack generally, they were certainly silent on proportionality in attack.

<sup>118</sup> Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.

commander to refrain from engaging in actions which had no grounding in military necessity. Rather, these rules would have placed positive duties upon 'the person responsible for ordering or launching an attack' which would be easily recognisable to a military legal advisor in an operations centre today: the attacker must obtain positive identification (PID) of an objective to determine its nature; they must make sure that any likely loss and destruction to the civilian population is not out of proportion to the military advantage anticipated and they must adhere to a series of other attack precautions to further mitigate the likelihood or extent of civilian losses or damage.

The conference adopted a resolution encouraging the ICRC to submit these rules to the states for possible adoption into international law, but their appeals were largely ignored at the time. Nevertheless, many of the ideas contained in them were later taken up by states in the mid-1970s at the CDDH.<sup>119</sup> Even if the ICRC's draft rules had not become treaty law, the proportionality rule was gaining traction as state practice for the United States.<sup>120</sup> For example, the 1956 *US Army Field Manual on The Law of Land Warfare* included a phrase that bears a striking similarity to the draft rules:<sup>121</sup>

Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.<sup>122</sup>

Moreover, after a long silence over the legality of the US nuclear strikes on Japan, the District Court of Tokyo took up a case in 1963, *Ryuichi Shimoda et*

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<sup>119</sup> Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' 97. Pilloud *et al.* 587.

<sup>120</sup> Despite the US's view on proportionality, it is difficult to tell if there had been a customary proportionality rule during this time. For example, confer with the UK Military Manual (1958), which stresses the legality bombardment, regardless of the civilian costs, so long as a town remains 'defended': 'In defended towns and localities modern methods of bombardment will inevitably destroy many buildings and sites which are not military objectives. Such destruction, if incidental to the bombardment of military objectives, is not unlawful'. 'Practice Relating to Rule 14. Proportionality in Attack' (*ICRC Customary IHL Database*, 2014) <[https://www.icrc.org/customary-ihl/eng/print/v2\\_rul\\_rule14\\_sectiona](https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14_sectiona)> accessed 6 November 2014.

<sup>121</sup> Furthermore, by 1976, the US Air Force had included a similar proportionality clause into its LOAC Pamphlet, stating: 'Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes... This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and *which are not excessive in relation to the concrete and direct military advantage anticipated.*' [emphasis added] AFP 110-34 in *ibid.*

<sup>122</sup> FM 27-10 the Law of Land Warfare.

*al. v. The State*, to assess whether damages were due to the survivors of the attacks from the Japanese Government.<sup>123</sup> The judges in this case correctly chose to adopt only the relevant treaties and custom that were in effect during the Second World War and not the developments that had been made to the law since. Nevertheless, whereas the earlier Tokyo and Nuremberg Tribunals had largely ignored the principle of proportionality,<sup>124</sup> the Tokyo District Court believed that a proportionality rule of sorts was in effect as a matter of custom if not in treaty:

During the Second World War, it was sometimes found impossible to identify each individual military objective for attack in a place where munitions factories and military installations were concentrated in a comparatively small area, and where defence installations against air raids were very strong. In such a case, aerial bombardment of the whole area took place, and may be regarded as lawful even if it goes beyond the principle of military objectives, since the destruction of non-military objectives is small in proportion to the large military interests or necessity involved. However the doctrine of target-area bombardment cannot apply to the cases of Hiroshima and Nagasaki, since both cities clearly could not be said to be areas where such military objectives were concentrated.<sup>125</sup>

Based in part on the fact that the strikes violated even the widest margins of the proportionality rule (such as it was at the time), the judges decided that the nuclear attacks were in contravention of international law. However, they still did not find Japan liable for waiving the rights of Japan or Japanese citizens to demand reparations from the US, so the outcome of the trial was likely cold comfort for the survivors of the attacks.<sup>126</sup>

Whilst it would be a stretch to say that on the eve of the CDDH, distinction, proportionality, and precautions were considered customary international law, it must be said that the logic behind these rules had been thoroughly explored prior to the conference.<sup>127</sup> Therefore, the representatives to

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<sup>123</sup> Japan had waived any right to demand reparations from the US under Article 19 of the Treaty of San Francisco.

<sup>124</sup> See above at note 117.

<sup>125</sup> Hanrei Jiho, 'Report on Ryuichi Shimoda et al. v. The State' (1964) 8 Japanese Annals of International Law 231, 633.

<sup>126</sup> Ibid, 583.

<sup>127</sup> Boothby, 77; Indeed, The ICRC's commentary on the APs traces a long pedigree for the principle of distinction, even making the bold claim that some form of the principle was 'present in all great civilisations'. Pilloud *et al.*, 585. Furthermore, at a conference hosted by the ICRC in 1971 and 1972, government experts from the states drafted a series of articles pertaining to the principle of distinction that would form the starting position for the talks at the CDDH. ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session, 1972), 148-157.

the CDDH were not creating new law from scratch, nor were they free to adopt radically different interpretations of the rules from what was currently in vogue at the time. Nevertheless, this conference was the first time that the states formally negotiated what language would be used to frame distinction, proportionality, and precautions in international law. The result of these negotiations — the 1977 Additional Protocols (APs)<sup>128</sup> to the Geneva Conventions of 1949 — has since influenced the language of subsequent treaties and the states' military manuals.

### *The Principle of Distinction*

In the ICRC's estimation, the crowning achievement of the CDDH was the adoption of certain protections for the civilian population in the APs.<sup>129</sup> Traditionally, the Geneva Conventions protected the *victims* of hostilities and the Hague Conventions had regulated the *conduct* of hostilities,<sup>130</sup> but the ICRC was concerned that Hague law had not been sufficiently updated to reflect lessons learned after the Second World War, particularly with respect to aerial bombardment:

Although Geneva law had been developed in great detail in 1949, and adapted to the requirements of the time, the Hague law had not evolved to the same extent, while the techniques of warfare had developed enormously during the two World Wars. The written rules which could be invoked for protecting civilians against the dangers of hostilities dated back to 1907, when aerial bombardment did not yet exist. Such was the tragic absurdity of the situation.<sup>131</sup>

The ICRC saw the development of the APs as 'bringing together the two strands' of IHL into one legal framework: the protection of victims on one the one hand and the conduct of hostilities on the other.<sup>132</sup> In API, the principle of distinction is codified in Part IV, Section I, beginning with the Basic Rule:

Article 48. In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>133</sup>

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<sup>128</sup> Additional Protocol I (API) applies during international armed conflict and Additional Protocol II (APII) applies during non-international armed conflict.

<sup>129</sup> Pilloud *et al.*, 583.

<sup>130</sup> Boothby, 5; Interview with Charles Garraway, Former UK LOAC Policy Official (Exeter 3 June 2016).

<sup>131</sup> Pilloud *et al.*, 583.

<sup>132</sup> Boothby, 5; Interview with Garraway.

<sup>133</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

The Basic Rule is the cornerstone of modern LOAC and has been recognised as having achieved customary status for both international armed conflict<sup>134</sup> and non-international armed conflict (NIAC).<sup>135</sup> The rest of Section I provides more detailed definitions of the terms used in the Basic Rule (e.g. what constitutes a civilian object) and offers practical guidance for how to comply with the principle of distinction. Many of these subsequent provisions have also achieved customary status, at least in international armed conflict.<sup>136</sup>

The application of the principle in practice should not be difficult in situations where there is a clear difference between the civilian population and military objectives, but the framers of API recognised that when military objectives are located near civilians and civilian objects, commanders might be tempted to subject the civilian population to an unacceptable level of risk whilst prosecuting legitimate military targets. To address these concerns, Article 51 prohibits not only direct attacks against the civilian population, but also those operations which amount to indiscriminate attacks and Article 57 requires attackers to take positive steps to mitigate the effects of their operations on the civilian population.<sup>137</sup>

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<sup>134</sup> One would be hard-pressed to find a principle that is more widely accepted than the Basic Rule. Evidence for its acceptance by the states can be found in numerous military manuals and in Rule 7 of the ICRC's Customary International Humanitarian Law (CIHL) Study. J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law - Rules*, vol I (Cambridge UP 2005), 25-29. Furthermore, the experts who drafted Rule 10 for HPCR Manual on Air and Missile Warfare likewise regard the Basic Rule to be a fundamental tenant of the law of armed conflict. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Harvard Program on Humanitarian Policy and Conflict Research, 2010), 83-86.

<sup>135</sup> The version of distinction articulated in APII is not as strong as that stated in the Basic Rule. However, the ICRC CIHL Study puts forth a convincing case for the applicability of the Basic Rule in non-international armed conflict. The authors cite military manuals, the adoption of the rule into amended protocols II and III to the Certain Conventional Weapons Treaty (which is applicable in NIAC) and domestic legislation as evidence of state acceptance of the rule during NIAC. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 26-28. The HPCR Manual on Air and Missile Warfare confirms this view. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 83.

<sup>136</sup> The ICRC's CIHL Study is loosely based on the relevant concepts presented in the APs. Chapters 1-6 detail evidence of the customary nature of distinction as it is codified in the APs. This includes evidence of how states define civilians, combatants, civilian objects and military objectives. It also echoes the prohibition against indiscriminate attacks and the rules of proportionality and precautions in attack. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 3-74.

<sup>137</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

### *The LOAC Rule on Proportionality in Attack*

A key test of whether an attack can be considered indiscriminate is the proportionality rule: given what a commander knows about a target and the likely effects of using a particular weapon (or weapons), is the collateral damage associated with the attack excessive in relation to the military advantage gained from striking the target? The modern conception of this rule is widely accepted<sup>138</sup> to have been set forth in Article 51 of API:

Article 51(4). Indiscriminate attacks are prohibited... (5) Among others, the following types of attacks are to be considered as indiscriminate... (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.<sup>139</sup>

This phrasing of the proportionality rule was overwhelmingly adopted by the 95 states participating in the CDDH, but not without ongoing debate or criticism. The ICRC commentary on Article 51 claims that some of the participants were wary of the imprecise language used in the construction of the rule.<sup>140</sup> William Fenrick, writing five years after the signing of the APs noted several debates that occurred during the CDDH over the wording of API Article 51:

- The article does little to explain if a 'concrete and direct military advantage' describes an advantage at the tactical, operational or strategic level of the armed conflict;
- What constitutes 'excessive' loss of life or damage is subjective and difficult to distil into concrete instructions for a nation's armed forces; and
- The text does not adequately explain who should be held responsible for upholding the proportionality rule.<sup>141</sup>

Furthermore, some participants at the conference felt as if the ambiguity of the proportionality rule might give *carte blanche* to commanders to justify any attack on the grounds that there was sufficient military necessity. For example, in a

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<sup>138</sup> Enzo Cannizzaro, 'Proportionality in the Law of Armed Conflict' in Paola Gaeta Andrew Clapham (ed), *The Oxford Handbook of International Law in Armed Conflict* 101; Richard Hyde Robert Kolb, *An Introduction to the International Law of Armed Conflicts* (Hart 2008) 136; Solis 273; Boothby 170; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules* 46.

<sup>139</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>140</sup> Pilloud *et al.* 625.

<sup>141</sup> Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' 103-109.

statement given at the conference, the representative for Poland was concerned that:

The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared.<sup>142</sup>

Likewise, the representative for Romania was worried that by leaving the application of the proportionality rule to military commanders, Article 51 created a situation where the proverbial fox would be guarding the henhouse:

[Proportionality] amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental loss. The principle of proportionality was therefore a subjective principle which could give rise to serious violations.<sup>143</sup>

In defence of Article 51, the ICRC commentary refuted the claim that the proportionality rule authorises any level of civilian destruction:

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (Basic rule) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be *extensive*. [emphasis added]<sup>144</sup>

The gap between those actions that are considered excessive and those that are extensive could be quite wide and even the ICRC's commentary acknowledges that there may a problem with the application of the rule in cases where the relative values of civilian losses and military advantage are not clear. However, the commentary cautions that '[i]n such situations, the interests of the civilian population should prevail'.<sup>145</sup>

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<sup>142</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 314.

<sup>143</sup> Ibid, 314.

<sup>144</sup> Pilloud *et al.*, 626; Confer with the opinion of the Group of Experts who drafted the HPCR Manual: 'The fact that collateral damage is extensive does not necessarily render it excessive. The concept of excessiveness is not an absolute one. Excessiveness is always measured in light of the military advantage that the attacker anticipates to attain through the attack. If the military advantage anticipated is marginal, the collateral damage expected need not be substantial in order to be excessive. Conversely, extensive collateral damage may be legally justified by the military value of the target struck, because of the high military advantage anticipated by the attack.' *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 92. However, the ICRC's interpretation seems to comport more with the humanitarian purpose of the protocol.

<sup>145</sup> Pilloud *et al.*, 626.

The treaty basis for the proportionality rule is not only applicable during international armed conflict, but it also can apply during non-international armed conflict. Although there is no corresponding proportionality requirement in APII (which governs NIAC), one can find a nearly identical version of the rule in the 1996 Protocol II to the 1980 Certain Conventional Weapons Convention (CCW), which is applicable during NIAC:

Article 3(8) The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons ... 3(8)(c): 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.<sup>146</sup>

Just as in API, the ICRC Customary International Humanitarian Law (CIHL) Study frames the customary proportionality rule as a subset of the principle of distinction (i.e. disproportionate attacks are considered to be indiscriminate attacks) and its authors classify the prohibition against disproportionate strikes as a separate rule from the requirement for decision makers to take precautions in their methods and means of attack. Rule 14 most directly relates to proportionality and it essentially mirrors the definition of the rule found in API 51(5)(b):

Launching 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, is prohibited.<sup>147</sup>

As with the CIHL Study, the 2009 Harvard Humanitarian Policy and Conflict Research Program (HPCR) *Manual on International Law Applicable to Air and Missile Warfare* does not itself constitute international law. However, it does represent well-researched, contemporary thinking about the state of customary LOAC by both jurists and military professionals.<sup>148</sup> Its version of Rule 14 is more succinct, but as with the ICRC CHIL study, it is also based on API 51(5)(b): 'An attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is

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<sup>146</sup> Protocol on Prohibitions or Restrictions on the use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II to the 1980 Convention as Amended on 3 May 1996).

<sup>147</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules* 46.

<sup>148</sup> For example: Air Cdre Boothby, Prof Bothe, MGen Dunlap, Col Parks, Dr. Sandoz, and Prof Schmitt, who are all cited in this paper were among the 'Group of Experts' involved with drafting the HPCR Manual.

prohibited'.<sup>149</sup> Across different states' military handbooks, there is variation in the level of explanation given for the rule; some manuals are better at articulating the principle for a lay audience.<sup>150</sup> Furthermore, just as there was some debate at the CDDH over which level of the conflict military advantage ought to be assessed, there is predictably a divergence in the states' military manuals on whether the principle should take into account: 'concrete and direct'<sup>151;152</sup> tactical advantage or operational advantage that affects the 'attack as a whole'<sup>153;154</sup> when balancing against predicted collateral damage. Nevertheless, since there is evidence for the principle in one sense or another in the military handbooks of at least 37 states from every inhabited continent including non-participants to API, such as the US,<sup>155</sup> it is safe to assume that the general rule is accepted state practice in international armed conflict, even if there is some ongoing debate over its application.

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<sup>149</sup> *Manual on International Law Applicable to Air and Missile Warfare* (Harvard Program on Humanitarian Policy and Conflict Research, 2009), 10-11.

<sup>150</sup> For example, Burundi's LOAC manual gives a practical example of disproportionate action: 'It is prohibited to cause suffering and destruction which are excessive in relation to the aim of the mission. The means utilized must be proportionate to the objective sought. Thus, bombarding a village because a single sniper is located there violates the principle of proportionality.' 'Practice Relating to Rule 14. Proportionality in Attack'.

<sup>151</sup> According to the ICRC commentary of API, Committee III of the CDDH intended the term 'concrete and direct' to mean that the advantage must be: 'substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.' Pilloud *et al.*, 684.

<sup>152</sup> For example, the military manuals of Belgium, Cameroon, France, Germany, and Sweden have adopted the API 'concrete and direct' interpretation of proportionality. 'Practice Relating to Rule 14. Proportionality in Attack'.

<sup>153</sup> For example, the military manuals of Benin, the Central African Republic, Spain and Togo, use the less restrictive phrases 'overall' or 'attack as a whole'. *Ibid.* Ten other states made statements upon ratifying API expanding the phrase 'concrete and direct' to include 'military attack considered as a whole and not only from isolated or particular parts of that attack'. Julie Gaudreau, 'The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims' *International Review of the Red Cross* 143, 16. The 2015 US Law of War manual uses the term 'concrete and direct', but later clarifies that: "military advantage" is not restricted to immediate tactical gains, but may be assessed in the full context of war strategy. The military advantage anticipated from an attack is intended to refer to an attack considered as a whole, rather than only from isolated or particular parts of an attack.' Department of Defence Law of War Manual, 246.

<sup>154</sup> This interpretation was endorsed by the Group of Experts in their drafting of the HPCR Manual: '[Military advantage] means that it is necessary to consider the military operation in its entirety and not merely the military advantage immediately accruing from the attack at the time that it is conducted. For instance, an attack on a bridge to deny the enemy the capability to cross a river may seemingly be of low military advantage if the enemy is actually not using that bridge. However, if the purpose of the attack on the bridge is to block avenues of retreat which the commander knows will be taken once he launches his planned offensive, the military advantage of destroying the bridge will be high.' *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 93.

<sup>155</sup> 'Practice Relating to Rule 14. Proportionality in Attack'.

Moreover, the ICRC CIHL study claims that the rule also applies as a matter of custom during non-international armed conflicts<sup>156</sup> and this view is also held by the Group of Experts in the commentary to the HPCR Manual.<sup>157</sup> Besides the fact that the signatories of the CCW clearly regard this as *opinio juris*, the rule as it applies to NIAC has been incorporated into the domestic law of several states and violations of the proportionality rule tend to be condemned by the states in both international and non-international armed conflicts. Furthermore, the ICTY has applied API Article 51 to NIAC in its jurisprudence<sup>158</sup>

#### *The LOAC Rule on Precautions in Attack*

Whereas API Article 51(5)(b) set forth the negative requirement for combatants to refrain from launching disproportionate attacks, Article 57 laid out practical, positive measures to which combatants must adhere to ensure that their attacks are proportionate:

Article 57(2)(a). [T]hose who plan or decide upon an attack shall: i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; ii) 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; iii) refrain from deciding to launch any 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.<sup>159</sup>

The attack precautions enumerated in API Article 57 on the one hand include actions that need to be taken before planners perform the proportionality assessment, such as verifying the target's military nature, but on the other hand, they also include actions to be taken after the assessment to further minimise the likelihood of civilian damage, such as issuing warnings to the civilian population.<sup>160</sup>

The use of the phrase: 'those who plan or decide upon an attack' shows that the majority of the High Contracting Parties intended for precautions to be taken by all levels in the chain of command — from staff officers down to

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<sup>156</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 48-49.

<sup>157</sup> *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 94.

<sup>158</sup> 'Practice Relating to Rule 14. Proportionality in Attack'.

<sup>159</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>160</sup> Article 57(2)(c) in *ibid*.

tactical-level commanders.<sup>161</sup> However, this position has proved to be controversial since there were concerns from some states that the same standard of precaution could not be feasibly taken at every level of command<sup>162</sup> and even a member of the ICRC at the CDDH conceded that individual soldiers or small unit commanders could not be expected to perform proportionality calculations in the heat of battle.<sup>163</sup> In practise, the military handbooks of the states are divided on who bears responsibility for ensuring proportionality in attack. Some countries place the responsibility for taking precautions in attack on “those who plan or decide upon an attack”<sup>164</sup> (as stated in API), others mention the commander specifically or discuss the principle in a text dedicated for commanders<sup>165,166</sup> and yet others use passive voice or vague language (such as ‘one should...’) to show that precautions must be taken without weighing in on who must uphold the requirement.<sup>167</sup> These distinctions can seem quite trivial, but what is meant by a commander, planner or decision maker affects how a state assigns responsibility for ensuring that the proportionality rule is practised in the field and it affects what level of training is

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<sup>161</sup> ‘The terminology used in this provision led to some criticism and explanatory statements. Some considered that the introductory words (“those who plan or decide upon an attack”) could lay a heavy burden of responsibility on subordinate officers who are not always capable of taking such decisions, which should really fall upon higher ranking officers. This view is not without grounds, but it is clear that a very large majority of delegations at the Diplomatic Conference wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects. It clearly follows that the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged’. Pilloud *et al.*, 681.

<sup>162</sup> For example the Austrian delegation were worried that: ‘junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of proportionality during an attack’ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 54. The UK government issued a similar statement upon the ratification of API that stating that the responsibility to uphold Article 57(2)(b) only applied to ‘those who have the authority and practical possibility to cancel or suspend the attack’. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 358.

<sup>163</sup> De Mulien in Parks, 172.

<sup>164</sup> For example, the military handbooks of Argentina, France, New Zealand, and the US (Air Force) are worded this way. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 385-388.

<sup>165</sup> For example, the military handbooks of Canada, Croatia (Commander’s Manual), Ecuador (Navy), Germany, The Philippines and the US (Navy) are worded this way. *Ibid.*, 385-388.

<sup>166</sup> The US’s Joint Instruction CJCSI 3160.01A also details a process that combatant commanders and planners must follow in order for a strike to be in compliance with military regulations on proportionality in addition to LOAC. CJCSI 3160.01a: No-Strike and the Collateral Damage Estimation Methodology.

<sup>167</sup> For example, the military handbooks of Australia, Benin, Cameroon, Hungary, Israel, Italy, Kenya, Madagascar, the Netherlands, Spain, Sweden, and the UK are written this way. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 385-388.

given to each level of command.<sup>168</sup> Furthermore, it highlights the fact that oftentimes targeting is an activity that is distributed across multiple layers of command and it is sometimes difficult to identify one person who bears ultimate responsibility for the collateral damage caused during an attack.

In addition to clarifying who bears responsibility for upholding the proportionality rule, the practical measures given in API Article 57(2)(a) establish minimal procedures that must be taken for an attack to be considered legal. Before a commander can accurately perform a proportionality calculation for an attack, that person must have enough information about the situation to answer the following questions:

- Is the target a legitimate military objective<sup>169</sup> and what is the concentration of civilians or civilian objects nearby?<sup>170</sup>
- What is the military advantage that might be gained from attacking the target?<sup>171</sup>
- What means are available to prosecute the target?<sup>172</sup> and
- What are the likely effects of employing those means?<sup>173</sup>

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<sup>168</sup> Fenrick notes that the standard should vary according to how a particular national military is structured and that as a general guide, it should only be applicable to the divisional level or above. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare', 108. Olásolo likewise argued that there is a level of command at which it becomes impractical for commanders to identify targets and to prepare attacks in a pre-emptive manner, reckoning that these tasks would be very difficult to accomplish at a platoon or company level. Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (Martinus Nijhoff 2008), 170. This view seems to conform with State practice since there is, in fact, more of a burden placed upon high-ranking commanders to ensure compliance with these rules and there are more resources available to them to allow them to make a good-faith decision.

<sup>169</sup> Articles 48 & 57(2)(a)(i). Furthermore, if there is doubt as to the character of the target, Articles 50(1) and 52(3) state that a target should be presumed to be civilian. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977. The HPCR Group of Experts clarify: 'To facilitate verification that a target is a lawful target and does not benefit from specific protection, command echelons must utilize all technical assets (such as intelligence, reconnaissance and surveillance systems) at their disposal, to the extent that these assets are reasonably available, and utilizing them is militarily sound in the context of the overall air campaign.' *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 126.

<sup>170</sup> This is implied by Article 57(2)(a)(iii). Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>171</sup> Again, this is implied by Article 57(2)(a)(iii). *Ibid.*

<sup>172</sup> This is implied by Article 57(2)(a)(ii). *Ibid.*

<sup>173</sup> Article 57(2)(a)(ii). *Ibid.* The HPCR Group of Experts clarify: 'For instance, an attacker ought to choose a weapon with greater precision or lesser explosive force if doing so would minimize the likelihood of collateral damage, assuming the selection is militarily feasible... Similarly, angle of attack is one of the factors that determine where a bomb may land if it falls short of, or beyond, the target. Thus, to spare a building located, e.g., to the west of a target, it may be advisable to attack from the north or the south.' Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 127.

The answers to the second and third question may be immediately available to the commander, but the answer to the first and fourth will likely require additional investigation. Article 57(2)(a) imposes upon the commander a duty to employ all feasible measures to find the answers to these questions before planning or deciding upon an attack. Furthermore, when attackers are unsure of the civilian or military character of a target, API Articles 50(1) & 52(3) require them to assume that it is civilian.<sup>174</sup>

The corresponding customary law for precautions in attack applies in both international armed conflict and NIAC<sup>175</sup> and was described in the ICRC CIHL study in Rules 15-21. Of particular importance is Rule 18, which sets forth the requirement to gather sufficient intelligence before a strike:

Rule 18. Each party to the conflict must do everything feasible to assess whether 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.<sup>176</sup>

Furthermore, Rules 30-32 of the HPCR Manual describe precautions in attack along similar lines. Rule 32(c) specifically articulates the precautions needed to properly conduct the proportionality assessment.

Rule 32. Constant care [to spare the civilian population, civilians and civilian objects] includes in particular the following precautions: ... (c) Doing everything *feasible* to determine whether the collateral damage to be expected from the attack will be excessive in relation to the concrete and direct military advantage anticipated.<sup>177</sup> [emphasis added]

Like API Article 57, the obligation set forth here hinges on the word 'feasible'. The use of this word rather than 'reasonable' was intentional as the Rapporteur of the CDDH Working Group explained:

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<sup>174</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>175</sup> As with the proportionality rule, the ICRC CIHL Study concludes that the duty for commanders to take precautions in attack is applicable in both international armed conflict as well as NIAC. The most convincing evidence of this is the fact that the rule is standard operating procedure for many states, regardless of the international or non-international character of a particular conflict. For example, the rule is mentioned in the military handbooks of Argentina, Australia, Benin, Cameroon, Canada, Ecuador, France, Germany, Israel, the Netherlands, New Zealand, Nigeria, Spain, Sweden, Togo, and the US. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 385-388. The HPCR Group of Experts have also declared precautions in attack to be applicable in both international armed conflict and NIAC for the purposes of the HPCR Manual. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 124.

<sup>176</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 58

<sup>177</sup> *Manual on International Law Applicable to Air and Missile Warfare*, 16-17.

Certain words [in draft Article 50 (which later became 57) AP I] created problems, particularly the choice between “feasible” and “reasonable” ... The Rapporteur understands “feasible”, which was the term chosen by the Working Group, to mean that which is practicable, or practically possible. ‘Reasonable’ struck many representatives as too subjective a term.<sup>178</sup>

Despite the best intentions of the Working Group to limit subjectivity in the interpretation of API Article 57, the use of the word ‘feasible’ as opposed to ‘reasonable’ has done little to reign in the debate about what level of precaution is necessary in attack. In the French version of API Article 57, originally the conference chose to translate ‘feasible’ as ‘*possible*’. However, ‘*possible*’ has a different shade of meaning than what was intended by ‘feasible’ in the English version of the document, so the conference agreed on the phrase ‘*tout ce qui pratiquement possible*’ (‘all that is practically possible’).<sup>179</sup> This phrase has since been adopted by a number of states in clarifying their understanding of what is a feasible precaution. For example, upon ratifying API, Canada stated that: ‘the word “feasible” means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations’.<sup>180;181</sup> The UK attempted to more directly invoke military necessity in a reservation made upon signing API: “feasible” means that which is practicable or practically possible, taking into account all circumstances at the *time including those relevant to the success of military operations*’<sup>182</sup> [emphasis added]. However, the ICRC cautioned that this understanding of feasibility could lead decision makers to believe that humanitarian concerns are to be subordinated to military necessity, so upon ratifying the protocol, the UK changed the wording of its statement to the one used by Canada *et al.* In 1996,

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<sup>178</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 362. See also Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge UP 2015), 101.

<sup>179</sup> Pilloud *et al.*, 681.

<sup>180</sup> Germany, Ireland, Italy, The Netherlands, and the UK also phrased their clarifications this way. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Practice*, 357-358. Other statements to this effect were made during the CDDH or are incorporated into state military manuals. *Ibid.*, 359-361.

<sup>181</sup> Furthermore, reservations made by Switzerland and Austria upon signing API indicate that the rule must also recognise technological limits on what constitutes a feasible precaution, commanders can only make decisions based on the quality of intelligence that they can obtain from their own equipment, not the equipment that is in use by another state’s armed forces. Pilloud *et al.*, 682.

<sup>182</sup> Gaudreau, 14.

this common understanding of feasibility was then used to formulate the precaution rule of CCW Protocol II:

Article 3(10) All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or *practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.* [emphasis added]<sup>183</sup>

Even though reasonableness is not mentioned directly in API Articles 51 or 57, Fenrick postulated that the Vienna Convention on the Law of Treaties might assuage the worries of those who believe that the language of API might be tortured into an ‘anything goes’ interpretation of the rules on proportionality and precautions in attack:

Article 31(1) of the Vienna Convention specifies: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ It is considered that the primary purpose of Protocol I is contained in this provision of the preamble: ‘Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.’ This purpose is not furthered by the interpretation of specific rules in a way which provides ideal abstract protections for victims but is completely unworkable in the harsh reality of combat.<sup>184</sup>

Therefore, even if reasonableness is not specifically mentioned in API, it should be assumed to be a built-in part of the application of any treaty. By defining the appropriate level of precaution as what is ‘practically possible’ and by specifically mentioning the competing principles of humanity and military necessity, the states have tacitly endorsed the need for decision makers to strike a reasonable balance between the two rather than exhausting all possible courses of action to avoid civilian losses, or giving *carte blanche* to commanders to justify any deviation of the rule on the grounds of military practicality.<sup>185</sup> Furthermore, this interpretation of feasibility is also consistent with statements made by the states about the limitations of combat decision

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<sup>183</sup> CCW Protocol II . This is also the understanding of ‘feasible’ for the purposes of the HPCR Manual. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 38.

<sup>184</sup> Fenrick, ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, 101.

<sup>185</sup> ‘Military commanders may, therefore, take into account the circumstances relevant to the success of an attack or of the overall military operation, including the survival of military aircraft and their crews. However, the factoring in of such military considerations may not result in a neglect of humanitarian obligations under the law of international armed conflict. This means that, whereas a particular course of action may be considered non-feasible due to military considerations (such as excessive risks to aircraft and their crews), some risks have to be accepted in light of humanitarian considerations.’ *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 39.

making. The UK, for instance, made the following declaration clarifying its position on all of API Part IV, Section 1:

Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.<sup>186</sup>

Recalling the logic of the Rendulic rule, such statements confirm that commanders are not expected to be omniscient, nor must they do *everything* possible to avoid civilian losses, but they are expected to make a good faith effort to recognise the relevant humanitarian and military considerations and to apply their craft reasonably.<sup>187</sup> Moreover, the US has recently stated that it does not view the 'feasible precautions' as being different in meaning from 'reasonable precautions'.<sup>188</sup> Therefore, a 'reasonable military commander' test could be an appropriate way to assess if a commander correctly fulfilled their duty to take precautions in attack.

Although in the literature the LOAC rule on taking precautions in attack is often relegated to a subsidiary role underneath proportionality, some commentators claim it is of equal, if not more importance than proportionality. For instance, Geoff Corn writes:

Precautionary measures, if properly implemented as a priority in the planning of attacks and other military operations involving combat power, can play a vital part in civilian risk mitigation during all hostilities, and hold promise to enhance the ability of armed forces to ensure they give full humanitarian effect to other core LOAC principles. Civilian risk mitigation begins with implementation of the distinction obligation, AP I's 'Basic Rule.' With commitment to the distinction obligation as a requisite foundation, civilian risk mitigation then turns on implementing feasible precautionary measures, and, once implemented, refraining from any attack expected to cause indiscriminate effects or otherwise violate the 'proportionality' principle. While proportionality considerations certainly play an important humanitarian role in the targeting planning and execution process, precautionary measures bridge the conceptual borderline between distinction and proportionality. In practice, implementing feasible precautions as a second step in the targeting legality assessment will often mitigate the complexity of the proportionality assessment as a final step in this assessment by ensuring that all measures are taken

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<sup>186</sup>Australia, Austria, Belgium, Canada, Egypt, Germany, Ireland, Italy, The Netherlands, New Zealand, Spain, and Switzerland have made similar statements either about Section I, Part IV generally or about its constituent articles specifically. Gaudreau, 14. The Group of Experts have furthermore determined that: '[t] This is a clear rejection of any hindsight analysis.' *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 38.

<sup>187</sup>Pilloud *et al.*, 682. Parks, 172. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, vol II (Cambridge UP 2010), 133. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 39.

<sup>188</sup>*Department of Defense Law of War Manual (2016 Update)* (Office of General Counsel, US Dept of Defense, 2016), 191-197. Furthermore, in Interview with Former US Policy Official & ICTR Official, the official believed that the same reasonable standard applied to precautions as to proportionality.

so that attacks are only conducted when the risk to civilians are minimized and hence, the proportionality balance will tip decisively in favor of the “concrete and direct military advantage anticipated” to be gained from the attack.<sup>189</sup>

Unfortunately, as I shall explore in the next section, even though there is a clear basis for proportionality violations in international criminal law, the rule on taking feasible precautions in attack has not been codified directly in ICL. Despite its importance in bridging distinction and proportionality, offenses relating to precautions in attack tend to be reframed as criminal mental elements (e.g. recklessness), rather than crimes in their own right.

#### *The Rules of Proportionality and Precautions in International Criminal Law*

The grave breaches regime established by the Geneva Conventions of 1949 was an attempt to compel states to criminalise gross violations of the conventions in their own domestic laws.<sup>190</sup> Likewise, when API was adopted in 1977, it singled out certain actions as grave breaches of the treaty, including launching disproportionate attacks:

Article 85(3). [T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health ... (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii).<sup>191</sup>

Again, in keeping with the logic of Article 57, the proportionality rule acts as a test of whether an attack could be considered indiscriminate.

Although the grave breaches regime was intended to provide a way for states to try war crimes suspects in their own domestic jurisdictions, they have also been incorporated into statutes regulating international courts as well. In 1993, UN Security Council Resolution 808 authorised the ICTY to try those suspected of committing grave breaches of the 1949 Geneva Conventions<sup>192</sup> and the 1998 Rome Statute of the International Criminal Court (ICC) authorised the ICC to try both grave breaches of the Geneva Conventions of 1949, and

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<sup>189</sup> Geoffrey Corn and James Schoettler, ‘Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures’ (2015) 223 *Military Law Review* 785, 799.

<sup>190</sup> James Stewart, ‘The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?’ 7 *Journal of International Criminal Justice* 855, 856.

<sup>191</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>192</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* (UNSC, 1993).

some of the grave breaches of API in modified form. This included directly targeting civilians as well as clearly intentional violations of the proportionality rule:

Article 8(2). For the purpose of this Statute, 'war crimes' means: ... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives ...
- iv. 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.<sup>193</sup>

The ICC definition of a disproportionate attack largely reiterates the one found in API, but there are some important differences in the wording of these two treaties, the most obvious being the addition of environmental considerations into the proportionality calculus.<sup>194</sup> However, a few subtle words considerably constrain the scope of this attempt to criminalise disproportionate attacks: 'intentionally,' 'clearly,' and 'overall'.

Rather than the standard used in API for a violation of indiscriminate or disproportionate attack, which might include reckless conduct on the part of a planner/commander,<sup>195</sup> RS Article 8(2)(b)(iv) requires that the person launching the attack have knowledge of its disproportionate nature *ex ante* and nevertheless to intend<sup>196</sup> to proceed with it.<sup>197;198</sup> It may be helpful at this point

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<sup>193</sup> Rome Statute of the International Criminal Court of 1998.

<sup>194</sup> Article 55 of API did prohibit using certain methods or means of warfare upon the natural environment, but the prohibition was never explicitly linked to the principle of proportionality.

<sup>195</sup> As the ICTY found during the *Galić* trial that the term 'wilfully': 'encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences. The Trial Chamber accepts this explanation, according to which the notion of "wilfully" incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully." *Prosecutor V. Stanislav Galić* (ICTY Trial Chamber) para 54.

<sup>196</sup> I use the common law terms 'intent,' 'recklessness' and 'negligence', but in the Rome Statute Preparatory Commission (PrepCom) *travaux*, a statement prepared by the ICRC related these concepts to the continental law concepts of *dolus directus* (both first and second degrees), *dolus eventualis*, and negligence, respectively. *Paper prepared by the International Committee of the Red Cross relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law* in Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge UP 2003), 488-498.

to look at the subjective mental element of RS Article 8(2)(b)(iv) as put forth in the ICC Elements of Crimes (EOC), which expands upon the *mens rea* required to convict someone of disproportionate attack:

Element 3: The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>199</sup>

Furthermore, in footnote 37 of this particular element, the Rome Statute Preparatory Commission (PrepCom) clarified that: 'this knowledge element requires that the perpetrator make the value judgement as described therein',<sup>200</sup> effectively guarding against any attempt to prosecute a commander for ordinary negligence under this article.<sup>201</sup> Indeed, the ICC would probably not find a commander guilty for merely ordering a disproportionate strike based on incomplete or incorrect information because RS Article 32(1) admits mistakes of fact as a defence as long as one can show that the particular mistake negates

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<sup>197</sup> The fact that the word 'intentionally' establishes the highest possible *mens rea* requirement for the Rome Statute's definition of disproportionate attack is widely accepted in the literature. Didier Pfirter, 'Article 8(2)(b)(iv)' in Roy Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001), 150. Olásolo 218; Newton and May 113; Kevin Heller and Jessica Lawrence, 'The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime' (2007) 20 *Georgetown Intl Environmental Law Review*, 20-21.

<sup>198</sup> Newton and May make the argument that Article 8(2)(b)(iv) also covers inchoate disproportionate attacks, so long as the attacker's mind is on the criminal outcome: 'The crime is committed simply by the deliberate initiation of an attack, provided that the prosecutor can produce evidence sufficient for the finder of fact to infer that the perpetrator believed that the attack would cause an anticipated disproportionate result. The actual result is not necessarily relevant' (p. 113). Dörmann confirms that although inchoate crimes can already be charged by Article 25(3)(f), the PrepCom also intended for Article 8(2)(b)(iv) to cover commanders who launched what they thought were disproportionate attacks even though the attacks ended up causing little, if any, actual damage (p. 162). I find it difficult to believe that if credible allegations of disproportionate attack are rarely brought to trial that charges of inchoate disproportionality would ever have sufficient gravity to be pursued. As a legal theory, the assertion that an inchoate disproportionate attack is worth the same scrutiny as a completed attack has a logical appeal; however, in practice, only those attacks that cause a significant amount of damage will likely pass the Court's gravity test unless the inchoate attack were used to substantiate a larger pattern of criminality.

<sup>199</sup> ICC Elements of Crimes, 19.

<sup>200</sup> *Ibid*, 19.

<sup>201</sup> '[F]or the purpose of the proportionality analysis, one has to take into consideration the perpetrator's representation of the attack as to the scope of incidental civilian damage that such an attack will probably cause. This is so even in those cases which the perpetrator's representation of the probable incidental civilian damage is far lower than the real risk posed by the attack to civilians and civilian objects – regardless of whether the perpetrator's error was caused: (i) by a breach of his duty to first verify and subsequently minimize as far as possible the magnitude of the incidental civilian damage caused by the attack, or (ii) by the lack of due diligence in analysing the information at his disposal' Olásolo, 227-228. Furthermore, Sloane, in considering an attack where an attacker 'turns a blind eye on the facts of the situation' believes that: 'this does not imply negligence as the law conventionally understands it (a failure to act in conformity with some objective standard or reasonableness under the circumstances); rather, it implies something more like willful blindness or perhaps even recklessness' (p. 313-314).

the *mens rea* of the perpetrator.<sup>202</sup> Furthermore, in those cases that are difficult or lie at the margins of what would be considered reasonable conduct on the part of a military commander, the Court will give the accused the benefit of the doubt.<sup>203</sup> Héctor Olásolo argues that this is significant because it effectively raises the threshold of criminal intent required by RS Article 8(2)(b)(iv) version of the proportionality rule *vis-à-vis* the one articulated in API Article 85(3)(b).<sup>204</sup>

According to Kevin Heller and Jessica Lawrence, the strict *mens rea* requirement for RS Article 8(2)(b)(iv) is problematic because it makes it nearly impossible for the Court to find a perpetrator in violation of the proportionality rule. By their reasoning, a cavalier commander could avoid prosecution simply by inflating the anticipated military advantage of the target or by devaluing the amount of expected collateral damage, either before the attack or in an *ex-post* justification of it. The Court would then have to accept the commander's subjective assessment of the situation and would therefore conclude that he was unaware of the disproportionate nature of the attack.<sup>205</sup> However, ICRC legal advisor Knut Dörmann revealed that many delegations to the PrepCom saw the second sentence of footnote 37 as an implicit endorsement of the fact that a commander's value judgement must be open to objective judicial scrutiny<sup>206</sup> since it stipulates that: 'an *evaluation* of [the perpetrator's] value

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<sup>202</sup> Rome Statute of the International Criminal Court of 1998; Olásolo, 216.

<sup>203</sup> The Rule of Lenity is described in RS Article 22(2). Heller and Lawrence, 13. Sloane, 311. Likewise, Huffman notes that the ICTY has already used the Rule in its own jurisprudence (p. 38), so there is no reason to believe that the ICC will use Article 8(2)(b)(iv) as a way to prosecute unlucky commanders who unknowingly caused extensive collateral damage because of circumstances outside their control.

<sup>204</sup> Olásolo also argues that the use of the word 'intentionally' in RS Article 8(2)(b)(iv) shows that the drafters of this article were putting forth a unique *mens rea* requirement, rather than relying on the general one set forth in RS Article 30. Olásolo 232, 217. Cryer also believes that the word is significant and that it was an unnecessary way to give discretion to the commander: 'The inclusion of 'clearly' does not clarify the standard, it simply raises it by reference to an undefined adjective. Prosecutors also may prosecute only when the higher threshold provision of Article 8(2)(b)(iv) is itself clearly breached, which would create a double upsurge in the limits on liability. It would appear possible to argue, in defence to a charge under Article 8(2)(b)(iv), that the defendant determined that civilian casualties were excessive, but not clearly so. The discretion could have been accommodated by adopting, as the ICTY Prosecutor has, the test of the reasonable military commander.' Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 279. Confer with Dörmann who believes that the use of the word is a mere surplusage (p 166).

<sup>205</sup> Heller and Lawrence 21, 25-27. In fact, they doubt that one could ever find a commander who consciously launches a disproportionate attack in the manner required by footnote 37. (p. 26).

<sup>206</sup> Dörmann, 165. Pfirter, 'Article 8(2)(b)(iv)', 150. Cf. Interview with Garraway, who believes that this second sentence doesn't automatically imply that such an outside objective assessment must be made. Rather, he believes that the text merely reinforces the need to appreciate the commander's perspective.

judgement must be based on the requisite information available to the perpetrator at the time' [emphasis added].<sup>207</sup> Moreover, he clarifies that the use of the 'reasonable military commander' standard was never in question during the PrepCom and it remains uncontroversial:

In principle, there was no disagreement as to the standard for the adoption of the proportionality rule, which should be that of a 'reasonable military commander' insofar as the decision to launch an attack is made at a certain level within the chain of command. Furthermore, the use of this standard would avoid controversies in the application of the proportionality rule because the great majority of reasonable military commanders would agree on the fact that the incidental civilian damage expected from an attack is, or is not, manifestly excessive. Moreover, if there is an issue on which military legal writers, professors of international humanitarian law, non-governmental organizations (such as Human Rights Watch) and the ICRC agree, it is that the standard of the reasonable military commander is the most suitable for the application of the proportionality rule.<sup>208</sup>

Nevertheless, the *mens rea* element could be viewed as problematic because it does not seem to address reckless or negligent conduct on the part of the commander. By this reckoning, an unscrupulous commander might circumvent prosecution under Article 8(2)(b)(iv) by failing to take the precautions in attack prescribed by API Article 57(2)(a) (e.g. positively identifying civilian objects). In doing so, the commander could merely claim that they did not have sufficient intelligence about the number of civilians that were present near a target, and therefore, was unaware of the disproportionate nature of the attack.<sup>209</sup> However, Michael Newton refutes this hypothetical defence on two counts. Firstly, the EOC are not binding upon the Court, so a judge still has some discretion to widen the *mens rea* beyond the one specified by the EOC.<sup>210</sup> Secondly, the crimes listed in RS Article 8 cannot be taken out of context from the larger corpus of customary LOAC from whence they were derived, including the positive requirement to take all feasible precautions in attack:

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<sup>207</sup> ICC Elements of Crimes, 19.

<sup>208</sup> Olásolo, 229-230.

<sup>209</sup> Olásolo explains that: '[F]or the purpose of the proportionality analysis, one has to take into consideration the perpetrator's representation of the attack as to the scope of incidental civilian damage that such an attack will probably cause. This is so even in those cases which the perpetrator's representation of the probable incidental civilian damage is far lower than the real risk posed by the attack to civilians and civilian objects – regardless of whether the perpetrator's error was caused: (i) by a breach of his duty to first verify and subsequently minimize as far as possible the magnitude of the incidental civilian damage caused by the attack, or (ii) by the lack of due diligence in analysing the information at his disposal.' *ibid*, 227-228.

<sup>210</sup> 'To be sure, the *lex specialis* of the Elements of Crimes is reflected in Article 9, which states merely that the Elements "shall assist" the Court.' Michael A Newton, *Charging War Crimes: Policy & Prognosis from a Military Perspective* (Carsten Stahn ed, Oxford UP 2015).

For the purposes of the war crime in Article 8(2)(b)(iv) of intentionally directing an attack in the knowledge that it would likely inflict disproportionate damage, the most relevant permissive duties incumbent on those who order military strikes require them to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects...” Jurists and prosecutors absolutely must realize that the evaluation of the *actus reus* under Article 8(2)(b)(iv) cannot be made in isolation from these collateral duties of the commander, notwithstanding the fact that they are nowhere specifically referenced in the Rome Statute... The vital point is that the parallel duties incumbent on the commander are to be drawn from the larger *jus in bello* and need not be restated within the contours of Article 8 itself.<sup>211</sup>

Dörmann would likely concur with this assessment, arguing that a perpetrator who wilfully blinds him or herself through a refusal to take necessary precautions has accepted that the results of the proportionality calculation will not justify the attack. That commander can, therefore, be held responsible for their *reckless* behaviour:

It was argued that by refusing to evaluate the relationship between the military advantage and the incidental damage or injury, he/she has made the value judgement required by this element. Therefore, if the court finds that the damage would be excessive, the perpetrator will be guilty... In any case, an unreasonable judgement or an allegation that no judgement was made, in a case of clearly excessive death, injury or damage, would simply not be credible. It is submitted that the court would then, and it would be entitled to do so, infer the mental element based on that lack of credibility.<sup>212</sup>

Therefore, even though the ordinary meaning of the word ‘intentionally’ in Article 8(2)(b)(iv) may seem to restrict the ICC’s ability to try cases of disproportionate attack to those that were committed with direct criminal intent, in theory, there is still enough latitude within the context of the entire body of law available to the ICC to handle cases of recklessness, although perhaps not enough to handle cases of ordinary negligence. At any rate, the increased liability for the crime of disproportionate attack in the Rome Statute seems to be more of a restriction on the ICC as an institution, rather than an accurate reflection of the crime in customary ICL, where recklessness is a possible type of liability for disproportionate attacks.<sup>213</sup> As with the proportionality rule under LOAC, Didier

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<sup>211</sup> Ibid, 738. This interpretation is shared by Olásolo, who claims that: ‘as long as the attack is unlawful pursuant to the set of rules which develop the principle of distinction in the Additional Protocols, the competent Chamber of the ICC may proceed with an analysis of whether the result of the attack gives rise to criminal liability for any of the other crimes provided for in the RS (p. 231).

<sup>212</sup> Dörmann, 165. Heller and Lawrence concede that the Court may be able to handle reckless conduct in the way Dörmann describes, even though they would rather see an explicit expansion of the *mens rea* for Article 8(2)(b)(iv) to include reckless and negligent conduct Heller and Lawrence, 25.

<sup>213</sup> Interview with Former ICC Official.

Pfirter's commentary on the elements of RS Article 8(2)(b)(iv) indicates that the EOC also imply a reasonableness standard for the criminal norm.<sup>214</sup>

The effect of the word 'clearly' on the meaning of RS Article 8(2)(b)(iv) is more ambiguous. Dörmann claims that the word is legally superfluous since it is cannot be found in any of the sources of law for the Rome Statute.<sup>215</sup> However, other commentators believe that it is significant because, *prima facie*, it enables the court to focus on those attacks which are most egregious,<sup>216</sup> rather than becoming overwhelmed by cases which lie on the margins of what would be considered criminal under API. For instance, William Boothby believes the inclusion of this word allows the ICC to evaluate the proportionality of a strike based upon the judgement of 'all fair-minded people, including the well-known "man on the Clapham omnibus"', rather than those cases where even a group of reasonable military commanders would have difficulty deciding if a strike was warranted.<sup>217</sup> Furthermore, the International Criminal Tribunal's *Final Report on the NATO Bombing Campaign* reinforces this interpretation of the word:

Operational reality is recognized in the Statute of the International Criminal Court, an authoritative indicator of evolving customary international law on this point, where [in] Article 8(2)(b)(iv) the use of the word 'clearly' ensures that criminal responsibility would be entailed only in cases where the excessiveness was obvious.<sup>218</sup>

Therefore, it would seem that the use of the word 'clearly' does indeed have legal significance.

Even though there is a debate amongst states over how to handle expected military advantage as a matter of customary LOAC, the use of the word 'overall' in RS Article 8(2)(b)(iv) shows that the threshold for criminal conduct must take into account the military advantage of an *entire attack*, not just one element of it, consistent with the interpretation of API held by many states that military advantage should be assessed at the operational level<sup>219</sup>

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<sup>214</sup> Pfirter, 'Article 8(2)(b)(iv)', 148.

<sup>215</sup> Dörmann, 169. Sloane would agree with this assessment (p. 311-312).

<sup>216</sup> Pfirter, 'Article 8(2)(b)(iv)', 148. Olásolo, 83.

<sup>217</sup> Boothby, 190.

<sup>218</sup> *Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign against the Federal Republic of Yugoslavia* (ICTY, 2000), para 21.

<sup>219</sup> See above at note 153. Olásolo (p. 83) and Pfirter, 'Article 8(2)(b)(iv)' (p. 148) regard the addition of the word 'overall' to be significant. However, the ICRC noted in 1998 that the addition of the word 'overall' did not change the meaning of Article 8(2)(b)(iv) *vis-à-vis* API Article 51(5)(b) because it claimed that the

and it does not allow perpetrators to justify their actions at the strategic level, based on *jus ad bellum* concerns.<sup>220</sup>

Finally, although the ICTY has accepted some of the provisions of API, including those relating to proportionality, into its own jurisprudence, there is a glaring omission of any sort of proportionality rule during NIAC as part of the Rome Statute.<sup>221</sup> However, this seems to be more of a limitation on the ICC as a forum for trying cases of disproportionate attack, than a reflection of the state of customary ICL generally. Nevertheless, its noted absence from the Rome Statute could make it easier for defence counsels in other legal fora (either international or domestic) to argue that the customary status of the criminal proportionality rule applicable during NIAC is unclear and that the Rule of Lenity ought to be invoked in the defendant's favour.

Customary and treaty-based LOAC have defined the limits of what can be considered reasonably proportionate conduct in wartime for the purposes of state responsibility while the Grave Breaches regime and the Rome Statute have created a framework that both domestic and international courts can use to repress breaches by holding individuals criminally responsible for their actions. However, whether or not there is actually accountability for violations of the proportionality rule depends upon how courts apply the law in practice.

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conditions implied by 'overall' (i.e. temporal and spatial distance between the expected military advantage and the target) could be assumed by the wording of API Article 51(5)(b). Dörmann, 169-170. However, these differences can affect the way that the law is used to prosecute war crime suspects. For example, although the ICTY has used the 'clearly excessive' standard as the benchmark for criminally disproportionate conduct in war, to describe an attack in terms of time and space, it has, in different cases, defined military advantage at either the operational or the tactical level. In the *Galić* case, the court assessed the expected advantage of each sniping or shelling incident individually, rather than examining the military advantage of an entire attack. *Prosecutor V. Stanislav Galić* (para 37). In contrast, based on the *prima facie* meaning of 'overall' and in light of the many statements made by the states defining military advantage at the operational level, it would likely be more difficult for a prosecutor to break up the constituent parts of an attack in a hearing before the ICC per Article 8(2).

<sup>220</sup> A footnote in the Elements of Crimes for Article 8(2)(b)(iv) states: 'The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict'. ICC Elements of Crimes 19. Furthermore, Dörmann claims that in the Rome Statute PrepCom *travaux*: 'Several delegations emphasised that the term "overall" could not refer to long-term political advantages or the winning of a war, *per se*' (p. 164) and Pfirter, 'Article 8(2)(b)(iv)' would concur with this assessment (p. 148).

<sup>221</sup> Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 283.

### *The Rules of Proportionality and Precautions in International Case Law*

The effectiveness of any attempt to criminalise violations of the proportionality rule ultimately depends on the ability for a trier of fact to determine if an attack was indeed disproportionate. Despite the utilitarian logic of the rule, those judging an attack *ex post* may have difficulty understanding how the commander weighed the incommensurable values of civilian life and property against military advantage under the pressures associated with the fog of war. To date no commander has ever been sentenced specifically for violating the proportionality rule, but several have been either charged or convicted of launching direct attacks against the civilian population or indiscriminate attacks. In these cases, judges have often articulated their positions on the proportionality rule in their decisions, since disproportionate attacks are considered to be one subset of indiscriminate attacks.

The jurisprudence of the ICTY provides the largest source of case law on unlawful attacks to date. Even though the ICTY statute allowed the tribunal to try violations of the laws and customs of war, when such violations were not specifically enumerated, it was a challenge for the court to decide specifically which provisions applied, what the elements of the crimes would be, and what level of *mens rea* was required to convict a defendant of a particular crime. Many of these issues were resolved during pre-trial hearings between the Office of the Prosecutor (OTP) and the defence, but there was enough unresolved ambiguity in the law that the judges themselves would often offer clarification in their decisions.<sup>222</sup> One of the first cases to weigh in on the *in bello* proportionality rule as formulated in API was the ICTY tribunal of *Zoran Kupreškić et al.* in 2000.<sup>223</sup> Kupreškić had been the commander of a local unit of the Croatian Defence Council, which had attacked the town Ahmići as part of a

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<sup>222</sup> William Fenrick, 'Gold Standard or Double Standard: Proving Unlawful Attacks Before the ICTY' (Unpublished Manuscript, 2008), 3.

<sup>223</sup> The *ad bellum* principle of proportionality was addressed in the earlier 1996 ICJ Nuclear Weapons advisory opinion, but the *jus in bello* case against nuclear weapons rested more on their indiscriminate nature than with disproportionate use, *per se*. While there are occasions where the use of nuclear weapons might be considered discriminate (such as an example put forth by the UK whereby a tactical nuclear device could be used against troops in open terrain), the court found that generally the threat or use of nuclear weapons contravened LOAC. Even so, the court stated that it could not determine if their use would be lawful or unlawful in the face of an existential threat to the state. *Legality of the Threat or use of Nuclear Weapons* (International Court of Justice).

larger operation to push Muslim Bosnians out of the Lašva River Valley in 1993. During that case, the judges accepted that API Article 57 was considered customary LOAC and that the accused had a twofold duty to uphold the rules on proportionality and precautions in attack:

In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. *Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party.*<sup>224</sup> [emphasis added]

However, since there was such scant case law on proportionality up to this point, the ICTY initially chose not to treat disproportionate attack as a separate crime from intentionally attacking civilians or civilian objects, often relegating discussions of proportionality to mere *obiter dicta*.<sup>225</sup> Although the Trial Chamber in *Kupreškić* offered up a thorough analysis of the law on proportionality as it stood at the time, the grisly facts of the case caused the judges to focus on whether the accused had intentionally murdered the civilian residents of Ahmići outright, as a crime against humanity, rather than if he or his co-defendants had committed war crimes by ordering or launching indiscriminate or disproportionate strikes.<sup>226</sup>

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<sup>224</sup> *Prosecutor V. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (Aka "Vlado")* (ICTY Trial Chamber), 205.

<sup>225</sup> Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials' (2013) 46 *Israel L Rev* 271, 284. Olásolo, 156-157; see also William Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside' 3 *Yearbook of International Humanitarian Law* 53, 60.' *Prosecutor V. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (Aka "Vlado")*, 205.

<sup>226</sup> 'The many bodies of civilians found in the village after the attack, especially those of very young children, the wholesale destruction of Muslim – and only of Muslim – houses and even the destruction of the livestock of the Muslim families, do not match the picture the Defence tried to paint, which was that of a military battle between two armies... In sum, the damage and harm inflicted by the Croats on the Muslim civilian population was not collateral; it was the primary purpose of the attack.' *Prosecutor V. Zoran*

While the ICTY is best known for its decisions on the conduct of civil and military figures from the Balkans, the Office of the Prosecutor was also called upon to examine the legality of NATO's use of air power during the wars. In their 2000 report to the Office of the Prosecutor (OTP), the Committee Established to Review the NATO bombing Campaign were the first to explicitly mention the 'reasonable military commander' standard in a document coming from an international court:

It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the 'reasonable military commander'. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.<sup>227</sup>

With this standard in mind, the committee analysed both the bombing mission as a whole and also a few specific strikes which outside organisations such as Amnesty International and Human Rights Watch had suggested were in contravention of international law. While in some cases the civilian casualties were considered high, the Committee did not think there was enough evidence to open a formal war crimes investigation.<sup>228</sup>

Echoing the 'reasonable military commander' standard from the OTP's NATO Bombing Report, the Trial Chamber applied a similar approach to determine if Stanislav Galić should be held responsible for his role in the sniping and indiscriminate shelling of the civilian population of Sarajevo:

In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.<sup>229</sup>

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*Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (Aka "Vlado")*, 301.

<sup>227</sup> *Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign against the Federal Republic of Yugoslavia*, para 50.

<sup>228</sup> 'Further, in the particular incidents reviewed by the committee with particular care (see paras. 9, and 48-76) the committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred... In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.' *ibid*, para 90.

<sup>229</sup> *Prosecutor V. Stanislav Galić*, para 58.

Thus the *Galić* decision cemented a reasonableness standard into the ICTY's jurisprudence for determining the legality of targeting decisions, although that point was rendered moot by the fact that Galić was likely intentionally directing his attacks at the civilian population, rather than launching an excessive attack, per se.<sup>230</sup> Furthermore, the case also clarified the ICTY's position on the appropriate level at which proportionality ought to be assessed — although the topic is still contentious as a matter of customary LOAC,<sup>231</sup> the Tribunal accepted that the rule could be applied at the tactical level, but that it should never be applied at a strategic level.<sup>232</sup> Later, in the *Blaškić* (2000) and *Strugar* (2005) decisions, the Tribunal instead chose to look at the proportionality calculation from the operational level, examining the actions of the accused in reference to an entire attack, rather than a blow-by-blow analysis of each target.<sup>233</sup> The *Blaškić* tribunal also provided some guidance on the level of *mens rea* that would be required to convict a perpetrator of disproportionate attack. In this case, the Prosecutor 'maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute [relevant to the unlawful attack charges]... is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likenable to serious criminal

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<sup>230</sup> 'An evaluation of the Trial Record makes it also abundantly clear that although General Galić called occasionally for decrease of fire against the civilian population of Sarajevo, when prompted by outside action, he also, at other times, intended to target, by direct or indiscriminate fire, civilians and the civilian population in the city of Sarajevo to spread terror within the civilian population of Sarajevo. The Majority recalls the evidence of Henneberry, O'Keeffe, Mole and Bergeron. All four witnesses protested to General Galić against the indiscriminate targeting of civilians. Bergeron testified that General Galić was put on notice that "snipers would kill civilians, be it women, children, elderly people, for apparently no other reason than to terrorise the population". General Galić response to Henneberry and O'Keeffe that the ultimate goal was to either destroy the city or rid it of Muslims and that "he was going to make this area safe for his children's children" speaks for itself. The only reasonable conclusion is that General Galić acted in furtherance of a strategy to attack the civilian population of Sarajevo to spread terror within that population.'" *ibid*, para 745.

<sup>231</sup> See above at notes 142 & 143.

<sup>232</sup> Olásolo, 171. Although the court likely overstepped its remit by applying the proportionality rule at the tactical level, it was right to dismiss any attempt to look at the military advantage gained from an action at a strategic level. If it had, then it would be nearly impossible to apply the rule, particularly against the victor of a war, since the military advantage of winning a war is an infinitely large denominator against which almost any level of collateral damage might seem acceptable (this is the sort of argument that proponents of the nuclear strikes on Hiroshima and Nagasaki use to convince others of justness of those grossly disproportionate attacks). Olásolo also believes that the court was right not to apply the principle of proportionality at the strategic level: 'The application of the proportionality rule at the strategic level- i.e. against the backdrop of an overall military campaign or even an armed conflict - risks the implicit elimination of the requisite of a proportional use of force in any offensive and defensive combat action (*jus in bello*). This may, indeed, end up being the result of equating such a requisite with the lawful resort to armed force in self defence (*jus ad bellum*)' (p. 174).

<sup>233</sup> *Ibid*, 175-176.

negligence', so within the ICTY's jurisprudence, recklessness ended up being an acceptable level of *mens rea* to secure a conviction.<sup>234</sup>

More recently, in the 2012 decision of *Gotovina et al.*, the Tribunal had to determine, *inter alia*, whether the Croatian Armed Forces' use of artillery against targets in urban areas during Operation Storm was a violation of the laws and customs of war.<sup>235</sup> The prosecution claimed that the shellings which General Gotovina had ordered, were indiscriminate — or at least disproportionate — and therefore were used as a way to persecute civilian Serbs living in contested areas. The defence countered that there were a number of legal military objectives in the towns that the Croatian Armed Forces attacked. Their fires, though indirect, were aimed as best they could be at those military objectives or targets of opportunity that could be hit without causing excessive civilian harm. Despite showing the court the preparations that the Croatian Armed Forces took in collecting intelligence and drafting target lists, the Trial Chamber was unconvinced that they actually stuck to the military objectives on their lists. Interestingly, rather than relying on an explicit reasonable commander standard as the OTP Report or the *Galić* tribunal had, the Trial Chamber in this case instead relied on witness testimony and its own judgement to determine if a particular strike was proportionate.<sup>236</sup> However, in constructing an effects-based approach to judge if the shells actually hit their intended targets, the court used a somewhat arbitrary standard. They claimed it was reasonable to assume that any shells which landed outside a 200-metre radius from their intended targets must have been the result of indiscriminate fire. By this standard, the court

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<sup>234</sup> Dörmann, 152. This acceptance of recklessness as wilfulness comports with the *mens rea* used in the *Galić* case. Fenrick, 5.

<sup>235</sup> *Prosecutor V. Ante Gotovina, Ivan Čermak, Mladen Markač* (ICTY Trial Chamber).

<sup>236</sup> For example, in determining if the principle of proportionality was followed in the attack on Serbian Rebel leader Milan Martić: '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. 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.' *ibid*, para 1910.

found that Gotovina and his subordinates had fired indiscriminately into several towns during Operation Storm. This finding formed the lynchpin for the court's conviction of Gotovina and his co-defendants.

This ruling did not sit well with military professionals such as Major General Walter Huffman, who criticised the 200-metre standard, believing it to be an invention by the court which emphasised the effects of a strike *ex post* without considering the commander's intent. Instead, he claimed that the court must adhere to the Rendulic rule:

The law does not require the commander always to be right; instead it requires a good faith judgment based on information available in the heat of battle. Civilian casualties, property destruction, and impact locations viewed in hindsight are not enough to prove a commander guilty of indiscriminate attacks. The results of an attack are but one factor from which intent at the time of attack may be inferred.<sup>237</sup>

Indeed, the ICTY Appeals Chamber also found the 200-metre standard to be arbitrary and reversed the convictions of Gotovina and Markač.<sup>238</sup> However, in his dissenting opinion, Judge Carmel Agius lambasted the majority for fixating on the erroneous 200-metre standard while ignoring other useful effects-based evidence from which one might infer criminal intent on the part of Gotovina:

In my opinion, the Majority's reasoning is defective, just as the Trial Chamber's decision to adopt the 200 Metre Standard was defective. In the absence of the 200 Metre Standard, there remains evidence on the record from Witnesses Konings, Leslie and Rajčić regarding the accuracy of the weaponry used by the HV [Croatian Army] in shelling the Four Towns, and other evidence relating to the HV's capability in controlling the margin of error for its weaponry. The Majority completely disregards this evidence and assumes that it loses all evidentiary value outside the context of the 200 Metre Standard. This is simply not the case. Short of a decision by the Majority to appoint its own artillery expert, the underlying evidence regarding margins of error stands, and cannot be ignored by the Majority, particularly when in relation to Knin, at least 900 projectiles fell all over the town in just one and a half days and there are no findings of any resistance coming from the town. This underlying evidence, which itself has never been called into question, must therefore be taken into account by the Majority in determining whether a reasonable trier of fact could conclude that the attacks were unlawful, despite the error in the 200 Metre Standard.<sup>239</sup>

This case lays bare the conflict between the way that different legal professionals approach issues such as indiscriminate fire and proportionality. At its core, the debate on the 200-metre standard is about whether judges have

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<sup>237</sup> Huffman, 26.

<sup>238</sup> *Prosecutor V. Ante Gotovina, Mladen Markač* (ICTY Appeals Chamber), 18-21.

<sup>239</sup> *Ibid*, Dissenting Opinion of Judge Carmel Agius, para 18.

the appropriate background to develop a meaningful way to assess the reasonableness of a strike, given that they are not experts in military affairs.

In the ICC's case law, no violations of Article 8(2)(b)(iv) have been successfully brought to trial. However, the Office of the Prosecutor (OTP) has conducted preliminary examinations of a couple incidents in which it had been alleged that disproportionate attacks had taken place. After receiving numerous communiques claiming that Coalition forces had launched disproportionate attacks in Iraq during Operation Iraqi Freedom, the OTP responded to the allegations in a 2006 report. The report reiterated the applicable law regarding disproportionate attack, emphasizing that the ICC's version of the proportionality rule is indeed stricter than the corresponding rule in API: 'Article 8(2)(b)(iv) draws on the principles in Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, but restricts the criminal prohibition to cases that are "*clearly*" excessive.' [emphasis in original]<sup>240</sup> Although a 'considerable number of civilians died or were injured during the military operations,'<sup>241</sup> the OTP's analysis of the situation focused on the precautions that the belligerents used to avoid collateral damage, rather than the *ex post* effects of each attack:

Publicly available information from the UK states that: lists of potential targets were identified in advance; commanders had legal advice available to them at all times and were aware of the need to comply with international humanitarian law, including the principles of proportionality; detailed computer modeling was used in assessing targets; political, legal and military oversight was established for target approval; and real-time targeting information, including collateral damage assessment, was passed back to headquarters. This information was taken into consideration by the Office, in accordance with the standards of critical evaluation. The information was not contradicted by any other available information.<sup>242</sup>

The OTP then claimed that, based on its analysis of the collateral damage caused during the war and of the Coalition's precautionary measures, that the incident did not pass the 'clearly excessive' threshold required to bring the case under the jurisdiction of the Court.<sup>243</sup> This report was significant for two reasons. Firstly, it shows that the word 'clearly' does indeed have a practical legal

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<sup>240</sup> *Office of the Prosecutor Letter to Senders Regarding Iraq* (ICC Office of the Prosecutor, 2006), 5. This refutes the claim made by Dörmann and Sloane above at note 215.

<sup>241</sup> *Office of the Prosecutor Letter to Senders Regarding Iraq*, 6.

<sup>242</sup> *Ibid.*, 6.

<sup>243</sup> *Ibid.*, 7.

significance as the OTP interprets Article 8(2)(b)(iv).<sup>244</sup> Secondly, by reviewing how the Coalition's leadership had taken the requisite precautionary measures during their operations, the OTP was able to infer that they did not have the requisite *mens rea* to commit the crime of disproportionate attack. In 2014, the OTP re-opened a preliminary examination into the UK's role in the Iraq conflict, but that examination focuses on the treatment of detainees, rather than allegations of disproportionate attack. Moreover, for the time being, the Prosecutor is not inclined to pursue the case until the UK's Iraq Historic Allegations Team (IHAT) has completed its own inquiries.<sup>245</sup>

The other alleged disproportionate attack for which the OTP has conducted a preliminary examination occurred between North and South Korea in 2010. In that attack, North Korean forces fired shells onto the South Korean island of Yeonpyeong which hit both military and civilian objects and resulted in the death of two civilians and the injury of 52 others.<sup>246</sup> The 2014 OTP report on the incident reinforced the fact that the ICC only considers 'clearly excessive' cases of disproportionate attack within its jurisdiction and that it takes a cautious approach to inferring criminal action based on an assessment of the facts *ex post*:

The difficulties of calculating anticipated civilian losses and anticipated military advantage and the lack of a common unit of measurement with which to compare the two make this assessment difficult to apply, both in military decision making and in any *ex post facto* assessment of the legality of that action. Thus, the Rome Statute restricts the criminal prohibition to cases that are 'clearly' excessive. This is clear from the plain meaning, the meaning in context, as well as the intent of drafters, as confirmed in the relevant commentaries. (The term 'clearly' is designed to emphasize that a value judgment within a reasonable margin of appreciation should not be criminalized nor second guessed by the Court from hindsight.)<sup>247</sup>

This statement shows that the word 'clearly' not only keeps the Court focused on the most egregious violations of Article 8(2)(b)(iv), as Boothby suggested, but like the 'reasonable military commander' standard adopted by the ICTY, the use of the word 'clearly' in the Rome Statute has caused the ICC OTP to refrain from substituting the discretion of the Court for that of a military decision maker

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<sup>244</sup> C.f. Dörmann above at note 215.

<sup>245</sup> *Report on Preliminary Examination Activities* (ICC Office of the Prosecutor, 2015), 7-10.

<sup>246</sup> *Situation in the Republic of Korea: Article 5 Report* (ICC Office of the Prosecutor, 2014), 8.

<sup>247</sup> *Ibid*, 73.

except in those cases where there would be broad agreement by military commanders that a strike were disproportionate:

To conclude, while a reasonably well-informed person in the circumstances of the actual perpetrator, would have expected some degree of civilian casualties and damage to result from the attack given the relative proximity of military and civilian objects, the information available is insufficient to provide a reasonable basis to believe that the anticipated civilian impact would have been *clearly excessive* in relation to the anticipated military advantage of the attack, considering the size and population of the island, and the fact that military targets appeared to be the primary object of the attack.<sup>248</sup> [emphasis in original]

In the end, the OTP declared that the incident was not grave enough to warrant a formal investigation.

### *The Rules of Proportionality and Precautions in Domestic Case Law*

The rules of proportionality and precautions in attack have been no less difficult to apply in domestic case law as they have been in international case law. Some of the most infamous cases have been those brought before Belgian courts in the early 2000s. These cases could proceed because of a 1993 law which granted Belgian courts universal jurisdiction for genocide, crimes against humanity, and war crimes, even if there was no connection to Belgium by *ratione personae* or *ratione soli*.<sup>249</sup> On the eve of the 2003 Iraq War, seven Iraqis brought a case against high-ranking US officials, including the former president, George H. W. Bush, in connection with an airstrike during the First Gulf War against a bunker that had been converted into a civilian bomb shelter. The strike against the shelter in Ameriyya killed 403 people<sup>250</sup> and at the time, it had been condemned by Human Rights Watch as a failure to take feasible precautions in attack:

In public statements, U.S. military officials have repeatedly emphasized the basis for their judgment that the Ameriyya building was used for military-related activity and therefore a legitimate military target. Gen. Kelly said on February 13: 'We didn't know that the Iraqis had civilians in there.'... Gen. Kelly said on February 13 that 'we did take all the precautions we could.' He did not, however, spell out the specific nature of these precautions, in sharp contrast to the disclosure of information to support the contention that the building was used for military purposes. This is particularly important in view of three factors: the acknowledgement by the U.S. military that the building originally served as a civilian shelter, the contention that it only recently 'became' an active command-and-control bunker, and Iraq's repeated use of civilians to shield military

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<sup>248</sup> *ibid*, 24.

<sup>249</sup> Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003) 25 *Cardozo L Rev* 247, 247.

<sup>250</sup> *Ibid*, 251.

targets. The identification of an object as serving a military purpose is a necessary, but not sufficient, condition prior to making a decision to attack it. First, in the case of any uncertainty that a civilian object is being used for military purposes, there is a presumption of civilian use in favor of such objects.<sup>251</sup>

Nevertheless, the case was denounced by one of the co-indictees, Colin Powell, who warned that such 'politically motivated' charges could affect NATO leaders' ability to attend functions at the alliance's headquarters in Brussels.<sup>252</sup> Similarly, the Belgian foreign minister complained that the law was being exploited by 'opportunists' and that 'Belgium must not impose itself as the moral conscience of the world.'<sup>253</sup> Two weeks later, the Belgian Parliament amended the universal jurisdiction law such that its courts were able to dismiss the case.<sup>254</sup> A month later, 17 Iraqis and two Jordanians filed a suit against Tommy Franks, the commander of Coalition Forces in the 2003 invasion of Iraq, for *inter alia*, allegedly ordering indiscriminate attacks, but it seemed to some commentators as though the case was brought more for its media impact than with the expectation of a serious prosecution of the alleged offenses.<sup>255</sup> Invoking the newly amended law, the Belgian Government decided to use its authority to transfer the case over to US jurisdiction.<sup>256</sup> Even though this decision effectively dismissed the case,<sup>257</sup> US officials suggested shortly afterwards that if Belgium did not repeal what they thought to be its overly permissive universal jurisdiction law, then they might consider relocating NATO headquarters.<sup>258</sup> The Belgian cases have therefore revealed more about how

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<sup>251</sup> *The Bombing of Iraqi Cities: Middle East Watch Condemns Bombing Without Warning of Air Raid Shelter in Baghdad's Al Ameriyya District on February 13* (Human Rights Watch, 1991), para 26-29.

<sup>252</sup> Halberstam, 251.

<sup>253</sup> *Ibid*, 251.

<sup>254</sup> 'On Saturday, the upper house approved "filters" that will allow the judiciary to reject complaints in which there are no victims of Belgian nationality or in which the plaintiffs have lived in Belgium for less than three years. The government will also be able to reject cases in which the accused person comes from a democratic country, where the issue presumably could be brought in its own courts.', 'Belgium Eases Law on Trial of Foreigners' *New York Times* (New York, 7 April 2003) A8 <<http://www.nytimes.com/2003/04/07/world/belgium-eases-law-on-trial-of-foreigners.html>> .

<sup>255</sup> 'Professor Jan Wouters, director of the Institute for International Law at the University of Leuven, said the suit "could be just a spectacular way of catching attention in the media".', 'US General War Crimes Case Filed' *BBC News* (14 May 2003) <<http://news.bbc.co.uk/1/hi/world/europe/3026371.stm>> .

<sup>256</sup> 'Tommy Franks' (*Trial International*, 2016) <<https://trialinternational.org/latest-post/tommy-franks/>> accessed 23 June 2017.

<sup>257</sup> The plaintiffs appealed the decision to transfer the case, but that appeal was lost a few months later. *Ibid*.

<sup>258</sup> Ian Black and Ewen MacAskill, 'US Threatens Nato Boycott over Belgian War Crimes Law' *The Guardian* (13 June 2003) <<https://www.theguardian.com/world/2003/jun/13/nato.warcrimes>> .

politically-charged allegations of unlawful attack can be, rather than contributing any solid analysis about the cases on the merits.

As with international courts, a reasonableness standard has also been invoked by domestic courts to determine a commander's liability for conducting unlawful attacks. Indeed, as a matter of customary international law, the states' embrace of the 'reasonable military commander' standard to evaluate a commander's application of the proportionality rule seems to be gaining traction.<sup>259</sup> The Israeli High Court of Justice, in particular, has enthusiastically applied the standard in a number of high-profile cases that involved judicial review of military actions. For example, in the 2006 case, *Public Committee Against Torture v. Government of Israel* — which examined the Israeli Government's policy of using targeted killings against suspected terrorist leaders — one of the issues the petitioners raised was that targeted strikes against terrorist suspects will oftentimes inflict excessive collateral damage upon the nearby civilian population. By this time, the High Court of Justice had developed a substantial case law<sup>260</sup> which had invoked a 'reasonable military

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<sup>259</sup> If the inclusion of the 'reasonable military commander' standard in domestic courts provides evidence that states practice its use, its inclusion into the military handbooks could provide the complementary *opinio juris* to show that the 'reasonable military commander' is indeed a customary standard. For example, the US Air Force Legal manual states: 'The final determination of whether a specific attack is proportional is the sole responsibility of the air commander. The responsible air commander may be any commander from the (Joint Force Air Component Commander) down to the individual flight or aircraft commander depending on circumstances— regardless, this decision may not be delegated. Targeteers, weaponeers, air planners and judge advocates should offer well-reasoned advice, but the decision always remains with the responsible commander. If the commander can clearly articulate in a reasonable manner what the military importance of the target is and why the anticipated civilian collateral injury and damage is outweighed by the military advantage to be gained, this will generally satisfy the "reasonable military commander" standard'. Air Force Operations and the Law, A Guide for Air and Space Forces in Boothby, 181. Furthermore, the UK Joint Service LOAC manual states: 'As with personnel, the attacker also has to distinguish between civilian objects and military targets. This obligation is dependent on the quality of the information available to the commander at the time he makes decisions. If he makes reasonable efforts to gather intelligence, reviews the intelligence available to him and concludes in good faith that he is attacking a legitimate military target, he does not automatically violate the principle of distinction if the target turns out to be of a different and civilian nature'. *The Joint Service Manual of the Law of Armed Conflict* (Joint Doctrine and Concepts Centre 2004), 24.

<sup>260</sup> For instance, see the 2004 *Beit Sourik* Case for a discussion of the proportionality, not of an attack, but of the route for a security fence: 'We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours – to the extent that we have an opinion regarding the military character of the route [of the fence]. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well. *All we can determine is whether a reasonable military commander would have set out the route as this military commander did...* It is true, that "the security of the state" is not a "magic word" which makes judicial review disappear. Thus, we shall not be deterred from reviewing the decisions of the military commander... simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the

commander' test. Therefore, the Court in this instance also deemed that it was right to give the commander the benefit of the doubt when reviewing the legality of an order:

[T]he question is not what I would have decided in the given circumstances, but whether the decision that the military commander made is a decision that a reasonable military commander was entitled to make. In this regard special weight should be given to the military opinion of the person who has the responsibility for security...<sup>261</sup>

Even so, the court was adamant that it should not shy away from determining the applicable law and from applying it to the facts of the case before them, since that is their duty in all other judicial matters.<sup>262</sup> In the end, the court's discretion in this case was rendered moot because the justices found that the *policy* of targeted killings was neither expressly legal nor was it prohibited according to LOAC or ICL. Thus, only particular attacks could be assessed for compliance with the law on a case-by-case basis.<sup>263</sup>

However, even when looking at the lawfulness of individual strikes, the ambiguity of the provisions relating to proportionality and its associated attack precautions, combined with the added vagueness of its reasonableness standard makes it extremely difficult to achieve accountability in practice for any violation of these rules under Israeli law. For instance, there were no criminal indictments for violations of these provisions during Israel's 2008 and 2014 incursions into Gaza and there is only one criminal investigation that is still ongoing into an incident in 2014 when the IDF called in an airstrike on a café in Khan Younis, killing nine people. This investigation was opened ostensibly

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discretion of the military commander and ensure that his decisions fall within the "zone of reasonableness." [emphasis added].<sup>261</sup> *Beit Sourik Village Council V. The Government of Israel* (Israeli High Court of Justice), 27. The fence was also the subject of an ICJ ruling and eight more domestic cases: *The Beit Sira Village Council et al. v. The Government of Israel*, *The Bidu Village Council v. The Government of Israel*, *Abd el Wahab Kandil et al. v. The Military Commander of the Judea and Samaria Area*, *Agraib v. The Government of Israel*, *Hadur et al. v. The Military Commander of the Judea and Samaria Area*, *Saker Ibrahim Abdalla v. The Military Commander of the Judea and Samaria Area*, and *Jamal v. The Military Commander* discussed in *Mara'abe V. The Prime Minister of Israel* (Israeli High Court of Justice), 25-26.

<sup>261</sup> As President of the Court Ahron Barak speaking on behalf of the majority in *Public Committee against Torture in Israel V. Government of Israel* (Israeli High Court of Justice), 512-513.

<sup>262</sup> 'The court is not permitted to shirk this authority.' *ibid*, 512.

<sup>263</sup> 'It has therefore been decided that it cannot be determined *ab initio* that every targeted killing is prohibited under customary international law, just as it cannot be determined *ab initio* that every targeted killing is permitted under customary international law. The laws relating to targeted killings are determined in customary international law, and the legality of each individual attack needs to be decided in accordance with them.' *ibid*, 519.

because those involved violated IDF targeting procedures,<sup>264</sup> but, to date, there has been no update on the case from the Military Advocate General's (MAG) office. This case follows a pattern of slowly conducted investigations for which HROs such as Amnesty International, *YeshDin*, and *B'Tsaalem* have criticised the Israeli Government.<sup>265</sup> In another high-profile case, the IDF was condemned for having fired upon a group of children playing on a beach near a Hamas-operated naval compound. After opening a criminal investigation into the incident, the MAG described the factual circumstances prevailing at the time which caused the commander to believe that the silhouettes running around on the beach were legitimate targets:

At the time that the decision was made, the attack was not, according to the assessment of the operational entities, expected to result in any collateral damage to civilians or to civilian property. Moreover, the attack was carried out while undertaking several precautionary measures, which aimed to prevent any harm to civilians. Such measures included, *inter alia*, the choice of a munition which was not expected to cause any harm to civilians, and the deployment of real time visual surveillance. The MAG found that the professional discretion exercised by all the commanders involved in the incident had not been unreasonable under the circumstances. However, it became clear after the fact that the identification of the figures as militants from Hamas's Naval Forces, was in error. Nonetheless, the tragic outcome of the incident does not affect the legality of the attack *ex post facto*.<sup>266</sup>

Despite the MAG's insistence that ordering the strike was reasonable under the circumstances, NGOs have criticised his report's lack of detail,<sup>267</sup> particularly because there was no discussion about why the commanders were unaware that the figures running around on the beach were children, if the IDF unit had been surveilling the beach properly.<sup>268</sup>

Similarly, other domestic jurisdictions have had difficulty looking at the rules on precautions and proportionality as they relate to individual attacks. In 2010, an investigation undertaken by the German Federal Public Prosecutor examined the proportionality of a single attack where then-Colonel Georg Klein,

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<sup>264</sup> 'Decisions of the IDF MAG Regarding Exceptional Incidents That Allegedly Occurred During Operation 'Protective Edge'- Update No. 4' (*IDF MAG Corps*, 11 June 2015) <<http://www.law.idf.il/163-7353-en/Patzar.aspx>> accessed 30 June 2017.

<sup>265</sup> *Time to Address Impunity: Two Years after the 2014 Gaza/Israel War* (Amnesty International, 2016), 4; *Law Enforcement on Israeli Soldiers Suspected of Harming Palestinians: Figures for 2015* (Yesh Din, 2017), 2; *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge* (B'Tselem, 2016),

<sup>266</sup> 'Decisions of the IDF MAG Regarding Exceptional Incidents That Allegedly Occurred During Operation 'Protective Edge'- Update No. 4'.

<sup>267</sup> 'The findings of the MPIU investigation did no more than confirm what Israeli officials said right after the incident.' *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, 19.

<sup>268</sup> *Time to Address Impunity: Two Years after the 2014 Gaza/Israel War*, 8.

commander of a provincial reconstruction team, ordered a strike against two stolen NATO fuel tankers in Kunduz Province, Afghanistan. Although it was night-time, there was a large crowd of people gathered near the tankers attempting to siphon off fuel from them and a human intelligence source identified the crowd as Taliban. Thinking there were few, if any, civilians in the area and fearing the tankers could be used in against German forces nearby, Klein ordered the tankers destroyed. As a result of the attack, approximately 140 individuals were killed (the United Nations Assistance Mission in Afghanistan believed that 25-33 of them were children).<sup>269</sup> Nevertheless, from the Prosecutor's perspective, the standard for criminal prosecution of unlawful attacks was too high, so the case was ultimately terminated before going to trial.<sup>270</sup> In justifying her decision, the Prosecutor addressed the rules of proportionality and precautions separately, arguing that even if Klein had reason to believe there were civilians near the fuel tankers, the attack would still have been proportionate:

Even if the killing of several dozen civilians would have had to be anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be 'balanced'... Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting 'honestly', 'reasonably' and 'competently'... There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.<sup>271</sup>

This claim was not very convincing. The standard constructed by the Prosecutor here seems to conflate Klein's subjective assessment of the military advantage

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<sup>269</sup> Elisabeth Henn, 'The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflicts: The Kunduz Case' (2014) 12 National Prosecution of International Crimes Legislation and Cases 615, 624-625.

<sup>270</sup> 'Eine Strafbarkeit aufgrund sonstiger Tatbestände des Strafgesetzbuchs scheidet aus, da die konfliktsvölkerrechtliche Zulässigkeit des Vorgehens von Oberst Klein auch insoweit rechtfertigende Wirkung entfaltet.' German Federal Prosecutor, *Ermittlungsverfahren Gegen Oberst Klein Und Hauptfeldwebel W. Wegen Des Verdachts Einer Strafbarkeit Nach Dem Vstgb Und Anderer Delikte [Investigation against Col Klein and Sgt W. On Suspicion of a Criminal Offense under the International Crimes Code and Other Offenses]* (3 BJs 6/10-4, 2010), 69.

<sup>271</sup> *Ibid.*, 66. Translation from: 'Germany, Practice Relating to Rule 14. Proportionality in Attack' (*ICRC*, 2015) <[https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_de\\_rule14](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule14)> accessed 7 July 2015.

to be gained from hitting the fuel tankers with that of a reasonable commander. To be sure, the Prosecutor's report invoked the language of reasonableness and hinted that a commander could theoretically be criminally incompetent or dishonest about the facts of a particular case, but the standard for the incident to warrant further judicial scrutiny was for the commander to act unreasonably *and* for the damage to be 'obviously' excessive. Recalling an example used in the NATO Bombing Report, the Prosecutor described an obviously excessive incident as one where a commander orders the destruction of a whole town to kill one soldier.<sup>272</sup> However, this is an extreme example that would preclude prosecution for other clearly excessive actions which ought to be covered either by customary or treaty-based ICL (and their equivalent codifications in German domestic law).

Ultimately, it was unnecessary to examine Klein's proportionality calculus because his mistake of fact — misidentifying the people gathered around the tankers as combatants — meant that he was unable to conduct a proportionality calculation in good faith anyway. So, rather than asking whether his proportionality assessment was reasonable, this case hinged on whether he reasonably complied with his duty to take all feasible precautions to determine what the relative values of military advantage and civilian loss might be. However, instead of comparing Klein's precautions against that of a reasonable military commander, the Prosecutor again merely accepted Colonel Klein's subjective claim that he took reasonable precautions on that night to ensure that the advantage gained from the attack outweighed the collateral civilian losses.<sup>273</sup> A later civil proceeding in 2012 likewise found that Klein had complied with his duties under API Article 57(2)(a)(i), despite some evidence to the contrary.<sup>274</sup> Klein's mistake of fact may have negated the *mens rea* required for

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<sup>272</sup> 'Dies wäre etwa der Fall bei der Vernichtung einer kompletten Ortschaft mit Hunderten ziviler Einwohner um einen einzelnen gegnerischen Kämpfer zu treffen, nicht aber wenn es um die Ausschaltung einer in der Ortschaft befindlichen Artilleriestellung geht (Dinstein S. 122 f. m.w.N.). Vorliegend kommt eine derart offensichtliche Disproportionalität nicht in Betracht.' German Federal Prosecutor, 66.

<sup>273</sup> Bäumlner and Steiger in Henn, 625-626.

<sup>274</sup> Ibid, 629. 'Due to the factual confusion concerning civilians and insurgents in the region of Kunduz, a reasonable colonel would have asked whether there were children on site and whether adults were armed. Second, if Taliban and civilians move in a similar way, there was no reason to conclude that the individuals on site were fighters and not civilians. The pattern of motion was useless to provide any certainty on the

prosecution under international criminal law, but it should have been possible for the Prosecutor to recommend trying him for a lesser offense under German domestic law, such as manslaughter.<sup>275</sup> To date, Germany has offered *ex gratia* payments to victims or their next of kin, but it has not been found liable for this incident and Klein was allowed to continue his career, being promoted to brigadier in 2012.<sup>276</sup>

More recently, the rules on proportionality and precautions in attack were invoked, not in a criminal sense, but rather to determine at what point a state must withhold arms sales to another state when there is evidence that the weapons are being used to commit war crimes. Early in their 2015 campaign<sup>277</sup> against Houthi Rebels in support of the government headed by Mansour Hadi, the Saudi Arabian Armed Forces in coalition with other gulf states were accused of engaging in targeting practices which, if they were not outright unlawful,<sup>278</sup>

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characteristics of those on site. In case of doubt, individuals must be presumed protected against direct attacks. This rule aims at a good faith assessment of all available information. The fact that the Colonel sought to avoid killing bystanders by choosing smaller bombs also indicates that even Colonel Klein had remaining doubts and thus should have tried to gather further information. Furthermore, it seems that a reasonably well-informed commander, knowing the region of his operation, could have expected that, due to the extreme economic poverty, Ramadan and the ambivalent relationship to the Taliban, villagers were either forced or willing to obtain petrol for private use. According to plausible testimonies this was the case. It is questionable, therefore, whether the Colonel observed the necessary precautions in determining whether or not there may be civilians at the location. The Court should have assessed the observance of the obligations under Articles 57(1), (2)(a)(ii), (a)(iii) and (2)(c) of Additional Protocol I.' *ibid*, 632. Furthermore, Klein's human intelligence source could not directly observe the target area, thus relying so heavily on that source was violation of applicable ROE at the time. Roger Boyes, 'General Has to Quit after Video Reveals Airstrike Blunder That Killed Civilians.' *The Times* (London, 27 Nov 2009), 47.

<sup>275</sup> 'His criminal liability could follow from the omission of precautionary measures. As has been shown, this violation of IHL did not lead to criminal liability under International Criminal Law. However, as the Explanatory Memorandum of the *Völkerstrafgesetzbuch* clearly states, this does not necessarily preclude criminal liability under ordinary criminal law. In fact, the Explanatory Memorandum gives the example of a pilot who violates the obligation to take precautionary measures laid down in Art 57.2 AP I. Although not punishable under International Criminal Law, such a pilot might well be liable for manslaughter under ordinary criminal law. The case of Colonel Klein is analogous to this. Constantin von der Groeben, 'Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein' 11 *German Law Journal* 469, 487. See also: Dominik Steiger and Jelena Bäuml, 'Die Strafrechtliche Verantwortlichkeit Deutscher Soldaten Bei Auslandseinsätzen. An Derschnittstelle Von Strafrecht Und Völkerrecht' (2010) 48 *Archiv des Völkerrechts* 189, 222.

<sup>276</sup> Waslat Hasrat-Nazimi, 'Afghans Condemn German Colonel's Promotion' *Deutsche Welle* (Berlin, 13 August 2012 ) <<http://www.dw.com/en/afghans-condemn-german-colonels-promotion/a-16163783>> Retrieved 26 Jan 2017.

<sup>277</sup> There have been multiple Saudi military campaigns in Yemen.

<sup>278</sup> Human Rights Watch has documented at least 81 facially unlawful Coalition airstrikes in Yemen. See generally: *What Military Target Was in My Brother's House: Unlawful Coalition Airstrikes in Yemen* (Human Rights Watch, 2015); *Targeting Saada: Unlawful Coalition Airstrikes on Saada City in Yemen* (Human Rights Watch, 2015); *Bombing Businesses: Saudi Coalition Airstrikes on Yemen's Civilian Economic Structures* (Human Rights Watch, 2016).

exhibited a degree of recklessness<sup>279</sup> in planning or executing their attacks that suggested criminality.<sup>280</sup> Arms vendors, such as the US and the UK have a financial and political interest in supplying the Saudi Arabian Government with military hardware and the technical support needed to use it.<sup>281</sup> For example, in 2010, a \$60 billion agreement between Saudi Arabia and the US to support the Kingdom's fight in Yemen had represented the single largest arms deal in US history<sup>282</sup> until the Trump Administration's \$350 billion arms deal with Saudi Arabia in 2017.<sup>283</sup> Though states<sup>284</sup> and individuals<sup>285</sup> could be held liable for providing material support for war crimes in Yemen, the US Senate rejected a

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<sup>279</sup> [Belkis Wille from Human Rights Watch] told me she would often spot some kind of military installation near a bombed civilian site, which may have been the intended target. On the evening of July 24, for example, the coalition bombed a housing compound for workers of the Mokha power plant, in the southwest corner of Yemen. Sixty-five people were killed, including ten children. At least forty-two more were wounded, several of them critically. Wille concluded that the intended target was a military air-defense base, which had been empty for many years, according to unanimous local testimony. More to the point, the base was half a mile away, and easily distinguishable from the compound. "There may have been a lack of good military intelligence," she told me. "But the end result was an incredibly high rate of sloppiness and recklessness." Andrew Cockburn, 'Acceptable Losses: Aiding and Abetting the Saudi Slaughter in Yemen' *Harper's Magazine* (September 2016) <<https://harpers.org/archive/2016/09/acceptable-losses/>> para 46.

<sup>280</sup> Alex Whiting, 'Are Saudi-Led Coalition Forces Committing War Crimes in Yemen' (*Just Security*, 25 August 2016) <<https://www.justsecurity.org/32558/saudi-led-coalition-forces-committing-war-crimes-yemen/>> accessed 9 August 2017.

<sup>281</sup> 'As Des Roches reminded me, the U.S. government is the official vendor for weapons sales on behalf of corporations such as Boeing and Textron. "We levy a surcharge for the U.S. government's involvement," he explained, reminding me that the sale of the F-15s and other assorted items ran to \$60 billion. "Seven percent of that is a significant amount of money," he continued. "That basically covers U.S. government operating expenses to run things like training for the Bolivian armed forces in counternarcotics, and stuff like that. Up until very, very recently, the Saudis pretty much subsidized everything. People do not realize how much benefit we get from our interaction with them.'" Cockburn, para 15.

<sup>282</sup> *Ibid*, para 13.

<sup>283</sup> Bonnie Kristian, 'Trump Signs Largest Arms Deal in American History with Saudi Arabia' *The Week* (20 May 2017).

<sup>284</sup> For instance, Article 6(3) of The Arms Trade Treaty states that 'A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.' The UK is a state party to the ATT, while the US is merely a signatory, but the case could be made that the ATT merely crystallised a developing international norm to withhold arms shipments from governments that are known to use them to commit atrocity crimes. See, for example, Brehm's analysis of how IHL and HRL applied to the arms trade which was written before the ATT was negotiated: 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law' (2008) 12 *J of Conflict & Security Law* 359.

<sup>285</sup> In terms of individual criminal responsibility, state officials could be held liable for aiding another state with the commission of international crimes under the Article 25(3)(c) of the Rome Statute (though the Statute requires officials to *intend* for their support to be used to violate one of the crimes within the jurisdiction of the Court). They may also be liable under customary international criminal law (or domestic equivalents) for merely having knowledge that their support will lead to the commission of international crimes. Ryan Goodman, 'The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen' (*Just Security*, 1 September 2016) <<https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/>> accessed 11 August 2017.

bill that would keep the State Department from allowing the sale of tanks and armoured vehicles to Saudi Arabia.<sup>286</sup>

In the UK, the Campaign Against Arms Trade and other human rights organisations, brought a case before the High Court of Justice, claiming that the government's continued material support for the Saudi-led Coalition constituted a violation of the Government's own policy, which is based, *inter alia*, on the Arms Trade Treaty.<sup>287</sup> This policy prohibits the transfer of arms to states which the UK Government believes are responsible for serious LOAC violations, including violations of the rules on proportionality and precautions in attack:

The relevant principles of International Humanitarian Law are codified in the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 and in customary international law. They include the following: (1) Obligation to take all feasible precautions in attack; (2) Effective advance warning of attacks which may affect the civilian population; (3) Protection of objects indispensable to civilian population; (4) Prohibition on indiscriminate attacks; (5) Prohibition on disproportionate attacks; (6) Prohibition on attacks directed against civilian objects and/or civilian targets; (7) Obligation to investigate and prosecute; (8) Obligation to make reparation.<sup>288</sup>

Therefore, in principle, if the Government had reason to believe that the Saudi-led coalition were violating these rules, then they should refuse to transfer arms and withhold technical support from the Saudis until the Government can be certain that violations will be properly investigated and can be reasonably certain that the support will not be used to violate LOAC in the future. Though there was broad agreement between the claimants and the Government on the relevant law, the case hinged on whether the Secretary of State rationally believed that there would be a 'clear risk' that the exported equipment and assistance would be used in the commission of LOAC violations. He claimed that he did not believe there was such a risk, in spite of significant evidence to the contrary.<sup>289</sup> The Government responded that it possesses a superior ability to assess the facts on the ground in Yemen than were the claimants,<sup>290</sup> that it was in a better position to assess Saudi Arabia's good-faith compliance with the

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<sup>286</sup> Patricia Zengerle, 'Senate Clears Way for \$1.15 Billion Arms Sale to Saudi Arabia' *Reuters* (Washington) <<http://www.reuters.com/article/us-usa-saudi-defense-congress-idUSKCN11R2LU>> .

<sup>287</sup> *Campaign against Arms Trade V. Secretary of State for International Trade* EWHC 1726 (QB), para 7.

<sup>288</sup> *Ibid*, para 22.

<sup>289</sup> *Ibid*, para 51.

<sup>290</sup> *Ibid*, paras 104-120.

law than were the claimants,<sup>291</sup> and that its current procedures were suitable for making a rational determination of whether it needed to suspend arms transfers to Saudi Arabia.<sup>292</sup> After considering both the open-source information provided by the HRO claimants and the Government's own open-source and classified material, the justices concluded that the decision to continue support to Saudi Arabia was rational and therefore the arms transfers could continue:

In our judgment, however, the Secretary of State was reasonably able (i) to assess the gaps in his knowledge and 'known-unknowns' against what information and materials he did have and how critical or not the gaps were, (ii) to test and assess the reliability of the United Nations' and NGO's findings against the other sources of information at his disposal and (iii) to assess the significance of his knowledge (or lack of it) as to Saudi Arabian investigations into individual incidents. Moreover, these matters were factors in an overall assessment to be made by the Secretary of State in relation to Criterion 2c<sup>293</sup> in the light of the wide range of sophisticated first-hand and other evidence available to him. In these circumstances the Secretary of State's decision not to suspend at any stage cannot be said to have been irrational or unlawful.<sup>294</sup>

The decision did not sit well with the UK director of Human Rights Watch, David Mepham, who criticised the judgement for inaccurately describing the investigatory practices of the various human rights organisations which have been conducting operations in Yemen.<sup>295</sup> Moreover, he believed that the Court was overly deferential towards the Government's own assessment procedures and overly reliant upon classified information which the Government had

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<sup>291</sup> Ibid, paras 121-149. Moreover, it cited Saudi Arabia's establishment of an investigatory mechanism as evidence that the Kingdom was trying to uphold its international commitments. Ibid, paras 128-131. Nevertheless, Amnesty reports that the Joint Incidents Assessment Team has yet to meet international investigatory standards and there has yet to be accountability for a single incident from the war. *Urgent Need for Accountability in Yemen: Amnesty International's Written Statement to the 34th Session of the UN Human Rights Council* (Amnesty International 2017), 1-2.

<sup>292</sup> *Campaign against Arms Trade V. Secretary of State for International Trade*, paras 150-175.

<sup>293</sup> Criterion 2c of the Consolidated Criteria on arms exports states that: 'Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will... c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law.' *ibid* para 8.

<sup>294</sup> Ibid, para 198.

<sup>295</sup> 'While it does not say so explicitly, the logic of the UK's position is that Human Rights Watch, Amnesty and the UN rights agencies - whose work is often commended by the UK government in other contexts for its objectivity and rigour - have repeatedly gotten it wrong in the case of Yemen... The Court also makes some statements about the work of human rights groups, including that they have often "not visited and conducted investigations in Yemen and are necessarily reliant on second-hand information." This is not correct. Human Rights Watch has visited Yemen repeatedly since the start of the war in March 2015, and conducted numerous on-site inspections. Nor does Human Rights Watch rely on second-hand information. Instead, we conduct thorough investigations that draw on multiple sources of information, including interviews, video and photographic evidence, and satellite imagery.' David Mepham, 'Yemen Is Suffering at the Hands of Saudi Arabia - and the UK Is Profiting' (*Human Rights Watch*, 11 July 2017) <<https://www.hrw.org/news/2017/07/11/yemen-suffering-hands-saudi-arabia-and-uk-profiting>> accessed 9 August 2017.

declined to make public.<sup>296</sup> At the time of writing, the situation in Yemen has not improved and reports of new airstrikes against civilians prompted the Office of the Humanitarian Coordinator in Yemen to issue another statement urging the combatants to adhere to LOAC.<sup>297</sup>

The domestic case law which invokes the use of the *jus in bello* rules on proportionality and precautions in attack shows that even otherwise independent judiciaries will often defer to military and executive decision-making processes when reviewing the legality of their actions. There have been no domestic criminal cases involving the legality of a commander's decision to launch a disproportionate or sloppy attack (with Georg Klein's case being thrown out before it reached the trial stage). Even when the suspect official is a foreign national rather than a citizen of the same state, the decision to press forward with a case has proven to be difficult because the proceedings can be influenced by extra-legal factors, such as when the US applied diplomatic pressure against Belgium for its universal jurisdiction cases against US officials. Furthermore, even in civil actions taken against the state, judges assume a wide margin of appreciation for the conduct of state officials, making it difficult for them to review the legality of either single strikes or policies which contribute to significant collateral damage. There is also an unwillingness on the part of judges to acknowledge that patterns of *prima facie* disproportionate strikes amount to LOAC violations, at least when it comes to reviewing state officials' duty to comply with the law on arms trade.

#### *Non-Judicial Responses to Credible Allegations of Proportionality or Precautions Violations*

Just because the case law involving allegations of violations of proportionality or precautions in attack is sparse does not mean that few attacks warrant scrutiny. The number of reasonably credible violations far exceeds what can be covered in just a few paragraphs. Therefore, I will mention a few notable examples

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<sup>296</sup> Ibid.

<sup>297</sup> Jamie McGoldrick, *Statement by the Humanitarian Coordinator in Yemen, Mr Jamie McGoldrick, on Reported Attacks on Civilians in Sa'ada Governorate* (UN 2017).

which have come to light to show how non-judicial groups investigate these incidents and apply the law to the facts of each case.

As Huffman noted above,<sup>298</sup> one cannot infer that any particular attack is unlawful simply by looking at its effects, but when even the factual circumstances regarding a case are uncertain, it becomes nearly impossible to hold state actors accountable for disproportionate or reckless attacks. Just as battle damage assessments inform military leaders about what effect their attacks have had on the enemy, *ex post* civilian casualty reporting mechanisms are likewise indispensable for figuring out what effect their attacks have had on the civilian population — and if a LOAC violation had taken place.<sup>299</sup> However, the issue of civilian casualty reporting vexed the British Government during its involvement in the Iraq War. The Ministry of Defence was apprehensive about giving the impression that the number of civilian casualties in such a campaign could ever be known, since that might invite more trouble for the UK down the road:

The MOD's position remained that it did not believe it was possible to establish an accurate methodology for estimating the total number of civilian casualties. Although incident reports could be analysed, there was a danger that: "... once we have adopted a methodology, Parliament and the public would in future expect us to apply this no matter what the intensity of the operation."<sup>300</sup>

Although under API (and customary LOAC), states have a legal duty to take all feasible precautions to spare the civilian population the probable effects of their attacks *ex ante*, there is no similar legal requirement for them to take feasible measures to record the effects of their attacks *ex post*.<sup>301</sup> Without a robust methodology for collecting this information, how are investigators to know if an attack warrants further scrutiny? This lacuna has been noticed by HROs, such as the Oxford Research Group:

The primary omission in international law is that no actual legal obligation exists in either framework [LOAC or HRL] for parties to a conflict to record the identity of dead or

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<sup>298</sup> See above at note 237.

<sup>299</sup> See above at note 51.

<sup>300</sup> *The Iraq Inquiry* (Vol 12, Section 17, 2016), 194.

<sup>301</sup> 'Legal Advisers say there are no obligations to report civilian casualties in the Fourth Geneva Convention ... or under any other provision of international humanitarian law... While it is essential in advance of any particular attack to assess the likely civilian casualties, there is no obligation after the event to make any assessment of either the civilian casualties resulting from the attacks or of the overall civilian casualties of a conflict.' Dominic Asquith in *ibid*, 198-199.

missing civilians, as opposed to the rigorous process by which the details of combatants are recorded. This is surprising in that one of the primary obligations within international humanitarian law is to distinguish between civilian and combatant and to assess proportionality when civilian life is at risk. The loss of life of the civilian population must be in direct proportion to the military advantage expected. This balancing exercise can obviously have no credible function without any accurate recording of civilian casualties.<sup>302</sup>

Indeed, during the Iraq War, human rights organisations, such as the Iraq Body Count<sup>303</sup> and academic outfits, such as the Johns Hopkins Bloomberg School of Public Health,<sup>304</sup> took the lead on documenting both incident-level and theatre-wide civilian casualty totals. Under General David Petraeus, US forces began collecting statistics on civilian casualties in 2006, although the motivation behind this effort was to enhance the US's counterinsurgency operations, rather than to provide fodder for war crimes investigators.<sup>305</sup> Even so, the UK never developed its own casualty reporting method, instead relying on figures provided to them by Iraqi Ministry of Health, which could be dismissed more easily than if the UK Government had taken ownership of the statistics itself. The failure of the UK Government to come up with its own civilian casualty figures formed one of the chief findings of the Chilcot Report:

The Inquiry has considered the question of whether a Government should, in the future, do more to maintain a fuller understanding of the human cost of any conflict in which it is engaged. All military operations carry a risk of civilian casualties. The parties to a conflict have an obligation under International Humanitarian Law to limit its effects on civilians. In Iraq, the UK Government recognised that obligation in its Rules of Engagement, Targeting Directive and guidance on Battle Damage Assessment. The Government did not consider that it had a legal obligation to count civilian casualties. The Inquiry considers that a Government has a responsibility to make every reasonable effort to identify and understand the likely *and actual* effects of its military actions on civilians.<sup>306</sup> [emphasis added]

Therefore, one reason for the lack of case law involving violations of the rules on proportionality or precautions in attack is that, without a concurrent responsibility for states to assess the outcomes of their attacks, it is difficult to know which attacks warrant judicial scrutiny in the first place. In the absence of

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<sup>302</sup> Susan Breau and Rachel Joyce, *Obligations to Record Civilian Casualties* (Oxford Research Group, 2010).

<sup>303</sup> *The Iraq Inquiry*, 171.

<sup>304</sup> *Ibid*, 215.

<sup>305</sup> *Ibid*, 211.

<sup>306</sup> *Ibid*, 218-219. It should be noted that as with the US's RAND report, the Chilcot inquiry saw the collection of data regarding the effects of attacks not necessarily as a means of facilitating criminal prosecutions, but rather as a way to align military practices with counterinsurgency doctrine.

effective state mechanisms to perform reliable collateral damage assessments, this investigatory burden often falls on the press and interested nongovernmental or intergovernmental organisations, leaving states to assume that their attacks are legal until they have been challenged by third parties.

As with allegations of disproportionate or reckless attacks that have been examined by prosecutors in an official capacity, events which are tried in the ‘court of public opinion’ can also yield some insight into how the law ought to be applied to particular cases. For instance, after the 2008 Israeli incursion into Gaza as part of Operation Cast Lead, both the official report by the Israeli Government on the campaign and the Goldstone Report, which detailed the results of a UNHRC (UN Human Rights Council) fact-finding mission, reveal a similar understanding of which rules should have applied to the conflict. Both reports use the understanding of proportionality codified in API as the touchstone to begin their analyses<sup>307</sup> and both cite liberally from the ICTY NATO Bombing Report, with each acknowledging that the standard against which a commander ought to be judged is that of a ‘reasonable military commander’ in the position of the accused.<sup>308</sup> However, the authors of each of the two reports come to different conclusions about what that phrase means. The Israeli Government invokes the idea of a ‘reasonable military commander’ to pre-emptively justify conduct which may, *prima facie*, seem disproportionate:

It is precisely because this balancing is difficult that international law confirms the need to assess proportionality from the standpoint of a ‘reasonable military commander,’ possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole... Thus, the core question, in assessing a commander’s decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion. As W. Hays Park has explained, ‘[u]nintentional injury is not a violation of the principle of

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<sup>307</sup> ‘In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. This principle, known as the “principle of proportionality,” is reflected in Additional Protocol I, which prohibits launching attacks “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.’ *The Operation in Gaza 27 December 2008- 18 January 2009: Factual and Legal Aspects* (The State of Israel, 2009), 44. After determining that that some of the provisions of API are customary, the Goldstone Report quotes Article 57 verbatim while discussing a particular incident where the authors believed that Israel did not take enough care in an attack. *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (UNHRC, 12/48 2009), 156.

<sup>308</sup> *The Operation in Gaza 27 December 2008- 18 January 2009: Factual and Legal Aspects*, 46; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 156.

non-combatant immunity unless, through wilful and wanton neglect, a commander's actions result in excessive civilian casualties that are tantamount to an intentional attack.'... The standard does not penalise commanders for making close calls. Rather, it is intended to prohibit '[m]anifestly disproportionate collateral damage inflicted in order to achieve operational objectives,' because this results in the action essentially being a 'form of indiscriminate warfare.'<sup>309</sup>

In contrast, the Goldstone Report describes a particular incident, the shelling in al-Fakhura Street, and uses the idea of a 'reasonable military commander' to assess whether the commander in charge of the forces involved in that incident behaved reasonably. In the Israeli Government's account of the incident, an IDF (Israeli Defence Force) unit came under 120mm mortar fire and after 50 minutes, the source of the mortar fire had been detected. The unit returned fire with 120mm mortars, which the IDF claims was the most precise weapon available at the time, and in doing so, killed the five Hamas mortarmen who had been firing at them.<sup>310</sup> However, some of the mortars landed into a civilian neighbourhood, killing 33 people according to the Goldstone Report.<sup>311</sup> In the opinion of the report's authors, a reasonable commander would not have accepted the risk that the mortars posed to the civilian population in such a built-up area:

The Mission does not say that the Israeli armed forces had to accept the risk to themselves at all cost, but in addressing that risk it appears to the Mission that they had ample opportunity to make a choice of weapons that would have significantly limited the risk to civilians in the area. According to the position the Government has itself taken, Israeli forces had a full 50 minutes to respond to this threat — or at least they took a full 50 minutes to respond to it. Given the mobilization speeds of helicopters and fighter jets in the context of the military operations in Gaza, the Mission finds it difficult to believe that mortars were the most accurate weapons available at the time. The time in question is almost 1 hour. The decision is difficult to justify. The choice of weapon — mortars — appears to have been a reckless one. Mortars are area weapons. They kill or maim whoever is within the impact zone after detonation and they are incapable of distinguishing between combatants and civilians. A decision to deploy them in a location filled with civilians is a decision that a commander knows will result in the death and injuries of some of those civilians. Even if the version of events presented now by Israel is to be believed, the Mission does not consider that the choice of deploying mortar weapons in a busy street with around 150 civilians in it (not to mention those within the school) can be justified. The Mission does not consider that in these circumstances it was a choice that any reasonable commander would have made.<sup>312</sup>

Even with a common understanding of the applicable law, by invoking the hypothetical decision-making process of a reasonable military commander, the

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<sup>309</sup> *The Operation in Gaza 27 December 2008- 18 January 2009: Factual and Legal Aspects*, 45-46.

<sup>310</sup> *Ibid*, 128.

<sup>311</sup> *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 155.

<sup>312</sup> *Ibid*, 158.

Israeli Government was able to come up with a ready-made excuse for the actions of its forces, while the authors of the Goldstone Report were able to condemn those same actions. What differed between the two accounts of the Gaza campaign was how the different sides determined what ought to be the acceptable buffer between the decisions of a reasonable commander and the commander involved in the incident. An investigator from Amnesty International described to me how the parties to a conflict tend to exploit these differences in interpretation to advance their respective political objectives:

I have worked on many different conflicts over the past 25 years and so I'm in the perhaps 'privileged' position where I'm confronted with this daily. I can only apply the same principle whether I'm working on an investigation in a massacre of civilians in Nigeria, or in Gaza, or in Iraq, or in Iran, or in Yemen; whether it's done by Shias, or Sunnis, or Christians, by minorities, by allies of this or that other superpower. I don't really have any great difficulty doing that. You just apply the same standard, so the problem isn't there. The problem is much more at the political level, where there is a deliberate willingness to be creative and over-flexible with the interpretation. I mean, if we know that a mortar is not an accurate weapon, then firing a mortar over a densely populated residential neighbourhood is not a good idea. It doesn't make a lot of sense militarily, because your chances of hitting your target are pretty small (that's an area weapon) and your chances of hitting something else (for example, a civilian or a civilian object) is much greater, so the moment you employ that tactic, you know what you're doing (if you're a military person), particularly when you do that and you have other kit at your disposal. Now, these are clear facts, but what you then see are politicians who are willing to apply that in a different way, depending on who fired the mortar into the neighbourhood — whether it was a US soldier in Baghdad or it was some rag-tag rebel group in Fallujah — and you can't do that.<sup>313</sup>

Particularly when making a legal argument for public consumption rather than for a court, the acceptable buffer or margin of appreciation for the commander's decision has a great degree of elasticity. This elasticity can allow governments to easily justify actions that at face value seem excessive whilst also giving human rights organisations a vocabulary with which to condemn those same actions.

Although the Israeli Government did not cooperate with the Goldstone Inquiry whilst it was conducting its investigation, after Goldstone's team issued its report, the Israeli Government released an update describing how it investigated allegations of LOAC violations.<sup>314</sup> This report and other open-source materials were included in the McGowan Davis Report, which was

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<sup>313</sup> Interview with Amnesty International War Crimes Investigator.

<sup>314</sup> *Gaza Operation Investigations: An Update* (The State of Israel, 2010).

written as a follow-up to Goldstone's original fact-finding mission.<sup>315</sup> Based on the information that had come to light as a result of Israel's investigations, Goldstone later claimed that he did not believe that Israeli forces targeted civilians as a matter of policy and that if he had the new information at the time his team's report was written, they would have reached a different conclusion.<sup>316</sup> Nevertheless, both he and the authors of the McGowan Davis Report were frustrated with Israel's unwillingness to work with the UNHRC and with the slow pace of their domestic investigations.<sup>317</sup> Among the HRO community, there was a similar frustration with the fact that of the 150 incidents investigated by the Israeli Government, only 36 rose to the level of warranting criminal investigations<sup>318</sup> and even fewer resulted in any sanctions. For example, B'Tselem remarked that:

According to the information provided by the MAG Corps, only three investigations ended with indictments:

- One indictment was served against a soldier for theft of a Palestinian's credit card. He was sentenced to 15 months in prison, half of the term as a suspended sentence, and demotion.
- A second indictment was served against two soldiers accused of using a nine-year-old Palestinian boy as a human shield and ordering him to open suspected booby-trapped bags. The two were tried and given a suspended three-month sentence and demoted from staff sergeant to sergeant.
- A third indictment was served against a soldier for "killing an unidentified individual" and for misconduct. The soldier was convicted of unlawful use of firearms and misconduct in a plea bargain. He was given a 45-day prison sentence, a six month suspended prison sentence and demotion.

In three other cases, disciplinary action was taken against six officers... In conclusion: after massive harm to the civilian population, more than 300 minors killed, tens of thousands of people left homeless — and grave suspicions that these actions were the result of unlawful orders approved by the MAG Corps and the attorney general — the

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<sup>315</sup> For instance, the report reveals that the attack on al-Fakhura street was investigated by a Special Command Investigation. *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9* (UNHRC, 16/24, 2011), 23.

<sup>316</sup> 'Although the Israeli evidence that has emerged since publication of our report doesn't negate the tragic loss of civilian life, I regret that our fact-finding mission did not have such evidence explaining the circumstances in which we said civilians in Gaza were targeted, because it probably would have influenced our findings about intentionality and war crimes.' Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes' *The Washington Post* (Washington, D.C., 1 Apr 2011) <[https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html?utm\\_term=.a331801fe493](https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.a331801fe493)> .

<sup>317</sup> Ibid; *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9*, 20.

<sup>318</sup> *Gaza Operation Investigations: An Update*, ii.

military conducted hundreds of operational inquiries and launched dozens of MPIU investigations, but the harshest sentence given was for credit card theft.<sup>319</sup>

This followed a similar pattern to the way that US forces in Iraq tended to have little problem prosecuting troops for deliberate attacks against civilians and crimes involving civilian property, but have had a far more difficult time dealing with crimes based on recklessness.<sup>320</sup> Furthermore, given that Hamas had taken no actions to hold its operatives responsible for the indiscriminate rocket attacks against Israel,<sup>321</sup> achieving accountability for unlawful attacks in this conflict has certainly been a challenge.

The shortcomings of Israeli investigatory procedures were discussed at length during the Turkel Commission, which examined an Israeli maritime attack against civilian vessels in 2010. The commission also considered international best practice for reporting and investigating LOAC violations and how the Israeli approach could be improved.<sup>322</sup> From their findings, the commission made 18 recommendations, one of which was to create a fact-finding assessment (FFA) mechanism within the IDF to perform the initial investigation of a complaint. Then, the MAG would forward the complaint on to the military police if there were reasonable suspicion that a crime had been committed.<sup>323</sup> This FFA mechanism would later be used extensively to document the events surrounding allegations of unlawful behaviour by Israeli troops during Israel's 2014 incursion into Gaza.

The Israeli Government was prepared to receive new claims of excessive collateral damage and in its report on Operation Protective Edge, the Government thoroughly described the steps the IDF had taken to comply with LOAC *ex ante*:

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<sup>319</sup> 'Israeli Authorities Have Proven They Cannot Investigate Suspected Violations of International Humanitarian Law by Israel in the Gaza Strip' (*B'Tselem*, 5 September 2014) <<http://www.btselem.org/print/144810>> accessed 27 June 2017.

<sup>320</sup> Neta Crawford believes that US's normative understanding of what is permissible in war admits unintentional actions more readily than intentional actions, even if the objective harm of a particular unintentional action is greater than a particular intentional action. Crawford, 7-8. In practice, Eugene Fidell also notes that the US military justice system is better able to handle intentional 'battlefield outrages' than unintentional 'operational offenses'. Fidell.

<sup>321</sup> Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes'.

<sup>322</sup> *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (The Turkel Commission, Second Report, 2013) 264.

<sup>323</sup> *Ibid.*, 425-426.

During the 2014 Gaza Conflict, the IDF took steps to ensure the collection of all reasonably available, timely information regarding a target's surroundings, focusing in particular on civilians and civilian objects that may be in its vicinity at the time of the attack, regardless of whether an advance warning has been given. For example, remotely piloted aircraft flew over countless targets to monitor the presence of civilians in real time. In addition, the IDF routinely used engineers and damage-assessment specialists to assist with the assessment of expected collateral damage by considering the specific circumstances of each case... Moreover, there are often situations where it is necessary to launch an attack without being able to acquire or receive all information regarding the likely collateral damage. For example, during ground operations, fire from a building near an infantry platoon may demand an immediate response, and the platoon may not have access to real-time data regarding the presence of civilians or the nature of surrounding structures. In such exigent circumstances, the platoon will have to rely on whatever partial information it does have, in addition to its prior training on the Law of Armed Conflict. The legality of the platoon's conduct must be assessed in light of what a reasonable commander would or would not have done under the same or similar circumstances.<sup>324</sup>

The Government's assessment of the 2014 Gaza campaign covered much of the same legal ground as was included in their report on the 2008 conflict. However, it provided a clearer picture of why it was important to consider the perspective of a reasonable military commander, giving practical examples of the tough decisions that are needed to be made in combat. However, there has not been as much transparency with the investigation of alleged violations as there had been with the description of Israeli standard operating procedures. The new FFA mechanism investigated 360 incidents, but the MAG has not yet provided a complete breakdown of what these incidents entailed. He has provided some detail about 26 cases that were closed without referral to the military police, and of those, 17 of which were relating to strikes against residential buildings.<sup>325</sup>

B'Tsalem criticised the investigatory process that the Israeli government has adopted since the Turkel Commission, claiming that not all of the recommendations were followed<sup>326</sup> and that there is little transparency

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<sup>324</sup> *The 2014 Gaza Conflict 7 July - 26 August 2014: Factual and Legal Aspects* (2015), 183.

<sup>325</sup> *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, 12.

<sup>326</sup> 'The changes made to the investigation system in view of the Turkel Commission recommendations – first and foremost, the introduction of the FFA Mechanism while the fighting was still going on – might have helped appearances, but they have done nothing to improve the essence of the investigations.' *ibid*, 26. '[I]n 2015 the Ciechanover Commission, established in order to recommend practical steps for implementing the Turkel Commission's recommendations, published a report that failed to make any concrete, practical recommendations regarding standards of human resources and budgets necessary to implement the recommendations. For some of the recommendations, no timetables or stages or implementation were set at all. Without addressing these practical aspects, the various bodies clearly won't be able to implement the recommendations, and they will remain a dead letter for a long time to

regarding why some cases are referred to the military police while others are not.<sup>327</sup> However, from B'Tsalem's perspective, the biggest obstacle for assessing Israel's claim that it strictly adhered to the LOAC rules on precautions and proportionality was that the MAG treated each accusation of excessive civilian casualties as an 'exceptional incident', rather than considering how higher-level policy issued by the MAG himself might have contributed to the high number of casualties from attacks:

[T]he MAG's determination that the attacks he examined did, in fact, meet the proportionality requirement is also cast into doubt. This principle is based on balancing the assessment by those responsible as to the anticipated military advantage against their assessment as to the anticipated harm to civilians. Yet when the projection as to harm is made while knowingly disregarding the result of nearly identical strikes carried out in the days prior to the making of the assessment, namely that dropping a bomb in the middle of a residential neighborhood could result in many more civilian deaths than anticipated; that the warnings the military gives are not always efficient and that the intelligence information is sometimes incomplete or inaccurate — then their assessments of anticipated harm to civilians become hollow and worthless.<sup>328</sup>

By treating each case as an 'exceptional incident', the MAG was able to de-contextualise any individual strike, making it more difficult to establish if a pattern of high-casualty strikes resulted from a systematic failure of precautions, rather than a one-off mistake of fact.<sup>329</sup> For example, if a commander knew that their intelligence picture was consistently wrong, should investigators merely accept the commander's subjective assessment of the situation, or are there objective measures that a reasonable commander would take to mitigate civilian casualties after learning that their intelligence has been consistently faulty? To be sure, customary LOAC and the case law of the ICTY have shown that one should not assess the proportionality of a campaign as a whole.<sup>330</sup> However, if investigators discover a pattern of strikes that are *prima facie* excessive, it could point to a violation of a commander's duty to take all feasible precautions in setting up and launching their attacks and ought to warrant further scrutiny, if the law is to have any teeth.

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come.' 'Investigation Policy' (*Yesh Din*, 11 April 2016) <<https://www.yesh-din.org/en/investigation-policy/>> accessed 3 July 2017.

<sup>327</sup> *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, 13.

<sup>328</sup> *Ibid.*, 24.

<sup>329</sup> *Ibid.*, 9.

<sup>330</sup> See above at note 232.

It is important to recognise that that Israeli officials do not appear to have wanted to cause civilian casualties (unlike Hamas, who pursue it as a matter of stated policy<sup>331</sup>). Rather, the problem in this case is that without an effective accountability mechanism for dealing with excessive casualties, particularly when they arise from systemic issues, there is a worry that commanders will tend to err on the side of military advantage, rather than civilian harm when setting up their attacks:

The MAG's conclusion that all the attacks he examined were lawful in that those responsible for them could disregard the harsh outcomes of dozens of other attacks that took place during the fighting has a far-reaching implication that applies to all strikes carried out during the operation: It absolves every level of officials involved in the attacks — from the prime minister, through the MAG himself through to the soldiers who ultimately fired — of the duty to do everything in their power to minimize harm to civilians. In fact, the MAG sets the bar very low in terms of what is required of those responsible for the attacks — including senior military officers and the MAG (who are not under investigation in any case) — by doing no more than examining what they knew in practice, while entirely disregarding the question of what they should have known, including the obligation to learn from their own experience.<sup>332</sup>

Whilst B'Tsalem had worked with the IDF in previous conflicts to assess the effects of the IDF's operations, it ceased cooperation with the Israeli Government in 2014 in protest of what it and Yesh Din believed were insufficiently robust domestic investigations of LOAC violations.<sup>333</sup>

Some of the same problems with achieving accountability for violations of proportionality and attack precautions that have been discussed in previous conflicts were also present towards the end of the Sri Lankan Civil War in 2009. In this conflict, the Sri Lankan Government was accused, *inter alia*, of firing indiscriminately at civilians, while the rebel Tamil Tigers group (LTTE) was accused of using civilians as human shields. At the time, Human Rights Watch reported:

Under international humanitarian law applicable to the armed conflict in Sri Lanka, both the Sri Lankan armed forces and the LTTE are obligated to take all feasible precautions

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<sup>331</sup> *The 2014 Gaza Conflict 7 July - 26 August 2014: Factual and Legal Aspects*, 11.

<sup>332</sup> *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, 23-24.

<sup>333</sup> *Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1* (UNHRC 29/CRP4, 2015), 163. 'After Operation Protective Edge, B'Tselem announced it would not refer complaints to the military law enforcement system, despite receiving an official request to do so. We did, however at note that we would eagerly retract our decision if we see that serious, independent investigations are conducted with respect to the persons responsible for violations of IHL during the fighting. Two years have gone by but we see that, regrettably, what we said then still holds true, and Israel continues to devote most of its efforts to painting a façade, nothing more.' *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, 27.

to minimize harm to civilian life and property. But since January [2009], both sides have shown little regard for the safety of civilians in the embattled Vanni region in northeastern Sri Lanka, and more than 4,500 civilians are believed to have died in the fighting, according to UN estimates. The LTTE has violated the laws of war by using civilians as "human shields," by preventing civilians from fleeing the combat zone, and by deliberately deploying their forces close to densely populated civilian areas. The Sri Lankan armed forces have indiscriminately shelled densely populated areas, including hospitals, in violation of the laws of war.<sup>334</sup>

Unlike the Iraq war, in the Sri Lankan Civil War, even non-governmental organisations (NGOs) and IGOs had a difficult time assessing the number of civilian dead during this conflict, in part because staff could not move around the battlespace, but also because many civilians were buried before their deaths could be recorded by officials or hospital staff. Moreover, each side in the conflict had reason to manipulate reports regarding civilians casualties to suit their own information operations campaigns.<sup>335</sup> Even when the United Nations tried to provide civilian casualty estimates to the Sri Lankan Government confidentially to help them reconsider their methods of attacks, the Government balked at the suggestion that was implied by the statistics.<sup>336</sup> Nevertheless, because of the widespread nature of the violations, in 2011, a UN Panel of Experts was able to state with confidence that if the Sri Lankan Government forces were not targeting civilians directly, their actions were, at the very least, disproportionate:

While the Panel does not have information on all incidents, credible allegations suggest numerous violations of this provision [the CIHL rule of proportionality] insofar as the attacks on the NFZs [No Fire Zones] were broadly disproportionate to the military

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<sup>334</sup> *Sri Lanka: Protect Civilians in 'Final' Attack* (Human Rights Watch 2009). Similarly, the UN Panel of Experts would have concurred: 'The Sri Lanka Army (SLA) advanced its military campaign in the Vanni, using large-scale and widespread shelling, at times with heavy weapons, such as Multi-Barrel Rocket Launchers (MBRLs) and other large artillery, causing large numbers of civilian casualties. It shelled in three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, and after it had indicated that it would stop using heavy weapons. It shelled in spite of its knowledge of the impact, provided through SLA intelligence systems, including UAVs, and through notification by various external actors, including the United Nations and the ICRC. The majority of civilian casualties in the final phases of the war were caused by Government shelling... Despite the grave dangers and terrible conditions in the conflict zone, the LTTE refused civilians permission to leave, using them as hostages and at times using their presence as a strategic human buffer between themselves and the advancing SLA. Civilians were increasingly sacrificed as dispensable "cannon fodder" while the LTTE fought to protect its senior leadership. The LTTE's refusal to allow civilians to leave the area added significantly to the total death toll in the conflict.' *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (United Nations, 2011), 49-50.

<sup>335</sup> *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 39-40.

<sup>336</sup> 'It is worth noting that the United Nations raised casualty figures in private entreaties with the Government, but never publicized its specific estimates. Government officials strongly refuted the figures provided by the United Nations, stating that the numbers were fabricated and that this was not the business of the United Nations.' *ibid*, 40.

advantage anticipated from such attacks. The Government's repeated declaration that it had ceased using heavy weapons in these NFZs points to awareness that such usage could be considered disproportionate. Broadly speaking, once both the civilian population and the LTTE were confined to the very limited spaces of the second and third NFZs, the LTTE was no longer mobile as an armed force, and more precise means to defeat the LTTE than barrages of widely-spread artillery and mortar attacks could and should have been employed in order to ensure respect for international humanitarian law.<sup>337</sup>

Since Sri Lanka is not a signatory to the Rome Statute, nor is it likely that the UN Security Council will forward the situation to the International Criminal Court, accountability for crimes committed during the war must come from an *ad hoc* international tribunal, a domestic court or hybrid mechanism. Considering the evidence of clear LOAC violations committed by both sides in the conflict, the UNHRC issued a resolution in 2015 which enjoined the Sri Lankan Government to seek accountability for those violations.<sup>338</sup> As a result, the Sri Lankan Government agreed to establish a judicial mechanism to examine allegations of crimes committed during the final stages of the Civil War, but to date, there has been no progress towards setting up courts capable of trying individuals for their involvement in committing international crimes. In particular, the Sri Lankan Government opposes the notion that such courts ought to include international judges or prosecutors, even though their own Consultation Task Force has concluded that both the Tamil and Sinhalese communities support international participation in such an endeavour.<sup>339</sup> As with the earlier examples, the state that is accused of being responsible for excessive attacks seems to be simultaneously claiming to support transparent and independent investigations of unlawful attacks, whilst also doing little to actually achieve that goal.

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<sup>337</sup> Ibid, 58.

<sup>338</sup> '[The UNHRC] Welcomes the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system at notes with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators'. *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka* (UNHRC Resolution 30/1, 2015).

<sup>339</sup> Meenakshi Ganguly, 'Don't Backtrack on Justice for Sri Lanka's Victims' *The Sunday Leader* (Ratmalana, 19 February 2017) <<http://www.thesundayleader.lk/2017/02/19/dont-backtrack-on-justice-for-sri-lankas-victims/>> .

Some states go to great lengths to investigate suspected unlawful attacks, even if those involved never face criminal sanctions. In 2015, US forces fired upon a trauma centre operated by *Médecins sans Frontières* (MSF) in Kunduz, Afghanistan, killing 30 non-combatants.<sup>340</sup> The aircrew did not have the right briefing material for their mission because they were ordered to launch early. Moreover, some of their targeting equipment malfunctioned in flight and the crew had to take evasive actions to avoid ground-to-air threats, so when the ground forces commander (GFC) provided coordinates of a prison building that Afghan forces said had been overrun by the Taliban, the aircrew were not able to find it and could only see an open field. The closest large building to the open field was the trauma centre, so the aircrew assumed that was the target. The aircrew did not check the coordinates of the trauma centre against the 'no-strike' list, nor did they pass the coordinates of the building on to anybody else, but instead identified the building based on vague descriptions of the target provided to them by US troops on the ground, who could not themselves see the prison or the trauma centre.<sup>341</sup> Internal recordings of conversations between aircrew members and external recordings between members of the aircrew and the ground team reveal that the aircrew had a great deal of uncertainty about what the target actually was.<sup>342</sup>

In the subsequent US Central Command (CENTCOM) investigation of the incident, Major General William Hickman and his team were scathing in their assessment of the attack:

Neither the GFC nor the Aircraft Commander exercised the principle of distinction. Neither commander distinguished between combatants and civilians nor a military objective and protected property. Each commander had a duty to know, and available resources to know that the targeted compound was protected property.<sup>343</sup>

The investigators also weighed in on whether the strike was proportionate, correctly noting that: 'The critical issue with this strike is distinction and not proportionality, which relates the measured use of force against legitimate

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<sup>340</sup> *Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015* (US Forces - Afghanistan, 2016), 27.

<sup>341</sup> *Ibid.*, 28.

<sup>342</sup> *Ibid.*, 60.

<sup>343</sup> *Ibid.*, 75-76.

military targets.’ However, they then conflated a failure to take precautions with the crime of launching a disproportionate attack:

Proportionality assumes that the target to be engaged is a lawful military objective. Therefore, any engagement of a target that is not a lawful military objective is *prima facie* disproportional. The MSF Trauma Center was not a lawful military objective. At the point of engagement, any use of force against it was disproportional.<sup>344</sup>

There is a logic behind this claim — that by failing to take proper precautions to identify a target, the commanders have forfeited any claim to the proportionality of their actions. However, since the proportionality and precautions rules are listed separately in the law<sup>345</sup> and since the crime of disproportionate attack requires one to actually ‘make the value judgement as described therein’,<sup>346</sup> it is not appropriate to confuse the two legal concepts. Therefore, like the *Fuel Tankers* case and many of the Gaza allegations, the crux of the *MSF Hospital Bombing* case was that the commanders failed to take sufficient precautions to ensure that their target was lawful, rather than whether their actions were proportionate. The investigators’ claim that the aircrew failed in their duty to: ‘take feasible precautions to reduce the risk of harm to individuals they could not positively identify as combatants’<sup>347</sup> was well supported, invoking the language of reasonableness to decide if the aircrew’s actions were appropriate, given the conditions prevailing at the time:

(d.) The crew members... could not confirm the target. They arbitrarily chose the building they engaged. There were several other buildings in the compound besides the main Trauma Center building. The aircrew assumed the T-shaped building was the prison based on the description by the JTAC [the controller on the ground]. The prison, later referred to as a C2 node by the aircrew, could have been any of the buildings in the compound. However, the aircrew chose the largest building, after observing nine individuals, and making an assumption about the status of the MSF Trauma center as a lawful target with no further confirmation... (e.) *The GFC and Aircraft Commander actions were not reasonable under the circumstances.*<sup>348</sup> [emphasis added.]

Despite the clear evidence of a precautions violation, the US Government claimed that the attack was not a war crime because those involved did not commit the violation intentionally. Therefore, they opted not to refer the case to

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<sup>344</sup> Ibid, 91.

<sup>345</sup> This is particularly important because there is a clear basis for prosecuting proportionality violations under ICL, but the law is not as clear when dealing with violations of precautions in attack.

<sup>346</sup> See the elements of crimes for the Rome Statute above at note 200.

<sup>347</sup> *Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015*, 93.

<sup>348</sup> Ibid, 92.

courts-martial on those grounds, instead issuing administrative punishments to those involved.<sup>349</sup> Recklessness may have been deemed an appropriate *mens rea* for pursuing unlawful attack prosecutions at the ICTY<sup>350</sup> and some have claimed that there is room for manoeuvre in prosecuting reckless attacks in the ICL regime generally,<sup>351</sup> but like the other states mentioned above, the US does not seem prepared to try such cases in its domestic jurisdiction.<sup>352</sup>

Even more recently, the intensity of the operations in the Syrian Civil War has sparked accusations that if the belligerents were not deliberately targeting civilians as a matter of policy, then at the very least, they are not adhering to the rules on proportionality or precautions in attack. In 2016, the HRO Airwars reported that within the first three months of Russia's entry into the conflict, there was credible evidence to suggest that over 1000 civilians were killed in operations carried out either by Russian or pro-Government forces — six times higher than those caused by the US-backed Coalition forces over the same period.<sup>353</sup> However, the Russian Government has denied being responsible for any civilian deaths during its air campaign. Despite vocal opposition to alleged Russian violations, the Coalition has itself been reticent to discuss civilian casualties purportedly caused by its own operations, claiming responsibility for damage in only a handful of the total alleged incidents involving its forces.<sup>354</sup> This raises another difficulty with achieving accountability for *prima facie* disproportionate attacks: when two opposing air forces are operating near each other, one cannot easily tell which side was responsible for any particular mass casualty strike.<sup>355</sup> Without impartial investigators on the ground to assess the

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<sup>349</sup> Spencer Ackerman and Sune Rasmussen, 'Kunduz Hospital Attack: MSF's Questions Remain as US Military Seeks No Charges' *The Guardian* (New York, 29 Apr 2016) <<https://www.theguardian.com/us-news/2016/apr/29/kunduz-hospital-attack-msf-us-military-charges>> .

<sup>350</sup> See above at note 234.

<sup>351</sup> See above at note 213.

<sup>352</sup> Even though the US has not ratified either API nor the Rome Statute, it still recognises many of the provisions contained in them as indicative of customary international law and the UCMJ provides an adequate vehicle through which reckless attacks could be prosecuted – in theory, it could prosecute such cases under Article 119(b), which covers manslaughter by culpable negligence. Interview with Former US LOAC Policy Official (1).

<sup>353</sup> *A Reckless Disregard for Civilian Lives: Russian Airstrikes in Syria to December 31st* (Airwars, 2016), 2.

<sup>354</sup> *Ibid.*, 2.

<sup>355</sup> 'Determining which party is responsible for alleged civilian casualties remains a significant challenge. On November 20th 2015 for example, numerous Russian airstrikes targeted Dayr ez Zawr governorate in

scene of a strike, the belligerents are able to accuse each other of causing the damage. Furthermore, with each side eager to blame the other for casualties, there is less incentive for one side to unilaterally accept responsibility for collateral damage, even when that damage can credibly be ascribed to the actions of its own forces. This is not to say that there is a moral or legal equivalence between the different actors in the Syrian War, but that the lack of transparency from one side of the conflict tends to encourage less transparency from the other side. Furthermore, having multiple actors operating in the same battlespace can make it difficult to develop cases to the standard required by international justice against commanders for indiscriminate or disproportionate attacks.

The crescendo of the conflict so far has been the Battle of Aleppo, where the Syrian Government and their Russian allies were accused of launching indiscriminate aerial attacks on both the civilian population and on healthcare facilities.<sup>356</sup> The Atlantic Council's report on the offensive highlighted the fact that it would not be possible to report every strike that was *prima facie* indiscriminate because of the sheer number of alleged violations that were brought to the Council's attention:

The scale of attacks on Aleppo makes it almost impossible to compile a robust and verified record of every attack on the city. But drawing on a broad range of information, it is possible to see that an extensive aerial campaign was waged in Aleppo, and that a high proportion of the munitions deployed against the city and its population were indiscriminate... Every indiscriminate attack is worthy of investigation. However, for the sake of brevity and specificity, the following Chapters will focus in detail on particularly pernicious sub-categories of the attacks on east Aleppo: strikes on hospitals and medical facilities; incendiary weapons; cluster munitions and other explosive munitions; and chemical weapons.<sup>357</sup>

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western Syria leading to significant claims of civilian fatalities. Among the locations reportedly bombed was Al Bukamal, where five civilians are said to have died (including the pregnant wife of Abdul Qader Ibrahim Al Kadawi.) Despite credible claims to the contrary, Russia made no public mention of airstrikes in Dayr ez Zawr that day. The Coalition has confirmed it did target the city – noting that “Near Abu Kamal, one strike struck an ISIL crude oil collection point.” Given that two of those slain were said to work for the local electricity company - killed when an oil tank was hit – the Coalition may well be responsible for some of those civilians killed in Al Bukamal on November 20th, with Russia perhaps liable for other fatalities.’ *ibid*, 8-9.

<sup>356</sup> *Breaking Aleppo* (Atlantic Council, 2017), 19-30.

<sup>357</sup> *Ibid*, 20.

The Atlantic Council's report infers the Russo-Syrian commanders' intent by looking at the strikes as a pattern, rather than as individual isolated incidents.<sup>358</sup> Furthermore, it examines how particular weapons, which are not illegal, per se (such as cluster munitions and air-launched incendiary munitions), can nevertheless be used illegally in urban warfare.<sup>359</sup> The attacks drew international condemnation,<sup>360</sup> yet there was little chance that any individual would be held accountable for them at the ICC, either for individual attacks or for a systemic pattern of violations, because Syria is not a party to the Rome Statute and Russia could shield their ally from a security council referral.<sup>361</sup> Even so, in early 2017, the UN General Assembly created the International, Impartial and Independent Mechanism (IIIM) to collect and organise evidence of international crimes in Syria so it will be available, should a court ever have jurisdiction over the Syrian War in the future.<sup>362</sup> The lack of a venue to pursue the grossest violations of ICL for this conflict suggests that it is even more unlikely that there will be accountability in the near term for violations of the rules on proportionality or precautions in attack, in particular. If anything, the fact that those who conducted the air war over Aleppo managed to run their campaign with little oversight and a high degree of impunity portends a worrying trend for the development of a permissive state practice when it comes to the care with which a state should be expected to carry out its air operations. Given the magnitude of the offenses carried out in the Syrian War and the lack of any robust response from the UN Security Council, one of the members of the UN

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<sup>358</sup> This contrasts with the way the MAG wished to handle civilian casualty incidents in the Israeli/Gaza campaigns. See above at 329.

<sup>359</sup> *Breaking Aleppo* 32, 37.

<sup>360</sup> For example, the US and France called for war crimes prosecutions of ICL violations committed during the Battle of Aleppo. Mark Kersten, 'Calls for Prosecuting War Crimes in Syria Are Growing. Is International Justice Possible?' *Washington Post* (14 October, 2016) <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/>> . The US Ambassador to the UN, Samantha Power, decried the Aleppo campaign, saying: 'Three member states of the UN contributing to a noose around civilians. It should shame you. Instead, by all appearances, it is emboldening you. You are plotting your next assault. Are you truly incapable of shame?' Natasha Bertrand, 'Is There Literally Nothing That Can Shame You?': US Ambassador Power Attacks Russia, Assad over 'Crimes' in Aleppo' *Business Insider UK* (13 December 2016) <[uk.businessinsider.com/samantha-power-russia-assad-aleppo-2016-12](http://uk.businessinsider.com/samantha-power-russia-assad-aleppo-2016-12)> accessed 1 August 2017.

<sup>361</sup> Kersten.

<sup>362</sup> *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011* (UNGA Resolution 71/248, 2017), 2.

Commission of Inquiry into Syria, Carla del Ponte, resigned in protest, stating that her role had become nothing more than an alibi for more concrete action.<sup>363</sup>

### *Conclusions*

From this survey of the proportionality and precautions rules in the legal literature, one can see that there is broad agreement that any *ex post* evaluation of the criminality of an attack must acknowledge the intent of the commander and cannot be based solely on the effects of the attack. Furthermore, there is general agreement that one should look at the military advantage of a strike from the perspective of the attack as a whole, rather than from a bullet-by-bullet analysis or from the point of view of the entire conflict. Nevertheless, there is not a consensus about how to deal with patterns of marginally disproportionate attacks, which might suggest unlawful conduct when viewed in total, but appear lawful when each event is viewed in isolation.

Moreover, some other unresolved debates have made the law difficult to apply in the courtroom. Depending on the jurisdiction, there is some confusion about how to translate what are essentially regulatory norms for the conduct of hostilities into robust criminal law — hence the disagreements over whether to consider the failure to take certain precautions in attack as a non-criminal LOAC violation, as evidence of a commander’s intent to violate the proportionality rule, or as a reckless direct attack against the civilian population. Also, despite the near universal acceptance of the ‘reasonable military commander’ standard as the most appropriate way to examine a commander’s decision-making process as it applies to proportionality and precautions, the vagueness of the standard allows prosecutors and other legal experts to excuse a great deal of behaviour which, *prima facie*, ought to be subjected to judicial action of some sort.

Of the few cases that have even mentioned the rules on proportionality and precautions in attack, there is a worrying tendency for courts to defer to the military commander’s assessment of a particular situation or for extra-legal

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<sup>363</sup> Tom Miles, ‘Syria Investigator Del Ponte Quits, Blaming U.N. Security Council’ *Reuters* (6 August 2017) <<https://www.reuters.com/article/us-mideast-crisis-syria-investigator-idUSKBN1AM0P4>> .

factors (such as diplomatic pressure) to influence the outcome of judicial proceedings. The interpretation of these rules in international and domestic courts matters, not just for the sake of common law precedent, but also because judicial decisions influence the *normative* force of the law when human rights organisations try to use it to criticise state actions (e.g. the state's conduct of a military campaign or the state's arms trade policies). Therefore, if they are applied in a universally permissive manner by the courts, then HROs will find it more difficult to convince sceptical audiences that the state's conduct has ever crossed the line into illegality.

In effect, no case — neither criminal nor civil — has been resolved in a way that has found a state or its agents *legally* responsible for violating the rules on proportionality or precautions in attack. Nevertheless, there is no shortage of incidents where it could be reasonably argued that violations of these rules had occurred. For the moment, it seems that the law in this area has little force beyond an *ex ante* moral appeal. In Chapter 3, I shall explore how some of the unresolved issues surrounding the rules on proportionality and precautions in attack along with structural elements of the legal system that make it nearly impossible to try violations of these rules, particularly in international courts.

### Chapter 3

## The Difficulty of Achieving Accountability for the *Jus in Bello* Rules on Proportionality and Precautions in Attack

In Chapter 2, I presented the rules on proportionality and its associated attack precautions as they are codified into treaty law and as they are currently understood as customary international law. Though some of the logic behind these rules has been clarified by experts and through various court cases, the rules still evade robust adjudication. Without an effective accountability mechanism to put pressure on either the state or its agents, states might not be compelled to respect the regulatory function of the proportionality rule.

However, a number of barriers stand in the way of effectively prosecuting a case of disproportionate attack, particularly if the attack was caused by a reckless or negligent attitude on the part of the commander towards their required duty to take all feasible precautions in setting up or executing an attack. The following discussion in this Chapter will explore some of these legal and practical problems and will examine the degree to which each issue could theoretically be resolved, were there the political will to do so.

#### *Weighing Incommensurables*

Some of the debate regarding the application of the proportionality principle concerns the particulars left unaddressed by the state representatives at the CDDH. In the ICRC commentary on the Additional Protocols, Michael Bothe and his colleagues were sanguine about the ability for the law to effectively deter disproportionate attacks, despite the fact that it required commanders to compare values for which there was no common denominator:

As both sides of the equation are variables, and as they involve a balancing of different values which are difficult to compare, the judgement must be subjective. In the final analysis, however, most decisions on the major political, economic, and social affairs of societies as well as major military decisions rest on the subjective judgement of decision makers based on the weighing of factors which cannot be quantified. The best that can be expected of the decision maker is that he act honestly and competently... Despite the impossibility of quantifying the factors of the equation, a plain and manifest breach of the rule will be recognizable. The parties to the conflict, moreover, should curtail the limits within which commanders of operating units exercise their discretion by

issuing rules of engagement tailored to the situation prevailing in the area of conflict involved.<sup>364</sup>

Even so, when trying to apply the proportionality principle to NATO's conduct during the air war over Yugoslavia, the ICTY was unable to clarify this vagueness in a way that would allow court officials to identify what qualifies as a 'plain and manifest breach' of the rule. Quoting from the final report of a committee set up by the tribunal to assess the legality of NATO's bombing campaign, a member of that committee, William Fenrick, recounted four elements of the proportionality calculation that had yet to be adequately fleshed out:

The questions which remain unresolved, once one decides to apply the principle of proportionality, include the following: 1.) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects? 2.) What do you include or exclude in totalling your sums? 3.) What is the standard of measurement in time or space? 4.) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?<sup>365</sup>

Since then, many of these questions have been resolved by case law or in scholarly works, such as the 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare.<sup>366</sup> In their commentary on Rules 14 & 30-41 (regarding the proportionality rule), the Manual provided detailed, concrete guidance on what should be included in totalling up civilian damage and what should be considered military advantage. Importantly, it expressly stated that force protection should be taken into account for the proportionality calculation as part of military advantage, rather than being considered a separate concern.

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<sup>364</sup> Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982), 310-311.

<sup>365</sup> William Fenrick, 'Targeting and Proportionality During the Nato Bombing Campaign against Yugoslavia' (2001) 12 *European Journal of International Law* 489, 499.

<sup>366</sup> Since the manual is neither a treaty nor a compilation of statements made by the states, it is not a primary source of law. However, as the work of 30 experts, working closely with state representatives, the document carries some weight as a secondary source of law. Furthermore, the Manual and its associated commentary were designed to provide clear and actionable ways to comply with the law: 'Each Black-letter Rule of the HPCR Manual is accompanied by a Commentary that is intended to provide user-friendly explanations for both legal advisers and those who plan, approve or execute air or missile operations on both sides of the armed conflict. The format of the Commentary is tailor-made to the requirements of the "ops" officer. Legal cites are kept to a minimum and the Commentary itself is often encapsulated in terse "bullet point" style. The rationale is that there is usually no real need to go through a legal disquisition in order to figure out what must or must not be done.' *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 4.

It also clarified what ought to be considered the boundaries of a single attack in time and space.<sup>367</sup>

Furthermore, the HPCR Manual actually provided a more robust proportionality standard by not commenting on Fenrick's first question. On the face of it, the difficulty of weighing incommensurable values seems to be the key to understanding the intractability of the proportionality rule. However, Hamutal Shamash argued that, when discussing the proportionality of particular attacks, legal experts have tended to focus their discussions on the subjective decision making process of the commander, rather than the objective precautions a commander should have taken in attack. Narrowing the definition of an unlawful attack to only include the proportionality assessment implicitly serves the interests of an attacker,<sup>368</sup> particularly if it is incumbent upon the court to prove that a commander was making a decision in bad faith. However, by examining the proportionality of an attack in light of whether an attacker had taken the sort of precautions set forth in the HPCR Manual, courts could subordinate the more polemic discussion of whether a commander had properly weighed incommensurables to a much easier discussion of whether they had followed the prescribed actions to ensure that all feasible precautions were, in fact, taken before and during the attack:

The standard is objective in that expectations must be reasonable. If the attacker expected, in light of reliable information available at the time, that the collateral damage to civilians or civilian objects would be excessive relative to the anticipated military advantage, the principle of proportionality will have been violated. 'Expected' collateral damage and 'anticipated' military advantage, for these purposes, mean that that outcome is probable, i.e. more likely than not. Both terms assume a good-faith assessment by the commander planning or approving the attack, or the combatant executing it. They are 'judged in the light of the information reasonably available' at the time. Moreover, it must be acknowledged that mistakes occur due to the 'fog of war' or when it turns out reality did not match expectations, perhaps due to faulty intelligence. An attack does not violate the principle of proportionality unless such mistakes were unreasonable in the circumstances. See Section G on feasible precautions in attacks.<sup>369</sup>

Although the drafters of the APs expressly rejected using the word 'reasonable' when formulating the language of API Article 57,<sup>370</sup> the HPCR manual's

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<sup>367</sup> Ibid, 91-94.

<sup>368</sup> Hamutal Shamash, 'How Much Is Too Much - an Examination of the Principle of Jus in Bello Proportionality' (2005) 2 IDF L Rev 103, 62-63.

<sup>369</sup> *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 91-92.

<sup>370</sup> See Ch 2 at note 178.

rendition of the precautions rule makes clear that the same reasonableness standard that applies to the proportionality rule generally also applies to taking precautions in attack, thereby creating a set of objective benchmarks that could be used to judge whether a commander had violated the proportionality rule. Some commentators argue that these objective measures are even more important for the regulatory function of LOAC than the more esoteric balancing of incommensurables demanded by the proportionality rule because they have a greater chance of actually promoting civilian casualty mitigation.<sup>371</sup> From an operational perspective, the process-oriented provisions of the precautions rule are far more instructive than the proportionality rule and following the former almost always keeps a commander from getting close to violations of the latter.<sup>372</sup> From an accountability perspective, investigators and courts will likely be attracted to the objective nature of the precautions rule, allowing them to side-step the thornier problem of second-guessing the commander's subjective value judgement:

If you're looking for the rule and you're looking for an international criminal legal basis, I would feel better as a prosecutor going with precautionary part [of proportionality]. These principles are so very loose, so amorphous and ambiguous that it's hard to imagine a prosecution really stemming from the notion of the proportionality principle.... I think that that's the relationship between the two. I envision precautionary notions of proportionality being more susceptible to prosecution than probably the principle.<sup>373</sup>

While the problem posed by the inherent difficulty of assessing competing and vague values is substantial, it is not insurmountable and there are objective ways to infer whether a commander is applying the proportionality rule in good faith, so the fact that commanders have a responsibility to weigh incommensurables should not in itself allow the proportionality rule to evade adjudication.

### *LOAC as a Civil Regulatory Norm versus ICL as a Criminal Accountability Mechanism*

It is tempting to think of any violation of the law of armed conflict as a war crime and indeed, many of the provisions in international criminal law have been

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<sup>371</sup> Corn and Schoettler; See also: Geoffrey Corn, 'War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure' (2014) 42 Pepperdine Law Review 419.

<sup>372</sup> Corn and Schoettler 839.

<sup>373</sup> Interview with Former US JAG & ICTY Defence Counsel.

imported from LOAC verbatim. However, the underlying purpose of the two regimes is different and this affects the way that similar rules are articulated in each body of law. LOAC primarily issues regulatory guidance for troops to follow during the course of their military operations in an attempt to *prevent* them from behaving in a proscribed manner.<sup>374</sup> Therefore, the language used to spell out the content of this law is aimed at military commanders, their legal advisors, and subordinates, but not necessarily legal professionals who would be using the law for prosecutions or litigation after the fact. Moreover, to the extent that LOAC was designed to be used in the courtroom, it was intended to be used as a way of establishing state responsibility for violations, rather than individual responsibility, making it more analogous to civil tort law (delicts), rather than a robust criminal code.<sup>375</sup>

In contrast, the corpus of ICL *has* evolved as a way to achieve individual accountability for war crimes after the fact. The interplay between ICL and LOAC is not always straightforward and the degree to which LOAC has influenced ICL depends upon which legal forum is hearing a particular case. For example, the International Criminal Tribunal for the former Yugoslavia was able to import more of the language used by the Additional Protocols into its jurisprudence than has the International Criminal Court because the ICTY Statute authorised that Court to try violations of the ‘laws and customs of war’.<sup>376</sup> To criminalise violations of the laws and customs of war, the tribunal then had to reverse engineer, *ex post*, a set of criminal elements for the behaviours proscribed in the APs — documents that were not designed to be used in criminal proceedings.<sup>377</sup> Similarly, the negotiators of the Rome Statute also used treaty-based and customary (as it stood in the mid-1990s) LOAC as the starting point to figure out which violations could be serious enough to be

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<sup>374</sup> Interview with Garraway.

<sup>375</sup> *Ibid*; Bartels, 276-277; Aaron Fellmeth, ‘The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency’ (2012) 45 *Israel L Rev* 125, 145.

<sup>376</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (Article 3).

<sup>377</sup> Bartels, 277.

considered criminal actions.<sup>378</sup> However, because the ICC Statute was negotiated to be positive criminal law from the start, its designers gave greater *ex ante* specificity as to what behaviours would warrant criminal prosecution and what mental state would be required to trigger criminal liability for offenders than what is found in the fuzzier provisions of LOAC.<sup>379</sup> It is also for this reason that the UK and US delegations at the Rome Conference were keen to include the phrase 'clearly excessive' in the version of the proportionality rule found in RS Article 8(2)(b)(iv). According to Charles Garraway, one of the UK's delegates, the inclusion of this phrase was indeed meant to differentiate between ordinary violations of the rule under LOAC from those that would give rise to criminal liability under ICL. While a state could theoretically be held responsible for merely excessive strikes, individual commanders should only be criminally responsible for the most obvious violations of the rule.

Additionally, in order to protect the human rights of the accused, any forum — international, hybrid or domestic — that tries a commander for a criminal breach of the proportionality rule will likely include certain safeguards which will make it more difficult for a prosecutor to secure a conviction. This includes the criminal law principle of *in dubio pro reo*, which states that if the *facts* of the case are disputed, the accused should receive the benefit of the doubt<sup>380</sup> and the Rule of Lenity, which requires that if the definition of the *law* is

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<sup>378</sup> When presenting its Draft ICC Statute to the UN General Assembly, the International Law Commission explained the way its members conceptualised the relationship between LOAC and ICL: 'The Commission shares the widespread view that there exists the category of war crimes under customary international law. That category overlaps with but is not identical to the category of grave breaches of the Geneva Conventions of 1949 and Additional Protocol I of 1977... Reference is made here both to "the laws and customs" not only because the phrase is a hallowed one but also to emphasize its basis in customary (general) international law. On the other hand not all breaches of the laws of war will be of sufficient gravity to justify their falling within the jurisdiction of the court, and article 20, subparagraph (c) is accordingly limited by the use of the phrase "serious violations"...' 'Draft Statute for an International Criminal Court with Commentaries' in Yearbook of the International Law Commission, vol II (A/CN.4/SER.A/1994/Add.I (Part 2), United Nations 1994), 39. William Lietzau, 'International Criminal Law after Rome: Concerns from a US Military Perspective' (2001) 64 Law and Contemporary Problems 119, 122.

<sup>379</sup> 'On the battlefield, the conduct of the fighting parties is best governed by rules that are simple and allow the commander a certain level of discretion. However, fair criminal proceedings demand, first and foremost, that the parties in a criminal trial have recourse to clear rules that describe criminal conduct in a strict manner'. Bartels, 277. Interview with Former ICC Official (3 Jun 2016).

<sup>380</sup> Bartels, 279.

unclear, then the court must use the interpretation of the law that yields the best outcome for the accused.<sup>381</sup>

### *Mens Rea and the Limits of Liability in LOAC versus ICL*

Further complicating efforts to achieve individual accountability for disproportionate attacks is the strict *mens rea* required for securing a conviction under ICL. As discussed in Chapter 2, in theory, it should be possible to try commanders for reckless attacks that result in disproportionate collateral damage, but not for attacks that result in disproportionate collateral damage arising from ordinary negligence.<sup>382</sup> Nevertheless, in practice, there is some lingering confusion about how to prosecute disproportionate attacks, particularly whether one can point to violations of the precautions rule as evidence that the commander had the requisite *mens rea* needed to warrant criminal prosecution of the proportionality rule. This is important because normally attack precautions are considered part of LOAC, but not ICL, so in order to be criminally convicted for a disproportionate attack, the commander must know with a high degree of certainty that there are civilians or civilian objects present in the target area, make the judgement call that the military advantage is not high enough to warrant the attack — articulate that judgement call — and then nevertheless proceed with the strike.<sup>383</sup> It is more likely that *prima facie* disproportionate attacks occur either by accident or because the commander approached the duty to take all feasible attack precautions with a blasé or indifferent attitude.<sup>384</sup>

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<sup>381</sup> ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.’ Rome Statute of the International Criminal Court of 1998 Article 22(2). See also *Prosecutor V. Zenginil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* IT-96-21-T (ICTY Trial Chamber), 152.

<sup>382</sup> See Ch 2 at notes 195 & 204.

<sup>383</sup> ‘Trew: So, short of somebody coming into an operations centre saying, “screw it, kill them all and let God sort them out”, it’s rather difficult for somebody to look at [a strike] after the fact and put the pieces back together?’

Participant: Short of finding that smoking gun or a whistle blower or something like that, this is enormously difficult to prove.’ Interview with Former US JAG & ICTY Defence Counsel.

<sup>384</sup> ‘Yeah, there is no doubt in my mind that some of the commanders of the UK Task Force in Helmand had a more cavalier approach to casualties than others (and I might even suggest that they had a more cavalier attitude to their own casualties than others). That may be hugely unfair on some people, but having been [one of the commanders there early on] and then having watched several afterwards – another 12 or 13 – there are one or two that I think got a bit Patton-esque in their approach to it.’ Interview with Former UK Commander. Similarly, in Interview with Former ICTY Official and Interview with Amnesty International War Crimes Investigator, the participants stated or agreed that it is more likely that proportionality violations arise from a blasé attitude toward attack precautions rather than an intentional choice to launch disproportionate or indiscriminate attacks.

In this second scenario, the commander may be going through the motions of making a proportionality assessment, but since the inputs are flawed (e.g. the commander is unsure of how many civilians are in a building because of an unreasonable reliance on one intelligence platform at the expense of another inconvenient, but feasibly accessible one), the resulting proportionality calculation will necessarily also be incorrect. The idea that there should be accountability for both types of intention has an intuitive appeal, and as a former ICC official put it to me: ‘I think there’s got to be some sort of move in the law that covers not just commanders who deliberately target civilians or deliberately use disproportionate force, but also those who are merely indifferent about it.’<sup>385</sup>

In the ICTY case law, rather than examining the LOAC principles of distinction, proportionality and precautions separately, Jens Ohlin claims that the tribunal conceptualised these different principles as being facets of one crime: directly attacking civilians.<sup>386</sup> Then, in several cases, they allowed the prosecution to assert that the accused was reckless in ordering or launching attacks where the eventuality of civilian casualties could be foreseen.<sup>387</sup> In Ohlin’s estimation, the reason the ICTY has accepted this way to structure ICL is because many of the court’s lawyers and judges are conversant in continental law notions of criminal liability which include *dolus eventualis* (akin to recklessness) as a form of direct intent. He argues that this causes them to intuitively see any strike in which civilian death could be expected in the ordinary course of events as a direct attack on the civilian population. Ohlin’s worry is that ICL practitioners may be sleepwalking towards an interpretation of

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<sup>385</sup> Interview with Former ICC Official.

<sup>386</sup> Ohlin was highly critical of this conceptual framework: ‘The problem is that the specific war crime of attacking civilians has a more specific mental requirement that arguably changes the default *mens rea* applicable for other international crimes. The whole point of the IHL rule is that directly attacking civilians is *per se* illegal, while causing collateral damage – even if it is envisioned – is only illegal if it is disproportionate. To collapse the two on the basis of a general ICL finding that recklessness is satisfactory for the crime of murder is to undermine the more specific rule and the distinction between its two tracks.’ Jens Ohlin, ‘Targeting and the Concept of Intent’ (2013) 35 Michigan J of Intl L 79, 97.

<sup>387</sup> ‘Trial Chamber judges now almost mechanically apply the usual sources without even considering the issue, citing Galic, the ICRC Commentary, and now the Strugar Appeal Judgment; they even use the same language verbatim: “the concept of ‘wilfulness’ encompasses both the notions of direct intent and indirect intent, that is, the concept of recklessness, excluding mere negligence.” For a tribunal that claims to operate with no principle of *stare decisis*, this appears to be an issue that is now immune from reexamination and is firmly entrenched in the background jurisprudence of the ICTY’ *ibid*, 99.

unlawful attacks that renders the proportionality rule moot.<sup>388</sup> Based on a thorough analysis of the negotiation history of the Rome Statute and the Additional Protocols, he argues that the delegates did not intend for the crimes of directly attacking the civilian population or of causing disproportionate attacks to include recklessness or *dolus eventualis* as a mode of criminal liability.<sup>389</sup>

This comports with what I discovered through my interviews. The two delegates to the Rome Conference that I interviewed for this project argued that there should be repercussions for reckless attacks that violate the proportionality rule, but not necessarily *international* criminal proceedings.<sup>390</sup> For example, US delegate Bill Lietzau explained that even if *dolus eventualis* can be considered a type of criminal liability in continental law, it does not necessarily hold that it should have been a subject for the ICC,<sup>391</sup> since the court should only concern itself with international crimes where there is broad agreement of what constitutes a violation of the criminal norm across both continental and common law legal systems.<sup>392</sup> Instead, both he and Garraway saw violations of the precautions rule as having a more solid basis for

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<sup>388</sup> Ibid 97-99. Interview with William Lietzau, Former US LOAC Policy Official (Washington, D.C. 6 June 2016).

<sup>389</sup> Ohlin 100-116.

<sup>390</sup> Admittedly, both were representing common law countries. Interview with Garraway; Interview with Lietzau. This does not seem to be an unusual view within the common-law tradition as Andrew Ashworth notes, 'The criminal law is society's most condemnatory instrument... A person should not be censured for wrongdoing without proof of choice (as distinct, perhaps, from being held civilly liable). This is a fundamental requirement of fairness to defendants... Moreover, in so far as the criminal trial has a communicative function, strict liability impairs this by severely limiting [the defendant's] ability to explain, excuse, or justify the conduct and by requiring a conviction in all but exceptional circumstances.' Ashworth and Horder, 162.

<sup>391</sup> Interview with Lietzau. However, in Interview with Former ICC Official, the official confirmed that the ICC Statute could not be read to include recklessness as sufficient *mens rea* for the crime of disproportionate attack, but that official saw that as more of a limitation on the ICC and was not convinced that recklessness was completely out of bounds as a mode of criminal liability under customary international criminal law or those domestic laws which are meant to enact the provisions of LOAC, such as the UCMJ.

<sup>392</sup> 'Trew: I think that they [continental law experts] would agree that you have to make tough calls. But, they're also concerned with sloppiness in figuring out the information that's going into that decision — someone who's relying upon all of the available evidence and ticking through their checklist meticulously versus someone who just gets in the jet and goes and then is overly reliant on sources of information that they're not sure about.

Lietzau: And you see, that whole thing that you just described — in the United States that's not so much the subject of criminal liability. That's civil liability... If you're being reckless, you can be prosecuted, but when you're being negligent or you're only arguably being negligent when you, in fact, have to make a call, I don't even see this *as dolus eventualis*... [T]he point is: it is not cleanly in the criminal realm, but even if it is in the criminal realm, it's not cleanly in the war-crime, worse-crimes-that-affect-humanity realm. It's just that the consequences are so bad because the consequences of war are so bad.' Interview with Lietzau.

prosecution under domestic criminal law or litigation under civil tort law.<sup>393</sup> Indeed, an ICC official, two US policy officials and a US military judge all claimed that, in theory, US military law could have easily handled something like the *Kunduz Hospital Bombing* case, had it been referred to courts-martial.<sup>394</sup>

However, the *Hospital Bombing* case was never referred to a domestic criminal court or court-martial<sup>395</sup> — neither was the *Kunduz Fuel Tankers* case, despite *dolus eventualis* being a mode of criminal liability in German Law.<sup>396</sup> Assuming that violations of the precautions rule are not serious enough to give rise to a criminal mental state in any criminal code, surely they should be enough to establish state responsibility and civil liability for *prima facie* unlawful attacks? Nevertheless, in the case of the *Kunduz Hospital Bombing*, US domestic law prohibits claimants from suing the US government or its agents for actions that occur during combat<sup>397</sup> and in the *Fuel Tankers* case, the civil court in Bonn that heard the case decided that Col Klein did not breach his official

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<sup>393</sup> Interview with Garraway.

<sup>394</sup> UCMJ Article 119(b)(1) (Manslaughter) includes killings that arise from culpable negligence, a bar that is even lower than recklessness. Interview with Former ICC Official; Interview with Former US LOAC Policy Official (1); Interview with Former US LOAC Policy Official (2); Interview with Former US Military Judge.

<sup>395</sup> However, those responsible did receive administrative punishments. Ackerman and Rasmussen. In Interview with Former US Military Judge, the participant suggested that this type of punishment was unusually light, given the magnitude of the offense.

<sup>396</sup> 'A broader legal analysis of the case of Colonel Klein shows that even under different assumptions regarding his state of mind and the actual intent of the attack Colonel Klein is not criminally liable under International Criminal Law for the attack itself. However, under ordinary criminal law Colonel Klein bears criminal responsibility. The difference lies in the omission of precautionary measures. While not criminally relevant under International Criminal Law, the omission carries weight under ordinary German criminal law. Due to this omission Colonel Klein is liable for either intentional or negligent manslaughter as long as he does not demonstrate that he fulfilled his *Sorgfaltspflicht* [duty of care] to take precautionary measures.' von der Groeben, 488.

<sup>397</sup> 'In the United States, the Federal Tort Claims Act (1948), which derogates from the general principle of state immunity, establishes that no claim may be brought that arises "out of the combatant activities of the military or naval forces". Additionally, the Act denies access to US courts to "any claim arising in a foreign country". If instead under the Bivens rule the responsible officials are sued individually, a further defence stands in the way of claims based on the violation of constitutional rights in that the alleged misconduct must have violated "clearly established rights [. . .] of which a reasonable person would have known". Thus, litigation regarding war damages has almost no room in the United States.' [ellipses in original] Christian Tomuschat, 'State Responsibility and the Individual Right to Compensation before National Courts' in Andrew Clapham and Gaeta Paola (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford UP 2014) 820-821. See also: Kenneth Bullock, 'United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation' (1995) 58 *Law and Contemporary Problems*. Similarly, Israeli tort law contains a 'combat action' exemption, which prohibits victims from bringing a tort against the government for actions taken by the state whilst 'combating terror, hostile acts or insurrection', even if there may have been evidence of LOAC violations. *Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, 175.

duty, in spite of substantial evidence to the contrary.<sup>398</sup> In both cases, *ex gratia* payments were given to the victims instead.<sup>399</sup> Therefore, even with the lower liability standards of civil law, it is extremely difficult to prove fault in cases of *prima facie* disproportionate attack.

#### *The Reasonable Military Commander Test*

If there is any broad agreement in court cases and in the academic literature regarding the application of the proportionality rule, it is that the rule must be assessed from the perspective of a 'reasonable military commander' in the circumstances of the accused that were prevailing at the time. Though jurists were thinking of a reasonableness standard for the proportionality rule before the *NATO Bombing Report* was issued,<sup>400</sup> after the report, international and domestic courts alike have cited the report's 'reasonable military commander' standard as the appropriate way to gauge whether commanders correctly weighed the competing values of military advantage and civilian losses.<sup>401</sup> Moreover, this same standard has emerged as a way to evaluate whether a commander diligently took all feasible precautions in attack.<sup>402</sup> It has also been invoked by investigators looking into allegations of disproportionate attacks, such as those who wrote the US report on the *Kunduz Hospital Bombing*,<sup>403</sup> the Goldstone Report,<sup>404</sup> and the Israeli Government's reports on Operations Cast Lead and Protective Edge.<sup>405</sup> However, there is still controversy over what the phrase means and how it is to be applied practically when looking at the legality of a strike after the fact.

Ideally, the function of the reasonable military commander standard is to

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<sup>398</sup> Henn, 627.

<sup>399</sup> German Federal Parliament, *Beschlussempfehlung Und Bericht Des Verteidigungsausschusses Als 1. Untersuchungsausschuss Gemäß Artikel 45a Absatz 2 Des Grundgesetzes [Decision Recommendation and Report of the Defence Committee Sitting as the First Committee of Inquiry in Accordance with Article 45a, Paragraph 2 of the Basic Law]* (Drucksache 17/7400, 2011). Idrees Ali, 'U.S. Strike on Afghan Hospital in 2015 Not a War Crime: Pentagon' *Reuters* (Washington, 29 Apr 2016) <<http://ca.reuters.com/article/topNews/idCAKCN0XQ24T>>

<sup>400</sup> See Ch 2 at note 184. n.b. Fenrick was the head of the committee set up to review the NATO bombing campaign and was one of the jurists who was calling for a reasonableness standard for proportionality shortly after API came into effect.

<sup>401</sup> For instance, see Ch 2 at notes 229, 261, 271.

<sup>402</sup> For instance, above at note 369.

<sup>403</sup> See Ch 2 at note 348.

<sup>404</sup> See Ch 2 at note 312.

<sup>405</sup> See Ch 2 at note 309; *The 2014 Gaza Conflict 7 July - 26 August 2014: Factual and Legal Aspects*, 186.

provide an objective test for what amounts to a subjective value judgement, thus allowing courts to infer if the accused possessed the *mens rea* required for the crime of disproportionate attack. As Constantin Groeben reveals in his discussion of the *Fuel Tankers* case, the problem is that the very idea of the reasonable military commander could itself be a rhetorical tool that allows legal professionals to pretend as though an objective standard for judging unlawful attacks exists, while allowing commanders to justify their actions however they see fit:

Some argue that proportionality should be assessed from the viewpoint of a 'reasonable military commander.' This emphasizes the general idea that in cases of 'armed conflict' it is necessary to think in military rather than civilian terms. Unfortunately, beyond this general notion the introduction of the notion of a 'reasonable military commander' does not bring much clarity to the issue but merely substitutes one term for another. We are hence left with the conclusion that in fact 'objective standards for the appraisal of expected collateral damage and intended military advantage are virtually non-existent.' But without objective standards the proportionality of an attack has to be assessed by the attacker himself, in which case he enjoys not only a great margin of discretion, but in fact an unlimited margin. This undermines the value of the prohibition — for a prohibition that leaves the definition of its content to its addressee does in fact not prohibit anything at all. It can be argued that the function of this provision is ultimately only that of a moral appeal. The 'law' in this case would provide no binding rules; it would allow for an executive decision by the commanding officer. The case of Colonel Klein seems to suggest exactly this result.<sup>406</sup>

Indeed, the invocation of a 'reasonable military commander' test does cause courts to defer to the military expertise of the commander and this, in turn, tends to have an exculpatory effect. This was certainly as true for the *Fuel Tankers* case<sup>407</sup> as it was for the ICTY's handling of the *NATO Bombing Report* and for several cases heard at the Israeli High Court of Justice.<sup>408</sup> The only cases that go against this general trend were the *Gotovina* Trial Chamber judgement (which was overturned)<sup>409</sup> and the *Kunduz Hospital Bombing* case, where military investigators were more than willing to weigh in on what behaviour and what decisions were considered unreasonable, given the situation prevailing at the time,<sup>410</sup> but ultimately, the case was never sent to trial.

The fact that the 'reasonable military commander' test causes

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<sup>406</sup> von der Groeben, 480.

<sup>407</sup> See Ch 2 at notes 273 & 274.

<sup>408</sup> See Ch 2 at note 261.

<sup>409</sup> See Ch 2 at note 238.

<sup>410</sup> See Ch 2 at notes 348 & 349. This may be because the investigating officials were themselves in the military, privy to the available evidence and knowledgeable of the standard tactics, techniques and procedures of their own organisation.

investigators and courts to defer to the professionalism of military commanders should not in itself invalidate the standard as a way gauge the legality of an attack *ex post*. After all, in other high-stress professions, such as medicine and law enforcement, courts have been able to apply reasonableness standards in ways that respect professionals' expertise whilst also guarding the level of competence society demands of such professionals.<sup>411</sup> Accordingly, it stands to reason that courts could take up cases of disproportionate attack if they adopted some of the same procedures that are employed in medicine or law enforcement cases, for example, using expert witnesses to assess what reasonable conduct might look like for the case at hand – either in a battle of experts,<sup>412</sup> or as independent advisors to the court.<sup>413</sup>

Although there is broad agreement that, in order to render an appropriate judgement on a proportionality case, a judge must consider the *technical expertise* of a military commander (as they should with any other profession), there is less agreement about whether they should have to ascribe to a military commander's *moral* judgement regarding the relative values of civilian life and military advantage. To be sure, the debate over whether it is appropriate to entertain a reasonable military commander's moral assessment about what would be considered excessive collateral damage is indicative of a larger

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<sup>411</sup> A similar argument was made by Dill, 84.

<sup>412</sup> 'Trew: So if you did end up with somebody in the dock, would it be helpful to have expert witness battle it out to say what was reasonable at the time, or would that just be a waste of time?

Participant: I think that one would have that. You'd inevitably have that.

Trew: Like in Gotovina?

Participant: One saw this at the Yugoslav Tribunal; one saw this all the time. They'd bring in eminent talking heads, from former generals from the UK, the US, or anywhere else that would come and give evidence as to what was good military practice.' Interview with Garraway.

<sup>413</sup> 'I actually had a discussion about this with Ted Marron a couple of years ago after they did the [Gotovina] appellate opinion, which by the way, he is very proud of, but also very defensive of because he received so much criticism. He says, "I just disagree with you. You have judges who do all sorts of complex cases: railway cases, structural engineering cases, complex financial cases. What they do is they rely on experts." I said, "I'm okay with that, but the problem is that you're at the mercy of the litigants for the quality of the expertise." I'll tell you something (and I've said this before): if the prosecution in Gotovina had gotten a better expert, they would have won the case. So... why not appoint commissioners to the tribunal? Retired combat commanders – not JAGs – so that when you get a case involving proportionality, they can write a neutral report for the judges. They don't have to be judges, but why does the international tribunal rely on the litigants to proffer the experts? Now, the litigants can still bring their own experts in, but wouldn't it be great if you were a judge – Judge Orié from Gotovina and you could go back to your chambers during the break and sit down with General So-And-So, who commanded troops in combat from the rank of captain through general and say, 'what do you think about what you just heard?' I think it would be a positive attribute for the Tribunals, but until that happens, that's one of the reasons why I think the national tribunal is a better approach.' Interview with Former US LOAC Policy Official (1). Independent operational advice was also advocated in Interview with Former ICTY Official.

disagreement between military lawyers and lawyers from human rights organisations over the purpose of LOAC. As Luban aptly explains:

The [military] LOAC vision of the law begins with armed conflict. It assigns military necessity and the imperatives of warmaking primary, axiomatic status. In this vision, the legal regulation of warfare consists of adjustments around the margins of war to mitigate its horrors. Those adjustments occupy a noble and important role that must be honored and that militaries in fact want to honor. But it is logically secondary, and it yields to the force majeure of military necessity. The law of war dwells in the interstices of warfare. The [human-rights] IHL vision begins with humanitarianism, and assigns human dignity and human rights primary status. It measures the progress of civilization in the enhanced protection of human dignity, views law as an indispensable instrument for advancing human dignity, and regards peace as the normal condition for human life. This vision regards war as a human failure—no doubt inevitable, in the way that poverty and injustice are inevitable, but, like poverty and injustice, not something that deserves legal priority over the protection of rights and dignity.<sup>414</sup>

Though the object of both the military and human-rights visions for restrictions in war are roughly the same – to reduce human suffering – the different ‘tribes’ often offer very different legal prescriptions about how to accomplish this common goal.

Some commentators, such as Mark Oisel, have rightly pointed out that the tendency for members of the military to see themselves as a separate subculture from civil society can nurture the development of certain institutional values, such as discipline and self-sacrifice. This, in turn, can sometimes make members of the military less likely to commit atrocities on the battlefield compared with their civilian counterparts (e.g. civilians committed the bulk of the atrocities during the Rwandan Genocide and certain civilian units in Bosnia were more prone to committing atrocities than military units operating under similar circumstances).<sup>415</sup> Recognising this, states have, to greater or lesser degrees, encouraged this divergence of values by holding members of the military to a separate (and usually stricter) legal system from the rest of civilian society.<sup>416</sup> The military view of LOAC, therefore, encourages judges to show some deference to military commanders based on the fact that they ought to already have built-in restraints on their behaviour by virtue of their membership in the profession of arms – so any deviation from those internal norms must

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<sup>414</sup> David Luban, ‘Military Lawyers and the Two Cultures Problem’ (2013) 26 *Leiden J. Int’l L.* 315, 315-316.

<sup>415</sup> Mark Oisel, ‘Obeying Orders: Atrocity, Military Discipline, and the Law of War’ (1998) 86:5 *California L. Rev.*, 953-959.

<sup>416</sup> *Ibid.*, 957.

have been due to overwhelming situational pressures. However, others, such as Bothe, contend – equally rightly – that the value system of soldiers serving democratic countries should never be so different from that of the general public as to make it necessary to specifically invoke the moral decision-making process of a military commander in order to adjudicate proportionality cases.<sup>417</sup> Though the military is indeed a society-within-a-society and judges would be wise to keep that in mind, ultimately in a liberal-democratic state, civilians have the final say over what the military is or is not allowed to do – not the military itself. Ideally, under the assumption that the profession of arms inculcates higher virtues than those found in civil society, the standard of behaviour required of members of the military should be higher than that demanded of a civilian under similar circumstances. Therefore, if judges are to entertain special pleas to the moral decision-making of a military commander for proportionality cases, presumably the relative weight of military advantage compared against collateral damage should be higher than what would be assigned by a civilian in the same circumstances. However, in reality this does not seem to be the case.

As a matter of *lex ferenda*, the correct interpretation of the phrase ‘reasonable military commander’ should be more nuanced than either the military or human-rights perspectives offer in the extreme. At the risk of setting up an infinite regress, I would suggest invoking the perspective of a reasonable military commander requires one to strike a proportionate balance between the value systems of both the military and civil society (if one is to assume that the value systems are different in the first place). The authors of the ICTY’s *NATO Bombing Report* were right to defer to the technical expertise of a reasonable military commander and their assessment of the tactical situation, given the information they reasonably had at the time.<sup>418</sup> However, by defining a reasonable military commander in opposition to a reasonable human rights lawyer, the Committee discounted the possibility that the value system of a

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<sup>417</sup> Michael Bothe, ‘The Protection of the Civilian Population and Nato Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY’ 12 *European Journal of International Law* 531, 535.

<sup>418</sup> See Ch 2 at note 227.

reasonable military commander ought not be too different from that of a reasonable *person* in the same situation. In spite of the fact that the test has already been used in courts and elsewhere as a way for legal professionals to defer to the subjective opinion of military commanders, there should be room for alternate interpretations of the reasonable military commander test which would force judges to consider the appropriateness of a commander's proportionality assessment, given both military members' professional expertise and what a reasonable *person* would have done.

However, given that international courts have reached farther in other domains (such as stating that the attack precaution provisions of API Article 57 are customary LOAC in non-international armed conflict<sup>419</sup>), it is a puzzlement as to why courts have not adopted some way to operationalise proportionality beyond the vague and deferential 'reasonable military commander' test and the flawed 200m standard used in the *Gotovina* Trial Chamber.<sup>420</sup> This suggests that there is at least some value for courts to keep the definition of proportionality and precautions in attack (and their associated reasonableness tests) vague.

#### *Flexibility and the Value of Vagueness in the Law*

The particulars of the proportionality rule and its associated rule on precautions in attack have been convincingly pinned down in the writings of legal experts — such as those who wrote the HPCR manual — to such a degree that it would not be difficult with help from expert witnesses for a court to determine reasonable from unreasonable conduct in most cases. However, as a subsidiary source of law,<sup>421</sup> such texts would not carry the same weight in a courtroom as statements made by the states or the vague black letter of international treaties. Furthermore, as with the 'duelling experts' problem associated with operationalising the reasonable military commander test, it is also possible to find some legal authorities who will argue for more permissive interpretations of proportionality and others who will argue for equally-

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<sup>419</sup> See Ch 2 at note 155.

<sup>420</sup> See Ch 2 at note 239.

<sup>421</sup> Article 38, Statute of the International Court of Justice.

convincing, but stricter interpretations. Nevertheless, this should not be a barrier to prosecution, since hearing conflicting interpretations of law and deciphering the better argument is precisely the role that the courts should play.<sup>422</sup> If this vagueness could be addressed, it stands to reason the ambiguity associated with the proportionality rule serves some function, which is why it has yet to be pinned down by the states in a reliable way.

It may seem, on the face of it, that a more precise law is better than a vague one, particularly when it sets forth a criminal standard.<sup>423</sup> If a law is too vague, then the application of the law by states and the courts might seem arbitrary, allowing the same behaviour to be punished by one judge and excused by another.<sup>424</sup> However, vaguely worded laws are not merely poor laws that should have been better drafted, but as Timothy Endicott argues, lawmakers often use words such as ‘reasonable’ as a *deliberate* way to introduce ambiguity into the law.<sup>425</sup> It is hardly a revelation that lawmakers (be they legislatures or plenipotentiaries) do this, but what is interesting are the reasons why they do so given the problems associated with vague laws. Laws

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<sup>422</sup> ‘[L]imitations of language and of ability to anticipate mean that courts do always have to construe the words of a statute and a big part of the job of judges, all the way up to the Supreme Court is to interpret: what did Congress mean (or for international tribunals — what did the treaty makers mean) when they wrote the provision this way. It’s just not possible to write things that are so crystal clear that it does not require, or does not admit of, subsequent interpretation. What I tell my students around here is: that’s what the whole world of lawyering is all about. There are two teams of highly paid, highly trained litigators who offer competing, plausible, but contrary interpretations of what the statute or what the contract or what the Constitution means and that’s what litigation is all about: finding latent ambiguities in terms the drafters probably thought were pretty clear.’ Interview with Former US LOAC Policy Official (2)

<sup>423</sup> ‘Effective rules require a shared understanding of how they apply to specific cases, both so that actors can take account of those rules and the consequences of breaking them and so that others know how to respond. More detailed and specific rules help to produce such a shared understanding by clarifying what the rules mean.’ James Morrow, *Order within Anarchy: The Laws of War as an International Institution* (Cambridge UP 2014) 66.

<sup>424</sup> Timothy Endicott, ‘The Value of Vagueness’ in Vijay Bhatia *et al.* (eds), *Vagueness in Normative Texts* (Peter Lang 2005) 35-37. Certainly there are other psychological/sociological reasons for why two judges might rule differently over cases which involve the same behaviour (as discussed by legal realists), but for the purposes of this argument, I assume that the two judges in question have honestly different *legal* reasons for preferring to interpret a vague law differently.

<sup>425</sup> ‘The requirements of reasonableness in various areas of tort law, contract law, and administrative law are important examples of the very widespread use of extremely vague standards in legislation and the common law... Vagueness in legal instruments is generally far from trivial. When lawmakers use vague language in framing standards, they typically use extravagantly vague language such as “neglected” or “abandoned” or “reasonable”. The resulting vagueness in the law can generate serious and deep disputes over the principles of the standard in question. Because it may allow different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters), it leads to the danger that its application will be incoherent.’ *ibid* 32.

might be intentionally vague because it is more efficient<sup>426</sup> for lawmakers to delegate authority for determining the precise definition of a statute to the courts, particularly if lawmakers cannot come to a consensus regarding the law's particulars.<sup>427</sup> To some degree, this has occurred with proportionality. Recalling the fact that the original purpose of the APs is to be regulatory, rather than punitive, Lietzau claims that some of the vagueness in the proportionality rule was indeed intentional:

[T]he treaties were written as agreements between countries, well knowing that when you have 130 countries in a room and they have to reach common agreement on lots of different clauses. That's very hard to do, because they all have different interests and different ways of conceiving of the particular principles involved, so what they usually do is that they come up with ambiguous wording and the ambiguous wording allows each of them to go home and claim success and what you end up with frequently is slightly different interpretations of a general principle and the kernels of the principle are there, so that you've accomplished something, but you haven't accomplished as much as your average legislator would want to accomplish, because he'd want to nail down these 10 characteristics of the principle, and instead he's nailed down the *essence* of the principle and then used ambiguous wording that is designed to let everyone go home thinking that they've succeeded. If you accept that paradigm as the way we write treaties, we can live with that if it's a law of war treaty — the rights of one country juxtaposed with the rights of another country who might be in conflict with each other... It would've been negotiated with purposeful ambiguity, or at least sanctioned ambiguity, so that you could reach agreement and everyone goes home knowing: 'there's no judge that's going to tell me that I'm wrong'.<sup>428</sup>

As a regulatory norm, it suits states to keep the principle of proportionality somewhat vague, since it allows several competing interpretations of the principle to all be correct and this gives the states the ability to compromise with each other. This also grants the state some flexibility to choose whichever interpretation of proportionality advances its interests at a later point once decision makers have become aware of how the law affects the state's freedom of action.<sup>429</sup> However, as a criminal norm, the United States and the United

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<sup>426</sup> By efficient, I mean Pareto optimal.

<sup>427</sup> However recent research is calling into question this traditionally held view that judge-made law is more economically efficient than statute-based law or, by extension that plenipotentiaries necessarily desire for law to be settled in international courts. Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge UP 2016), 189-190; See generally, Depoorter and Rubin.

<sup>428</sup> Interview with Lietzau; similar views were expressed in: Interview with Garraway, Interview with Former US LOAC Policy Official (2). Furthermore, 'As Chayes and Chayes (1995: 12) so bluntly state: "[S]tates, like other legal actors, take advantage of the indeterminacy of legal language to justify indulging their preferred course of action." Likewise, Simmons (2010: 277) notes, "precision reduces the plausible deniability of violation by narrowing the range of reasonable interpretations." Koremenos, 164.

<sup>429</sup> 'There are lots of different reasons why rules of law are vague and here I would refer both to treaty law and customary law and to all the other sources of law. Partly it's vague because countries want to keep their flexibility. That's a strategic use of imprecise language in order to defer the question of what exactly is going to be prohibited or permitted until some future point where we can see what the immediate

Kingdom actually wanted more precision for the proportionality rule, since they were unsure of how the law might be applied in the courtroom:

Now you take it [proportionality] to an international criminal context and now you can put people in jail for it. So, a person like me comes to the negotiating table and I look at the proportionality principle as it might find its way into Protocol I or into some customary law treatise or something like that and I look at that language and I say: 'oh my goodness, that is *very murky!*'. I do not to feel comfortable as a prosecutor knowing that I can prosecute someone for that and I certainly don't feel comfortable as defence counsel or an advisor saying, 'no, don't worry, no one will ever put you in jail for this particular attack based on that murky language'... The jury system is hard enough — to have to figure out if the facts line up with the principles — but if you also don't even know what the principles are, because you're using ambiguous language, that's a real problem and it doesn't give comfort to the person who has been alleged to have committed crimes. So, we tried to build in precision and some specificity into the international criminal law norm, yet we tried to do it in the context of international treaty writing, where 130 countries had to agree and that was a very difficult process.<sup>430</sup>

There was indeed a push to clarify RS Article 8(2)(b)(iv), but only to raise the liability needed to secure a conviction for the crime. Because the delegations were pressed for time, Garraway argued that much of the vagueness associated with the version of the rule as it was articulated in API had to be imported directly into the ICC Statute, since they were unable to come to an agreement otherwise:

We never really reached agreement on quite a lot of issues. That is why Philippe Kirsch, on the last day, slammed a text down and said 'take it or leave it'. Even the bits that were negotiated, a lot of them are deliberately ambiguous... You've got two completely conflicting views and what you have got to do is try to come up with a compromise. Now, the compromise allows both sides to claim victory. There was a classic example of that (in fact, we didn't realise until it was too late, actually) in the elements of crimes on the proportionality test. There was deadlock between Bill Lietzau and myself, and Switzerland and Belgium. Both sides were adamant about what we wanted. We set it aside to be one of the problems that we would deal with at the end. On the last day, we were faced with having to reach a decision on this and a compromise was put to us. Bill and I looked at it and said, 'great, but the other side will never agree' and the Swiss looked at it and said, 'great, but the other side will never go for it'. It was agreed... What then happened is that you had the commentary — the Roy Lee commentary on the elements, which was being written and the Swiss [Didier Pfirter] were given the task of drafting that section. He did and sent it around to all the authors and it came to me and I said, 'no way!' He had interpreted the wording to reflect his views — the Swiss position. I said that this is so serious that as a still-serving UK officer, I cannot be linked with this commentary any longer if that goes in. It is such a critical point; I would have to withdraw... We both knew each other well — after all, we'd been negotiating for something like six years or so. We phoned each other and we suddenly realised the text was actually ambiguous. It is still my view that, on an English reading of the text, it can

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controversy is and we can see which side of it we're on — some of it is strategic. Some of it is just incompetence. It's an inability to anticipate the different circumstances under which the rule might arise and, if we could've thought about that, we would've dealt with it, but we just didn't anticipate it.' Interview with Former US LOAC Policy Official (2).

<sup>430</sup> Interview with Lietzau; similar views were expressed in: Interview with Garraway and Interview with Former US LOAC Policy Official (2).

only mean one thing, but I had to accept that it was possible (certainly for a non-English speaker) to see that it could mean something different. So, the only way we could decide to deal with it was in the commentary, Didier wrote: 'one view could be that this means...'. I then wrote: 'another view is that this could mean...'. In the end, we had to say that it would be for the Court to decide.<sup>431</sup>

Therefore, some of the ambiguity in the criminal norm was sanctioned, some of it was accidental, and much of it was imported directly from API.

In her interdisciplinary study of collateral damage, Janina Dill identified three levels of vagueness that have plagued the API version of the proportionality rule as it was negotiated at the CDDH and she argued that the cumulative *effect* (even if it was not the explicit intention) of the different types of indeterminacy in the law has been to shield attackers against judicial oversight:

The principle of proportionality was adopted by many delegations [to the CDDH] in spite of, by some because of, its failure to put flesh on the bones of the prescription to balance humanitarian and military concerns (purposive indeterminacy). Most delegations hedged against IL [international law] imposing a standard for legally acceptable outcomes of an attack (consequential indeterminacy). And the drafters seem to have chosen the criterion of a military advantage without substantively agreeing on a necessary degree of nexus between an object and military action for the advantage to count as a military objective or for it to outweigh incidental civilian harm. Nor did the delegations clearly state the point of reference they envisaged would determine what counted as a military advantage in the first place (semantic indeterminacy). In Martti Koskeniemi's language, it seems that the diplomatic conference made sure that IHL would be flexible enough to serve as a ready apology.<sup>432</sup>

Vagueness in the law is able to provide a ready apology because, upon discovering *lacunae* in the law, either through its genuine absence or through extravagant<sup>433</sup> vagueness in treaty-based or customary international law (or its

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<sup>431</sup> Interview with Garraway. Garraway was referencing the following passage: 'Footnote 37 sought to provide the compromise, but only later did it become apparent that there was no meeting of minds as to its meaning. All accept that a value judgement must have been made as required by the first sentence. However, the meaning of the second sentence is in dispute. To those who require a more objective test, the phrase "an evaluation of that value judgement" refers to an external evaluation by the Court. This would mean that the Court would make an objective analysis of that judgement "based on the requisite information available to the perpetrator at the time." To the others, the second sentence is not directly linked to the first and merely reinforces the point that the judgement has to be made on the basis of the information available at the time. Thus, the Court could not cast doubt on the veracity of the judgement by referring to material that was not available to the perpetrator when the judgement was made. It will be for the court to decide on the interpretation of this element and the footnote, in light also of the text of the Statute. In so doing, it may also appreciate that the drafters would not have wanted to make it impossible to prove this crime, otherwise they would not have included it in the Statute.' Pfitzer, 'Article 8(2)(b)(iv)' 150.

<sup>432</sup> Dill, 105.

<sup>433</sup> Endicott uses the term 'extravagant vagueness' to denote the extremely vague language that lawmakers use to purposefully introduce flexibility into the law: '[T]he really extravagant (and very common) instances of vagueness in law are the general evaluative terms used to regulate diverse activities in a broad class. The requirements of reasonableness in various areas of tort law, contract law, and administrative law are important examples of the very widespread use of extremely vague standards in legislation and the common law.' Endicott 32.

various domestic vehicles), judges might determine that the Rule of Lenity should apply and the accused should not be convicted.<sup>434</sup>

### *An Impossible Evidentiary Burden*

It is not just vagueness in the law that frustrates efforts to achieve accountability for disproportionate attacks, but often the facts of a particular incident are also in doubt. Finding evidence of war crimes is generally challenging enough, but finding enough evidence to successfully prosecute disproportionate attacks is even more difficult.<sup>435</sup> Rogier Bartels, a legal officer with the ICC, argued that the first problem with gathering evidence for conduct of hostilities violations — to include the crime of planning or launching a disproportionate attack — is that it is oftentimes difficult to penetrate the fog of war during combat, so it is equally difficult to reliably establish what occurred after the fact.<sup>436</sup> This is particularly true if the attackers<sup>437</sup> or defenders<sup>438</sup> were engaging in operations designed to deceive the other side.

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<sup>434</sup> If it is civil case, they might issue a *non-liquet* decision.

<sup>435</sup> ‘Trew: Do you still think you’d be difficult prosecute something like pillage or, you know, something that we just don’t do all that often?’

Participant: I think it would be, for a variety of reasons: it’s hard to get the evidence; the testimony of the involved people will be contradictory; the witnesses will be hard to locate and the circumstances will be obscure. In general, all these cases are hard to bring. Pillage might be an easier one, because the threshold is so high and despite the difficulty, the United States does bring these kinds of charges. In every armed engagement, there have been war crimes committed. It’s just a statistical fact that commanders have to bear in mind that when you send 18-year-olds into a dangerous situation and you get them excited and you give them guns, bad things are going to happen. You regret that, try to control it, you try and limit it and you try prosecute it, but as a statistical matter, you know that’s going to happen. Still, it’s difficult to bring these cases and I think that proportionality cases are among the hardest.’ Interview with Former US LOAC Policy Official (2).

<sup>436</sup> Bartels, 279; ‘Given the chaos typically governing armed hostilities, even military commanders themselves may not always be able to ascertain with certainty *ex post facto* whether any specific attack complied with the applicable rules of engagement, much less the principle of proportionality.’ Fellmeth 132.

<sup>437</sup> For example, the attacker can legally strike a target with little objective military advantage in order to divert the defender’s attention away from a more important target that is part of the attack as a whole. “An attack considered as a whole” ought not to be confused with the entire armed conflict, but could refer to a large air campaign. For example, a series of air attacks may be directed against military objectives in one zone — in anticipation of a military operation in another — as a ruse to deceive the enemy regarding the actual location of the intended operations (see Rule 116 (a)). Although the expected collateral damage to civilians or civilian objects resulting from the attacks might be excessive if viewed solely from the perspective of the advantage gained from individual target destruction, it must instead be considered in terms of the ruse’s value relative to the military operations elsewhere.’ *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 93.

<sup>438</sup> For their part, defenders can legally use ruses of war to deter attacks (provided they aren’t intentionally inviting the attacker to violate LOAC). ‘Article 37(2). Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.’ Protocol Additional to the

Gathering physical evidence of a disproportionate attack should be straightforward, but sometimes investigators cannot access the crime scene because the authorities who exercise control of the site refuse to cooperate or because it is simply too dangerous.<sup>439</sup> The longer investigators wait to access the site, the more opportunity there is for other actors to tamper with the forensic evidence or for it to be removed. The former ICTY official I interviewed stated that early on, the Prosecutor's Office had difficulty accessing some of the sites in the former Yugoslavia where crimes were alleged to have taken place, so investigators had to rely on information that could be gained from satellite photographs combined with witness testimony.<sup>440</sup> Compared to the richness of evidence that could be obtained by a site visit (e.g. shell fragments, explosive/incendiary material, internal effects of the attack on buildings), a satellite image may lack the detail needed to determine who launched the strike and for what reason. Witness on the ground can help, but witness memory tends to degrade over time and case take years to appear before a court.<sup>441</sup> Their testimony, particularly when describing the details of emotional events, can also be flawed since eye-witness memory is malleable, susceptible to suggestion after the fact.<sup>442</sup>

Even if physical evidence of a *prima facie* disproportionate attack, backed up by the testimony of witnesses on the ground can prove the *actus reus* for the crime, it is also necessary for a prosecutor to find evidence of the offending commander's criminal intent. Those with experience investigating<sup>443</sup>

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Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>439</sup> Carla Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY' (2006) 4 J of Intl Crim Justice 539, 551-552.

<sup>440</sup> Interview with Former ICTY Official. Similar comments were made in Interview with Richard Goldstone, Former ICTY & ICTR Chief Prosecutor (18 Aug 2016).

<sup>441</sup> Bartels, 280

<sup>442</sup> See generally: Elizabeth Loftus, 'Make-Believe Memories' [2003] American Psychologist 867. Furthermore, former ICTY Chief Prosecutor Del Ponte believed that it was difficult for witnesses to divorce their personal experiences from broader in-group narratives propagated at the time: 'Understanding cultural, language or historic factors that may exist when dealing with witnesses from the former Yugoslavia is another challenge. Their collective memory as members of an ethnic group and its portrayal by leaders and the media may be relevant to understanding how witnesses viewed the conflict.' Del Ponte, 552.

<sup>443</sup> 'Well, there are two things: there is the evidence of intent. That is always difficult. You have two ways, really: 1.) the perpetrator... admits it, willingly or unwillingly – he's talking in private and somebody records it... or else 2.) you have enough pieces and I'm not talking about the evidence of the crime, because the

or trying<sup>444</sup> conduct of hostilities crimes have stated that it is more difficult to find evidence of a commander's intent to plan or launch a disproportionate strike. The former ICTY defence counsel I interviewed worked on a case involving disproportionate attack and claimed:

I do think that the chief obstacle [to prosecuting proportionality] is again evidentiary. It's rare that the prosecutors are ever going to have the entire picture, unless you got a whistleblower or some sort of smoking gun in terms of evidence that was sitting in front of that commander. It's enormously difficult to fill in the military advantage side of the scale — to get a true reading of what this attack was going to accomplish for the attacker.<sup>445</sup>

Since forensic evidence may be sparse or difficult to obtain and witness testimony may be of limited reliability even if it is coming from a whistle-blower or someone with access to the commander, documentary evidence therefore becomes the lifeblood of an investigation into allegations of disproportionate attack. In my interviews, Former Chief Prosecutor for the ICTY, Richard Goldstone noted that many of the prosecutions at Nuremberg were able to proceed without much need for witness testimony because of the 'treasure trove' of documentation the investigators were able to collect from the vanquished Nazi state<sup>446</sup> and another former ICTY official recalled a similar event when Stjepan Mesić was elected president of Croatia:

[T]he new president of Croatia was our [former] witness and so all of a sudden, we started getting access to all kinds of Croatian documents. And, in fact, the first president of Croatia... Franjo Tuđman, had the Richard Nixon habit; he taped everything in his office and so we got copies of the tapes. So all of a sudden, we had a much easier way to document what was happening and, somewhat similarly, we got all kinds of information and insider witnesses and that sort of thing from the Yugoslavs as the country gradually shrank in size and as we got regime change there. So eventually, we had all kinds of evidence that could prove all kinds of things, but it certainly wasn't what we started with it certainly wasn't what we expected to have.<sup>447</sup>

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evidence that the crime has happened is one thing; the evidence that the crime happened intentionally is another. Intentionality is more difficult to prove. The two greatest challenges for me have been: concerned parties not accepting the evidence for political or economic reasons or not being able to gather sufficient evidence about exactly what happened. Then, of course, I'm not a prosecutor. I'm in another line of work — I prosecute in the court of public opinion. It's very different.' Interview with Amnesty International War Crimes Investigator. Similarly, in his reflections on the UN report regarding Operation CAST LEAD, Richard Goldstone stated that it was difficult for his team to establish the intent of Israeli forces in that campaign, because they were not privy to information that Israel only released after his report. Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes'.

<sup>444</sup> Bartels, 280.

<sup>445</sup> Interview with Former US JAG & ICTY Defence Counsel; similar statements about the difficulty of establishing intent were made in Interview with Former ICC Official, Interview with Garraway, Interview with Former US LOAC Policy Official (1).

<sup>446</sup> Interview with Goldstone.

<sup>447</sup> Interview with Former ICTY Official.

Even so, investigators and prosecution teams will run into difficulties getting cooperation from state actors,<sup>448</sup> particularly if they are investigating a government that is still in power. State actors may generate large amounts of documentary evidence, but they also might not be forthcoming with information about an attack, particularly if that requires offering up classified intelligence.<sup>449</sup> Furthermore, as Bartels notes, many of the cases heard at the ICC actually involve non-state groups which do not generate records the same way that state actors might.<sup>450</sup> Aaron Fellmeth argues that this reticence regarding the events leading up to an alleged disproportionate attack also extends to the way states dispose of cases of disproportionate attack in their own national disciplinary systems.

National legislation and most military manuals are a matter of public record, but many states have extremely secretive and closed military cultures that inhibit the gathering of information about their methods for ensuring compliance with the laws of war. This is especially so if, when the proportionality rule has been violated, the practical consequences take the form of informal or sub rosa sanctions or corrective measures, such as demotion, unpaid leave, reforms to classified procedures, or simply a private reprimand.<sup>451</sup>

Garraway argues that some of the secrecy is necessary, not merely to protect the reputation of the state or its agents, but also the lives of intelligence sources:

Trew: Do you suspect that it's the states fear of having an external body prosecute that's keeping them from being forthcoming or just the negative publicity that comes from having their eye gaze towards them?

Garraway: A little bit of both of those, but also something further as well: they don't want to release their intelligence, because they'd release their methods of intelligence and the sources of intelligence. I know that because in one country, ... A UN report was being made into a particular operation and this was an internal UN report and the country decided to cooperate with the report and it provided the UN investigation team with the intelligence that they had. A lot of the intelligence was HUMINT — the guys

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<sup>448</sup> In identifying the problems that International Criminal Courts have in enforcing ICL, Former ICTY President Antonio Cassese described how the ICTY President's office regularly complained to the UN General Assembly about the general lack of state cooperation with the mission of the court. Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 10.

<sup>449</sup> 'Obtaining documents containing, eg, the targeting decisions or orders to commit a violation is problematic because the armed forces will normally attempt to prevent these documents from falling into the hands of a third party. Furthermore, written documents by non-regular forces or militias rarely exist, if indeed at all' Bartels, 280; Similar statements were made in Interview with Former ICTY Official and Interview with Former US Policy Official & ICTR Official .

<sup>450</sup> Bartels, 280. Furthermore, Fellmeth suggests that this might be because non-state groups are trying to remain clandestine to avoid having their operations discovered by whatever state actor they are fighting. (p. 133)

<sup>451</sup> Fellmeth, 143.

disappeared. It was leaked within the UN and those guys were dead and that particular country said, 'never again will we release any intelligence to the UN'.<sup>452</sup>

Nevertheless, when provided in good faith, declassified material can help immensely to clarify the events surrounding an apparent case of unlawful attack even when such sensitive information has been redacted. As US Central Command's report on the *Kunduz Hospital Bombing* case shows, it is not necessary to divulge the exact specifications of certain pieces of equipment or the names of the individuals involved in the strike to fill-in the military's version of what happened.<sup>453</sup> Furthermore, the transcripts of the radio chatter that night gave both investigators and the public a way to determine what the aircrew or ground crew knew at the time and what their intentions were. When comparing that against what they should have known at the time, one can determine what could be considered reasonable conduct, given the circumstances. Likewise, it is technologically possible to record the goings-on in a military operations centre to provide investigators with a record of either criminality or a good-faith effort on the part of a military commander and there are procedures available to clear investigators to see the material or to provide them the information in redacted form.<sup>454</sup>

Even without documentation from those accused of launching an unlawful attack, one can infer a certain criminal intent if it can be proved that the

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<sup>452</sup> Interview with Garraway. Furthermore, expressing concerns regarding the use of intelligence at the ICTY, the United States proposed a strict non-disclosure policy for evidence submitted by states to the Court. In the original US proposal, not even the defendant could know the contents of intelligence given to the court if the state providing such information deemed it relevant to its national security. The rules that were eventually adopted by the Tribunal were not as strict as the ones that the US had lobbied for and they did require the prosecutor to turn over any evidence used in the indictment over to the defence. Laura Moranchek, 'Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY' (2006) 31 *Yale J Int'l L* 477, 482.

<sup>453</sup> *Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015.*

<sup>454</sup> In Interview with Former UK Commander, the participant and I speculated about the possibility of having a 'black box' style recorders for the ops room:

'Participant: 'We have the technical capability to do this now (it would be highly classified because of everything that's being sucked into them), but I'm sure we would have the ability to...

Trew: ...to declassify as necessary?

Participant: Absolutely. I mean, if you have a war crimes trial now...

Trew: ... you would only have the effects.

Participant: Yup, but if you went into the records, the logs, everything else that's been recorded, if there was a top secret discussion that went on, there would be a mechanism of clearing those people who needed to make the decision to look at that information or to declassify that information. There's a lot to be said for saying, "we are conducting live military operations, but we are conducting them, we believe, for the common good and there isn't any reason why everything we do shouldn't be recorded so that, if accusations are made subsequently, we can defend our people."

same commander was responsible for planning or launching a large number of apparently disproportionate attacks, or if it can be shown that a politician or high-ranking commander were responsible for allowing such attacks to occur as a matter of policy.<sup>455</sup> As Goldstone reveals, evidence of a pattern of attacks was key to building many of the cases at the ICTY:

Trew: So hypothetically, to go after the crime of disproportionate attack, do you suspect it would be easier if it were a pattern of widespread apparently disproportionate attacks all by the same commander as opposed to an individual incident?

Goldstone: Absolutely. That was certainly the position in the former Yugoslavia where one was looking at it in the context of a situation where military commanders were pretty much given a free hand and encouraged not to spare civilians if there was a good military reason for taking *any* action. I think that one has to have a look the general atmosphere and the general rulings taken by the most senior commanders — sometimes political in addition (or as an alternative) to military command.<sup>456</sup>

Similarly, under ICL, prosecutors could theoretically charge commanders whose attacks are reckless or who show a disregard for taking proper precautions if it can be shown that such attacks occurred as part of a systematic pattern of behaviour.<sup>457</sup> However, if this is the case, then it leaves one to wonder why the ICL regime makes a distinction between the war crime of disproportionate attack and murder as a crime against humanity.<sup>458</sup> The elements for that crime, as articulated in the Rome Statute, include:

Article 7(1)(a). 1. The perpetrator killed one or more persons. 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>459</sup>

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<sup>455</sup> Interview with Amnesty International War Crimes Investigator, Interview with Desmond Travers, Former UN War Crimes Investigator (Telephone 6 Sept 2016).

<sup>456</sup> Interview with Goldstone.

<sup>457</sup> 'Applying the articulation of the criminal recklessness standard in Blaškić, prosecutors would need to focus on awareness of a substantial risk of a criminal outcome. The paradigmatic case might be the very circumstance described by the Blaškić court itself, when a commander orders an action by soldiers he or she knows will likely engage in criminality. In a conduct of hostilities case involving questions of distinction and proportionality, the quintessential case might be the commander who had time to reflect but was simply indifferent to whether targets were military or civilian. *Prosecutors in conduct of hostilities cases also look to see if there is a pattern of targeting civilians is assessing whether there has been criminality.*' [emphasis added] Alex Whiting, 'Recklessness, War Crimes and the Kunduz Hospital Bombing' (*Just Security* 2016) accessed 9 May 2016.

<sup>458</sup> Robert Cryer has noted that the US representatives at the Rome Conference wanted all of the crimes listed in Article 8 to be committed as a matter of policy before they could rise to the level of war-crimes. However, this was rejected precisely because it blurs the line between war crimes and crimes against humanity. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* 269.

<sup>459</sup> ICC Elements of Crimes, 5.

Therefore, if there is value in holding commanders accountable for one-off disproportionate attacks, it stands to reason that the evidentiary burden should not be so high that it bleeds into another more serious crime.

### *Conclusions*

There are a number of legal and practical reasons why unlawful attacks in general and disproportionate attacks in particular are difficult to prosecute. At its core, the proportionality rule requires commanders to weigh civilian life and property against military advantage – two values which are not easily compared. Because of this, the drafters of the Additional Protocols and the Rome Statue seem to have given the commander an extra margin of appreciation in drafting the criminal version of the proportionality rule compared to the one found in the more regulatory-focused provisions of LOAC. In theory, accountability for negligent/reckless attacks could be achieved under a civil law regime, leaving the criminal version of the law as a way to try clearly excessive attacks where the commander expressed knowledge of the attack's disproportionate nature. However, this hasn't occurred in practice as there are few civil or tort law fora for hearing cases of *prima facie* disproportionate attack and though there exist a few such tribunals for trying criminal violations of the proportionality rule, the weak liability provisions stipulated for this rule stipulated by the law and the steep evidentiary burden on the prosecution make it unlikely that even serious violations of the criminal norm will end with a conviction. Without a reasonable chance of success, it is hard to imagine a prosecutor ever choosing to pursue a case of *prima facie* disproportionate attack, particularly when there are other crimes in the docket that are easier to prosecute. It is possible that the barriers to prosecution have arisen by coincidence, but many of them seem to be the direct result of state actions, such as: writing the regulatory version of the proportionality rule in a deliberately ambiguous way; advocating for an equally vague reasonableness test to determine what constitutes a violation; raising the burden of proof for the criminal norm; and simultaneously guarding access to evidence of the commander's intent. To be sure, as discussed in Chapter 2, the development of the law was an evolutionary process and those charged with drafting treaties or national

interpretations of customary law could not radically depart from the *lex lata*, as it stood at the time. Nevertheless, even within the framework of the law that existed in 1977 and certainly as it stands today, one could make a good case for including recklessness as a mode of liability for unlawful attacks. It is, therefore, possible that the inability to achieve accountability for the rules on proportionality and precautions in attack has as much to do with strategically-motivated behaviour on the part of states and prosecutors as it does with purely legal problems. In Chapter 4, I shall review the literature on the strategic choice perspective which has been used effectively to analyse when states comply with LOAC and suggest that a similar approach could shed light on why it has been difficult to achieve accountability for violations of these rules.

## Chapter 4

### Thinking Strategically About the Law

Despite being one of the central tenets of the law of armed conflict, the proportionality rule is infamously vague. However, rather than clarifying the rule to give prosecutors solid guidance on what constitutes illegal behaviour, the negotiators at the CDDH and the Rome Conference merely raised the standard of liability required to convict a commander of a violation of the proportionality rule as a matter of international criminal law.<sup>460</sup> Furthermore, the equally vague ‘reasonable military commander’ test used by both international and domestic courts could, in theory, be operationalised in a way that allows courts to distinguish mistakes from criminal actions.<sup>461</sup> However, to date, it has been invoked in a one-sided way, making it more of an exculpatory tool than a functioning test of criminality.<sup>462</sup> On top of this legal uncertainty, it is also a challenge to uncover evidence of a commander’s criminal mental state. While investigators can usually find evidence of the effects of an attack, any evidence that shows the commander’s intention is often hidden behind a wall of secrecy.<sup>463</sup>

On the face of it, each of these arguments for why the criminal proportionality rule is difficult to prosecute is convincing: the legal goods in question — military advantage and civilian suffering — are vague concepts;<sup>464</sup> one should indeed look at the commander’s intent as part of the elements of the crime of disproportionate attack; the accused should be given the benefit of the doubt when facts surrounding the case are not beyond all reasonable doubt; states oftentimes need to keep certain information classified on the grounds of national security. Furthermore, it is not entirely clear if precautions violations ought to indicate a commander’s reckless intent to launch a direct attack on civilians or a disproportionate attack. But taken individually, it ought to be possible to address each issue so the international community can achieve

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<sup>460</sup> See Ch 2 at note 204.

<sup>461</sup> See Ch 3 at notes 410-413.

<sup>462</sup> For examples, see Ch 2 at notes 228, 261, 238, & 273.

<sup>463</sup> See Ch 3 beginning at note 443.

<sup>464</sup> See Ch 3 at notes 365 & 430.

accountability for disproportionate or cavalier attacks while also respecting the professional competence of military commanders and recognising that mistakes are likely to happen in combat.

Nevertheless, the cumulative effect of these issues has been to insulate state actors from judicial scrutiny. Given the centrality of the proportionality rule in modern LOAC and the ubiquitous use of air power in modern warfare, if the function of the proportionality rule as a criminal norm is to promote accountability for gross violations of the corresponding regulatory norm, then one would expect that there would be at least one solid case of a commander being tried and convicted of a criminal violation. Or, at the very least, there ought to have been a robust attempt by international or domestic courts to weigh in on the problems that plague its application. If the barriers to successful prosecution for disproportionate attack are too high, then that would indicate that the criminal norm is merely decorative, serving no purpose above that of the regulatory norm.

Of course, the lack of prosecutions could reflect the broader dearth of war crimes cases, in general, but both international and domestic courts have managed to effectively try cases of direct attacks on the civilian population (a more serious crime)<sup>465</sup> and cases of looting (an arguably less serious crime).<sup>466</sup> Moreover, there is no shortage of possible test cases to choose from as HROs have documented numerous instances where the collateral damage from an attack was serious enough to warrant further investigation.<sup>467</sup> It is certainly true that all conduct of hostilities cases are difficult to prosecute,<sup>468</sup> but proportionality violations seem to be even more intractable than other rules in ICL.

Therefore, given the manifold difficulties with applying the criminal version of the proportionality rule, the major world powers may have intended for it to be dead-letter law. Without addressing the underlying strategy for why the law is written and enforced a certain way, even if HROs or a group of 'like-

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<sup>465</sup> See Ch 2 at note

<sup>466</sup> See Ch 2 at note

<sup>467</sup> See Ch 2 at note

<sup>468</sup> Interview with Former ICC Official

minded<sup>469</sup> countries could pressure states like the US or the UK into adopting a stricter *mens rea* for the crime of excessive attack, the latter could merely exploit other explicit and latent ambiguities in the law (like the reasonable commander test) or its enforcement regime to maintain their freedom to use air power without judicial scrutiny.

To explore the possibility that the lack of prosecutions for proportionality offenses is strategically motivated, it may be helpful to examine the how cases of disproportionate attack are adjudicated from the field of international relations (IR), specifically the strategic-choice perspective. The building blocks of this analytic framework are: 1.) the relevant actors' prior beliefs and preferences regarding the outcome(s) of their interactions; and 2.) the strategic environment, which describes the possible actions that actors can take to pursue their goal(s) and the external structures that actors use to gain information about others.<sup>470</sup> From these elements: the actors and strategic environment, one can model the dynamics behind a particular strategic interaction in a way that sheds light on a particular research question, regardless of the subject that is under investigation.<sup>471</sup> It remains just as relevant for understanding how trade ministers negotiate free trade agreements as it would for understanding why some countries comply with LOAC, while others do not.

### *Rationalist Apologetics*

To make predictions about how state leaders and other international actors make decisions, those working from a strategic-choice perspective assume that such actors are rational.<sup>472</sup> This is not to say that they are human calculators, or that they necessarily know what is in their self-interest in an objective sense, merely that, as a 'methodological bet', a methodological framework that assumes rationality on the part of international actors should accurately describe reality more often than one that assumes irrational decision

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<sup>469</sup> The 'like-minded' group of countries (those aligned with Switzerland) at the Rome Conference lobbied for strict interpretations of proportionality. Didier Pfirter, 'The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes' (1999) 32 Cornell Intl L J 499, 499.

<sup>470</sup> David Lake and Robert Powell, 'International Relations: A Strategic-Choice Approach' in David Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999), 8.

<sup>471</sup> *Ibid*, 5.

<sup>472</sup> Bruce Bueno de Mesquita, *Principles of International Politics* (Sage 2013), 6.

making.<sup>473</sup> To be considered rational, actors must have a set of preferred outcomes from a strategic interaction that are complete and transitive. By complete, I mean that they can express how each outcome relates to the others. For instance, in a possible set of outcomes, x, y, and z, a state leader could prefer x to y and can prefer y to z. By transitive, I mean that there is a logical consistency to the preferences; using the example above, the leader can prefer x to z, but not z to x.<sup>474</sup>

The strategic-choice perspective remains agnostic as to the content of actor's preferences and side-steps some of the grand debates in IR, like what constitutes a state's national interest.<sup>475</sup> Therefore, the approach is more a way of examining specific strategic problems in international relations, rather than a theory in its own right.<sup>476</sup> The core analytic tool of the perspective is game theory, which specifically addresses the way that actors try to achieve their preferred outcomes, given what they believe others will do.<sup>477</sup> By assuming rationality as a baseline condition and using the methodology of game theory, researchers working under the strategic-choice approach can make clear and parsimonious<sup>478</sup> predictions about questions in international relations which can be tested empirically.<sup>479</sup>

None of this is meant to discount the actual complexity of the real world. Indeed, those who adopt a strategic-choice approach understand that the phenomena under observation are often influenced by many variables which may be interacting with each other in chaotic (and therefore unexpected) ways, but by choosing to engage with some facets of strategic decision-making and not others, researchers are able to make their assumptions and logic clearer.

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<sup>473</sup> Lake and Powell, 6-7. However, it should be noted that at this stage, the supporters of the strategic-choice approach yield that they do not yet know what odds a bookie would assign this bet: 'In sum, the strategic-choice approach, like all research approaches, is really a series of bets about what will prove to be fruitful ways to increase our understanding of international relations. Some aspects of this approach will undoubtedly turn out more helpful than others. Indeed, some are likely to prove counterproductive. Unfortunately it is impossible to be sure ahead of time which of these bets will pay off. Future research will have to probe the boundaries of usefulness.' *ibid*, 20.

<sup>474</sup> Bueno de Mesquita, 7

<sup>475</sup> *Ibid*, 10.

<sup>476</sup> Lake and Powell, 6.

<sup>477</sup> Bueno de Mesquita, 29.

<sup>478</sup> *Ibid*, 41.

<sup>479</sup> Lake and Powell, 5.

James Rogers likens this sort of abstraction to the way that cartographers design maps.<sup>480</sup> The cartographer knows fully well that a map does not include every detail about the geography of a place and may, in fact, design several maps of the same place, including different details that are fit for different purposes. To include all the known details of the place (location of electrical cables, local bird migration patterns, and the water table depth) would clutter the map, making it difficult to use for navigation (but such details could be reintroduced as needed for an electrician, an ornithologist, or a builder). Such is the case with game theoretic modelling as well; the model is meant to be a useful abstraction, not the complete description of a political process. Furthermore, the strategic-choice perspective allows researchers to consider not only the historical path that lead to any particular equilibrium state in a strategic interaction, but also the counterfactual conditions.<sup>481</sup> This feature of the strategic choice perspective enables researchers to make predictions about what changes to the interaction would be necessary to change the actor's choices to a new equilibrium path.

Similarly, Jeffrey Dunoff and Joel Trachtman, argue that scholars could easily apply the insights gained from the related field of law and economics (L&E) to the study of LOAC and that doing so could complement more theoretically-complex doctrinal analyses.<sup>482</sup> Though the results of this sort of economic analysis may appear quite dull to legal scholars, Dunoff and Trachtman argue that nevertheless, there is value in making explicit what might be considered settled assumptions about the way the law functions:

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<sup>480</sup> James Rogers, 'A Primer on Game Theory' in James Rogers, Roy Flemming and Jon Bond (eds), *Institutional Games and the US Supreme Court* (Virginia UP 2006), 276-277.

<sup>481</sup> 'History provides the flow of events that can serve as evidence for or against competing explanations. Explanations, however, are not strings of facts. Explanation requires theory— that is, assumptions, logical connections between the assumptions, and implications derived from those logical connections.' Bueno de Mesquita, 36.

<sup>482</sup> 'L&E would seem at first to have little to say about the *lex lata* – what the law is. After all, an economist would see the determination of the law as a trivial matter: lawyers simply look it up. However, the determination of the law is neither trivial nor mechanical because it is not simply a matter of finding the law but – as critical legal theorists and American legal realists have long recognized – inevitably involves an element of *making* the law. Societies allocate a measure of flexibility to authoritative interpreters – often courts – overtly or covertly to legislate, under cover of interpretation, construction or otherwise.' [emphasis in original] Jeffrey L Dunoff and Joel P Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' *American Journal of International Law* 394, 398.

In many respects these techniques formalize, extend and contextualize insights that are familiar to most international lawyers. But this formalization is important — it allows us to focus on relevant variables, generate hypotheses, and, to some extent, empirically test those hypotheses. Furthermore, it provides a firmer and less subjective basis for argumentation than traditional international law analysis. It is less subjective insofar as it eschews simple natural law or epithet-based argumentation, and provides the capacity to render transparent the distributive consequences of legal rules. Perhaps most important to scholars, it furnishes a basis for a progressive research program built on shared foundations, one that will seek to answer research questions and move on, farther than endlessly address the same tired questions.<sup>483</sup>

Whilst it might not be surprising that the application of the law is susceptible to political influence (after all, the law is *created* through political processes), in some quarters, there is nevertheless a resistance to the idea of subjecting the study of international law to the sort of reductive strategic analyses favoured by political scientists. For example, Martti Koskenniemi expressed concern that:

‘[I]nterdisciplinarity’ often comes with a dubious politics. I am particularly thinking of the kind of ‘managerialism’ that suggests that international problems — problems of ‘globalization’ — should be resolved by developing increasingly complicated technical vocabularies for institutional policy-making... Managerialism wants to realize ‘actors’ (often identified as billiard-ball states) more or less unproblematic ‘interests’. For it, the objectives of institutional action are given and the only remaining questions concern their manner of optimal realization... For the managerialist, normative questions about the ends of action or about the right order between conflicting ends appear only in the language of ‘legitimacy’ that translates them into empirically manoeuvrable ‘feelings’ in the audience... The more one conceives of international law in those terms, however, the sillier it begins to look. The world’s causalities are too complex, the strategic simplifications too crude. The functional ‘interest’ is not a solid policy datum to ‘apply’ but an object of interpretative controversy, stable neither in place nor in time and just as indeterminate as the ‘rule’ that it was to replace — although of course accompanied by a different bias, that of the policy-science elite.<sup>484</sup>

Koskenniemi is correct that economic modelling can sometimes oversimplify the nature of a strategic interaction, but rather than dismissing the exercise outright, those working from the strategic-choice perspective would argue that the value of any individual model depends upon its ability to withstand empirical scrutiny. Therefore, even if a particular model is ill-fitting, that is no reason to abandon the perspective altogether.

His other critique of the perspective is apt and something which political scientists should keep in mind when studying international law through a strategic-choice lens. Historically, game theory has been advanced, not as a way to describe strategic interactions, but rather as a normative tool to help

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<sup>483</sup> Ibid, 395.

<sup>484</sup> Martti Koskenniemi, ‘The Politics of International Law - 20 Years Later’ (2009) 20 Euro J of Intl L 7, 15-16.

policy-makers make more rational decisions *ex ante*,<sup>485</sup> so the perspective's normative focus on maximising actors' 'utility' can be problematic when those actors' preferences are taken as an exogeneous feature of the problem under study. If efficiency is taken to be the highest good, then some outcomes which might shock the conscience can still be considered the 'right' outcome if the researcher ignores the moral implications of the actors' preferences and what actions are taken to achieve pareto optimality. In this study, I endeavoured to first explain why accountability for errant strikes is the right outcome and then I bring in game theory to explain how it might be possible to achieve it. My goal here is not to hold up strategic thinking as a virtue in itself. Rather, I show that it is something that constrains what is possible when evaluating different ways to promote greater accountability for violations of proportionality and precautions in attack.

#### *Actors, Their Preferences and the Strategic Environment*

Instead of focusing solely on the state as the unit of analysis, the strategic-choice perspective promotes a 'boxes within boxes' approach to understanding the interactions of actors across *multiple* levels of analysis.<sup>486</sup> However, it is up to the researcher to set the boundaries of their study *a priori*, selecting those actors which will be the most relevant to the issue at hand and aggregating features from lower levels of analysis where appropriate.<sup>487</sup> Often, researchers

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<sup>485</sup> 'Game theory has been used in international politics, as elsewhere, both to explain behavior and as a tool for improving the quality of decisions. The predominant focus in this volume, and thus for most of this essay, is on the use of strategic choice as an explanation for international politics. But to its progenitors and original practitioners, game theory has been a normative tool, one devised to make decisions more rational.' Authur Stein, 'Limits of Strategic Choice' in David Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999), 210-211.

<sup>486</sup> 'That actors are generally aggregates of more basic actors and that the appropriate level of aggregation depends on the question at hand means that the strategic-choice approach often resembles a collection of "boxes within boxes." In any given theory, a particular strategic interaction is isolated and explained, one hopes, by the relevant values of the four attributes defined above. In a single box, the preferences of an aggregated actor, for instance, are taken as exogenous, and their effects on choices and outcomes are examined. In a larger box, however, these preferences may themselves become the object to be explained. What is taken to be exogenous in one "box" or formulation may be endogenized or problematized in another. In some formulations it may be useful and insightful to take states and their preferences to be exogenous, whereas explaining these goals and interests.' Lake and Powell, 15. There is a similar agnosticism as to which actors ought to be the focus of study in the field of law and economics (L&E). Dunoff and Trachtman 406.

<sup>487</sup> Frieden, 46; 'Pragmatism is at the heart of the strategic-choice approach. It does not, for instance, privilege one group of actors over another. Which actors are relevant and must be included in the analysis of a specific problem de pends on the question at hand. Even so, there is no *a priori* way to know which

will examine the pressures placed upon individuals in order to show how personal motivations influence global politics.<sup>488</sup> In this study, the most relevant actors will be prosecutors and officials from a state that regularly uses air power. This is because these individuals have historically had the most direct impact on how the law on proportionality and precautions in attack was created and applied.<sup>489</sup> By prosecutors, I mean those with the ability to pursue or defer prosecution of an accused war criminal, in either international or domestic courts. By state officials, I mean those officials of a state with the ability to influence that state's war crimes policy. I make an added assumption for my analysis that the state official represents a country that regularly uses air power, because it is officials from those states who seem to be most threatened by the imposition of stricter accountability mechanisms for targeting violations.<sup>490</sup>

Along with preferences, actors have beliefs about other players and about the strategic environment<sup>491</sup> in which they find themselves. If an actor is reasonably certain about how to interact with others in a given game and about how those actors will, in turn, will respond to them, then it is easy for them to form a strategy,<sup>492</sup> that will allow them to maximise their expected utility from the interaction.<sup>493</sup> However, uncertainty over the rules of the game or the intentions of other actors makes it difficult to choose one particular course of action over another. An actor's beliefs are thus shaped by the degree of this uncertainty

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actors to include. Choosing the actors in a theory is a pragmatic judgment the researcher makes about what is likely to prove a fruitful way to analyze the issue at hand.' Lake and Powell, 34.

<sup>488</sup> 'Three principles guide the strategic perspective and its specific application, the selectorate theory, on which we will focus much of our attention. The three core principles are as follows:

- The actions that leaders take to influence events in the international arena are motivated by their personal welfare and, especially, by a desire to stay in office.
- Leaders define the national interest to coincide with their personal interests. International relations cannot be separated from domestic politics. Every foreign policy action is undertaken in the shadow of the domestic political consequences the action is expected to produce. Therefore, if a foreign policy is expected to achieve beneficial consequences for a nation in the long term but in the short term will result in the ouster of the leader, then that policy will not be pursued.
- Relations between nations and between leaders are driven by strategic considerations.

As such, foreign policy decisions are designed to influence international affairs and the leader's well-being. To be effective in this, foreign policies must be chosen with an eye toward the reaction they will create among friends and adversaries.' Bueno de Mesquita, 28-29.

<sup>489</sup> See generally, Chapters 2 & 3.

<sup>490</sup> I discuss this at greater length in Ch 5, starting at note 560.

<sup>491</sup> In game theory, the 'strategic environment' describes the structure of the game that best describes the strategic interaction under study. This includes the possible strategies (or moves) available to the actors and how much each actor knows about the intentions of the other. Frieden, 45.

<sup>492</sup> That is, a path through the game.

<sup>493</sup> Expected utility is the value that an actor ascribes to a particular outcome in the game.

and by how they judge the behaviour of the other actors.<sup>494</sup> For example, if after playing several games of chess against someone who always makes the same opening moves, one might develop a belief about the opponent's skill level. This belief allows that player to adapt their strategy to best deal with the opponent in subsequent games.

Once the model has been built, one can then change the parameters which govern the actors' expected utility or those which define the strategic environment in order to see how the interaction would logically progress under different counterfactual situations.

### *Strategic Models of LOAC Compliance*

To date, the most complete analysis of LOAC using the strategic-choice perspective can be found in the work of James Morrow, who has argued that the law does affect the behaviour of actors during wartime, but not always in the ways that traditional IR theories would have expected. A question about whether a state will follow LOAC, for example, would not be best understood by examining how powerful that state is in relation to its enemy, or whether the state has internalised international human rights norms.<sup>495</sup> Instead, he claimed that the law creates common conjectures about the way that the 'game' of war ought to be played. The signing of international treaties is strategic signalling tool, screening out those who will never play by the rules.<sup>496</sup> National leaders then fight wars either according to the law or they adjust their strategies to deal with the effects of the law. Therefore, even if state leaders choose to violate the law, they do so *knowing which behaviours* will likely provoke a response from the enemy, domestic audiences and other actors in the international sphere. Furthermore, they might even have a good idea about what those responses will be.<sup>497</sup> The insights gained from Morrow's analysis are intuitive in many

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<sup>494</sup> James Morrow, 'The Strategic Setting of Choices: Signalling, Commitment, and Negotiation in International Politics' in David Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999), 84; Lake and Powell, 11.

<sup>495</sup> Morrow, *Order within Anarchy: The Laws of War as an International Institution*, 11-14.

<sup>496</sup> James Morrow, 'The Laws of War, Common Conjectures, and Legal Systems in International Politics' 31 *The Journal of Legal Studies* S41, S48-S50.

<sup>497</sup> Morrow, *Order within Anarchy: The Laws of War as an International Institution*, 16-19. 'Common conjectures set standards of acceptable behavior, prescribe appropriate and inappropriate responses, create anticipations about the behavior of others, allow the actors to comprehend each other's actions, and

ways, but could be considered problematic from a legalist perspective, particularly one that holds courts to be independent actors. This is not to say that legal reasoning is invalid or that it holds a subordinate role to politics — only to say that strategic considerations set the boundaries of how far power is willing to pay tribute to reason.

In war, as with any strategic activity, common conjectures are necessary for creating expectations about how actors will respond to different signals in a given game.<sup>498</sup> For example, if two people are playing chess, both players know that the knight can only make L-shaped moves. It allows people who have never spoken to each other or who speak different languages to nonetheless have a mutual understanding of what behaviour the other player is expecting from them when they move their knight. A body of law may have different sources: shared cultural expectations, pre-negotiated treaties or organically arising custom,<sup>499</sup> but the function of the law in Morrow's view is the same—it serves as a way for states to plan their strategies around a common conjecture. His analysis of LOAC compliance identifies who the relevant actors are, what games are being played and what equilibrium states arise after the same actors play a game over time to study compliance with the law at national and individual levels.

At the level of the states, a state leader must consider the domestic costs of non-compliance with the law, even if pursuing a policy of non-compliance might give the state an advantage against the enemy. This is a more acute concern for democratic leaders, than for autocratic ones, because the former must answer to domestic coalitions who wish to see the leader live up to

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can differentiate the social roles of the actors even when they have no differences in their capabilities. This range of possible effect covers much of the role of norms and identities in international politics.' *ibid*, 24.

<sup>498</sup> *Ibid*, 8-16.

<sup>499</sup> Morrow explains that common conjectures can be taken as a cultural given, they can be negotiated ahead of an interaction, or they can arise organically, as actors interact with each other: 'All three sources are important in explaining how international law develops. Custom and precedent emerge from politics over time. The understandings of appropriate conduct come from prior interaction where the consequences of inappropriate conduct can be seen and alternative measures for controlling such conduct tested over time. Such understandings alone rarely suffice to create binding law; customary international law unsupported by a treaty lacks both explicit rules and public acceptance of its principles. Negotiation of a formal treaty creates those rules, and public ratification creates the common knowledge of which states accept those obligations. International law aids the players in their expectations about how one another will act, and so helps to bring order to international politics.' *ibid*, 283.

international agreements (or who worry about the effects of enemy reprisals on their fellow citizens). The latter have more freedom of action to ignore LOAC because they only need to worry about the law if they are concerned that enemy reprisals will significantly affect their war efforts.<sup>500</sup> However, despite the general trend of LOAC away from reprisals,<sup>501</sup> Morrow warns that reciprocity is a key ingredient for LOAC compliance. Unilateral restraint by one party to a conflict provokes more violations on the part of the other.<sup>502</sup> In the absence of other mechanisms in the offending country, such as audience costs or reliable post-bellum prosecution, reprisals may be the only reliable way for a state to inflict costs on its enemy that are high enough to overcome the payoffs from the enemy's violations.

Compliance is not just an issue for state leaders. Rather, one must also look at the incentives for following the law at each link in the chain of command. Although the leaders of a state may have decided that it is in their best interest to comply with the law, Morrow claims that the 'cruel logic of [the] battlefield — kill or be killed' creates different games that can induce soldiers to violate the law under certain circumstances.<sup>503</sup> Specifically, he sees compliance with the law at this level as a function of temptation and vulnerability. Combatants may violate the law because they are tempted to achieve better results on the battlefield for themselves and/or may do so because they feel vulnerable under their current rules of engagement and wish to perform an action that they feel will protect their own lives. In this model, the preferred outcomes of the state leadership do not count as much as the short-term (but personally very important) interests of the combatants. If the temptation to commit violations is

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<sup>500</sup> Ibid, 113-116.

<sup>501</sup> Rule 145 of the ICRC CHIL study states 'Where not prohibited by international law, belligerent reprisals are subject to stringent conditions.' Rules 146-148 go on to specify further restrictions to the use of reprisals, including their use against protected persons and protected objects and their use during non-international armed conflict. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 513-529. Morrow agrees that the law on the use of reprisals has shifted: 'The understanding of law of war has turned against reprisals, now seeing them as illegal violations rather than tolerable retaliatory enforcement.' Morrow, *Order within Anarchy: The Laws of War as an International Institution*, 56.

<sup>502</sup> Morrow, *Order within Anarchy: The Laws of War as an International Institution*, 144. Just as with the Prisoner's Dilemma, the tit-for-tat strategy was the only way of enforcing the pareto efficient solution which could induce both players to cooperate with each other in the iterated version of the game. Otherwise, if one player could consistently gain an advantage by defecting against a 'constant angel', they would.

<sup>503</sup> Ibid, 70-71.

high because it gives the soldiers an immediately useful result, and the risk of retaliation is low, then violations will increase. Likewise, if the combatants on one side of the conflict feel vulnerable to violations from the other side, then they will also violate the law in order to protect their own forces.<sup>504</sup> The main mechanisms keeping troops from violating the standard is the degree to which soldiers are monitored and punished by their own chains of command<sup>505</sup> and the possibility of retaliatory violations from the other side.<sup>506</sup> Zooming back out to the level of the state, leaders are making their own decisions to either follow or disregard LOAC. Violations<sup>507</sup> by individual troops introduce 'noise' into the informational structure of these higher-order games, making it difficult for leaders to signal their true intentions. This sometimes forces reciprocal agreements to break down even though it was in neither party's interest for them to do so.<sup>508</sup>

In his final assessment, 'successful law' Morrow argues, 'particularly at the international level, requires a marriage of moral principles with strategic logic if actors are to follow those principles'.<sup>509</sup> His analysis focused mostly on

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<sup>504</sup> Ibid, 71-72. A sobering example of how vulnerability increases the propensity to bend the law was documented in a Human Rights Watch report on the large number of Afghan civilians killed as collateral damage in 2007 – 321, compared with 116 in 2006 (p. 13): 'Broadly speaking, airstrikes are used in two different circumstances: planned strikes against predetermined targets, and unplanned "opportunity" strikes in support of ground troops that have made contact with enemy forces (in military jargon, "Troops in Contact" or TIC). In our investigation, we found that civilian casualties rarely occur during planned airstrikes on suspected Taliban targets (one in each of 2006 and 2007). High civilian loss of life during airstrikes has almost always occurred during the fluid, rapid-response strikes, often carried out in support of ground troops after they came under insurgent attack. Such unplanned strikes included situations where US special forces units – normally small numbers of lightly armed personnel – came under insurgent attack; in US/NATO attacks in pursuit of insurgent forces that had retreated to populated villages; and in air attacks where US "anticipatory self-defence" rules of engagement applied.' *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan* (2008), 3-4. In this case, ISAF forces were less sensitive to civilian casualties because they felt vulnerable from violations by the Taliban (e.g. not wearing uniforms, blending in with civilians in urban environments). Therefore, compliance with LOAC is not merely a matter of state commitment to the principles of the law, but it is also a matter of military discipline. The state must be willing and able to compel its forces to abide by the law, even when it is not in the combatants' interest to do so.

<sup>505</sup> Ibid, 74-75.

<sup>506</sup> Ibid, 72-74. Morrow was unconvinced by the constructivist claim that compliance could be induced by having actors internalise the provisions of LOAC: 'Constructivism does not provide a way to determine when actors will violate norms or what degree and level of violations renders norms and identities impotent... [T]o explain when the laws of war have been violated and when they have been observed... requires both the shared understanding of the norms of such conduct and the calculations of state interest in the light of those norms.' *ibid*, 12.

<sup>507</sup> This also includes mistakes that have the appearance of violations, such as striking a misidentified civilian apartment complex when the targeteers believed it was an enemy command & control building.

<sup>508</sup> Morrow, *Order within Anarchy: The Laws of War as an International Institution*, 67-70.

<sup>509</sup> *Ibid*, 18.

the way in which the strategic interactions of state actors affect compliance with the law of armed conflict, claiming that LOAC as an institution must be self-enforcing.<sup>510</sup> He was, therefore, far less sanguine about the ability of international courts to meaningfully contribute to LOAC compliance:

Prosecution is primarily a threat to leaders who lose a war or to those in law-bound states that are willing to turn the accused leader over to the ICC. The former are unlikely to be deterred from violations that they think will help them win, thereby insulating themselves from the threat of prosecution. The latter are leaders of democracies that have been willing to comply with their treaty obligations even unilaterally. *The prosecutions then are likely to be autocratic losers and democratic leaders who engage in legally questionable behavior, acts that some would not consider violations and so could justify under their treaty obligations.* Both of these types of cases can be seen as politically motivated rather than the pursuit of neutral law; the former because the losers but not the winners are brought to court, the latter because some will accept those leaders' public justifications of their acts as legal.<sup>511</sup> [emphasis added]

Given that the ICC has been accused of selectively investigating and prosecuting African leaders,<sup>512</sup> some of whom could be considered autocratic or at least illiberal,<sup>513</sup> Morrow may be correct about the fact that the courts only manage to go after the unsuccessful autocrats of the world. But, do the courts also go after the leaders of democracies, particularly powerful democracies, who engage in legally questionable behaviour, such as ordering or conducting disproportionate strikes? The case law presented in Chapter 2 suggests that they do not. Perhaps because he saw international courts as non-actors (or indeed as being actively harmful to the goal of ensuring LOAC compliance), Morrow did not look at strategic interactions happening between such courts and the states. However, modelling these interactions could prove to be fruitful, particularly if they reveal under what conditions a court might actually prosecute a democratic leader for a legally questionable action.

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<sup>510</sup> Ibid, 2.

<sup>511</sup> Ibid, 304.

<sup>512</sup> See generally: Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court' (Chatham House, London, July 2013).

<sup>513</sup> Looking through the 'Freedom in the World' database maintained by Freedom House, Sudan, the DRC and Libya all scored 6 or 7 (on a scale of 1-7, countries that score 7 are the least free), so I think it is safe to assume that many of the individuals under investigation by the ICC are coming from autocratic regimes. The indictment of Kenyan (score of 4) government officials does, however, buck this trend. 'Freedom in the World 2015' (Freedom House, 2015) <<https://freedomhouse.org/report/freedom-world/freedom-world-2015#.VqeGFImWHL8>> accessed 26 Jan 2016.

### *Strategic Models of Court Actors*

There is a rich literature in L&E and the strategic-choice perspective on the way in which judges will decide cases for strategic, rather than purely legal reasons. For instance, there has been much written on how U.S. Supreme Court justices are influenced by other actors in the balance-of-powers system. Theoretically, if justices' decisions were to provoke the ire of the legislature or presidency, the other branches have constitutional checks that they could deploy against the Court.<sup>514</sup> Several studies have indeed shown that justices tend to defer to other branches of government when exercising judicial review<sup>515</sup> and they sometimes even adjust the content<sup>516</sup> of their decisions based on what they expect the other branches of government might do in response. Moreover, judges from international courts have likewise deferred to the court's member states (which supply the court with a budget and legitimacy) in their judicial decisions, unless there are domestic interest groups which can support the work of the court in the face of state pressure.<sup>517</sup>

Looking specifically at ICTs, there is a nascent, yet growing literature on the role that strategic considerations play in the decisions of actors in these types of international courts as well. The studies conducted so far have tended to focus on the ability of ICTs to deter atrocious conduct on the part of state leaders. Dan Sutter, for instance, claimed that the mere threat of ICC sanctions

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<sup>514</sup> James Rogers, 'Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction' (2001) 45 *American J of Poli Sci* 84, 91.

<sup>515</sup> For instance, see: *ibid*; Andrew Martin, 'Statutory Battles and Constitutional Wars' in James Rogers, Roy Flemming and Jon Bond (eds), *Institutional Games and the US Supreme Court* (Virginia UP 2006); Jeffrey Segal, Chad Westerland and Stefanie Lindquist, 'Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model' (Empirical Legal Studies Conference, New York, 7th Nov 2007); Tom Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy' (2009) 53 *Am J of Poli Sci* 971.

<sup>516</sup> For instance, see: Bryan Marshall, Brett Curry and Richard Pacelle, 'Preserving Institutional Power: The Supreme Court and Strategic Decision Making in the Separation of Powers' (2014) 42 *Politics & Policy*.

<sup>517</sup> 'The tipping point analysis suggests that courts respond to the environment they are in, letting the preferences of their interlocutors largely determine their level of activism. The ECJ [European Court of Justice] went far beyond prevailing legal interpretations, filling in legal lacunae with inferences based on the preamble of the Treaty, and the direct applicability of European law. The ECJ found support for these novel interpretations within an advocacy movement that included a small number of law professors, government officials, lawyers and national judges...The ATJ [Andean Tribunal of Justice], by contrast, has not received the support of legal advocacy networks or national judiciaries. We looked for Andean analogues of the academics, attorneys, and interest groups who spearheaded European legal integration. We identified a few legal entrepreneurs within the Andean system, but no infrastructure or institutions to connect them to each other or to a larger pro-integration movement.' Karen Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics' in Peter Hall *et al.* (eds), *Constructed Interests: The Process of Political Representation in a Global Age* (Cambridge UP 2011), 8-9.

was enough to cause leaders to reconsider whether it would make sense to commit atrocities against their own populations to stay in power<sup>518</sup> and as with Morrow's analysis of LOAC generally, some scholars such as Michael Gilligan<sup>519</sup> and Nada Ali<sup>520</sup> have argued that the ICC regime<sup>521</sup> may be *self-enforcing*, requiring no special action on the part of the prosecutor to be effective. Gilligan suggested that without methodological rigour, it had been difficult for scholars to evaluate whether the ICC was capable of deterring leaders from committing atrocities:

While the modal opinion in legal journals probably supports the creation of the ICC, the Court has been the object of virulent criticism from both legal scholars and policymakers. Unfortunately neither the Court's proponents nor its detractors have been particularly rigorous in how they have made their arguments, so it is difficult to tell if the disagreement stems from faulty logic or simply from differences in unstated assumptions.<sup>522</sup>

Therefore, he constructed a game-theoretic model of a possible interaction between the court, a criminal state leader *and a third-party willing to offer the leader amnesty*, should they wish to 'retire' somewhere away from their enemies. Normally, after a leader commits an atrocity, they could either try to stay in power or flee to another country, if offered asylum. The third-party country, in seeking to shore up the instability caused by the criminal leader, may be willing to offer them asylum as an incentive to get them to step down (and presumably stop the abuses which are causing the instability). However, if they try to stay in power, there is a chance that they might be deposed and given a severe punishment by the opposition. However, with the ICC in play, a criminal leader may then choose between staying in power, seeking asylum or

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<sup>518</sup> Sutter argued that if a leader has not yet committed one of the crimes listed in the Rome Statute (whichever crime it happens to be), they may be persuaded against doing so if the probability and severity of the punishment outweighed the expected utility of committing the crime. Paradoxically, though, if the leader has already committed a crime, then the threat of ICC sanctions may merely cause the leader to commit more crimes to stay in power, thereby avoiding punishment by the Court. Daniel Sutter, 'The Deterrent Effects of the International Criminal Court' in Stefan Voigt, Max Albert and Dieter Schmidtchen (eds), *Conferences on New Political Economy: International Conflict Resolution*, vol 23 (Mohr Siebeck 2006), 7-24.

<sup>519</sup> Michael Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model for the International Criminal Regime' (2006) 60 *International Organization* 935.

<sup>520</sup> Nada Ali, 'The Effects and the Effectiveness of the International Criminal Court: A Game-Theoretic Analysis' (Ph.D. Thesis, University of East Anglia Law School 2014).

<sup>521</sup> I use the term ICC regime to include both the court and its associated legal framework, which includes the Rome Statute and any vehicles which incorporate the provisions of the Rome Statute into domestic law.

<sup>522</sup> Gilligan, 936.

surrendering to the ICC, with the understanding that the punishment meted out by the ICC will be less severe than if they are deposed by the opposition. *This, in turn, changes the strategy of the country that was going to offer the criminal leader asylum.* The third-country knows that a criminal leader, with no offers of asylum and rebels at the gates, will be inclined to turn themselves in to the ICC. If they do turn themselves in, this does not cost the third-country anything. Therefore, the third country will only accept the asylum request of those stubborn criminal leaders who find themselves at the point where they are confident enough in their chances of staying in power that they will not surrender to the ICC, but they are not so confident in their chances of staying in power as to risk being deposed.<sup>523;524</sup>

Even without a police force to carry out its arrest warrants, Gilligan believes that the ICC regime can induce some criminal leaders to turn themselves in and that the mere existence of the court may prevent a leader from committing crimes in the first place, because they know that they won't be granted asylum as readily as they might have been in the past and there is a possibility of punishment from both the Court as well as the opposition.<sup>525</sup>

Critiquing Gilligan's model, Ali similarly examined whether the ICC regime could successfully prevent leaders from committing atrocities in internal conflicts. However, breaking with Gilligan's model, she looked at how the existence of the ICC might also affect the behaviour of opposition group leaders. Since the ICC would be just as likely to prosecute opposition leaders for committing atrocities as state leaders, rebels must factor in ICC prosecution as a possible cost associated with rebelling. If a rebel leader does not believe that the opposition forces are strong enough to win the conflict without committing its own atrocities, then they can expect to incur a cost from the ICC. The strength and likelihood of this cost must be compared against the expected utility the rebels hope to gain by seizing power. If the likelihood of post-regime-

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<sup>523</sup> Put more formally: the leader's expected probable value for 'retiring' to a third-country is the same or greater than the expected probable value for remaining in office.

<sup>524</sup> Gilligan, 943-951.

<sup>525</sup> Gilligan cites the large number of indictees who surrendered to the ICTY as evidence in favour of his model. Ibid, 953.

change prosecution is too high, the opposition may choose not to rebel. This, in turn, changes the incentives for the state leader that Gilligan described in his model. Without the rebels at the gates to motivate the leader's departure from power, they are less likely to surrender to the ICC or to seek asylum elsewhere, thus motivating them to stay in power. Practically, this means that having the ICC in play may perversely incentivise state leaders to commit more atrocities than they would in the absence of the court, because those leaders know that weak opposition groups (i.e. groups that must commit atrocities to win a conflict) will come under the prosecutor's gaze if they win the conflict, so the opposition may therefore choose not to rebel in the first place, thereby removing a potential cost associated with committing atrocities described in Gilligan's model.<sup>526</sup> Therefore, depending on what type of opposition the criminal leader thinks they are facing (i.e. strong or weak), it may be in the state leader's interest to either:

- refrain from committing atrocities, because it can expect a strong enough punishment from the strong opposition or the ICC; or
- commit atrocities, because a weak opposition will not launch a rebellion in the shadow of future ICC punishment and without that rebel pressure, the state leader will not have an incentive to surrender to the ICC.

If, on the other hand, the opposition is strong enough to fight without committing their own atrocities or the punishments meted out by the ICC are calibrated to account for the efficacy of the opposition, then Gilligan's model should work as expected.

Besides accounting for the possibility that the existence of the ICC regime would change opposition group behaviour, Ali also created a separate principal-agent model to examine the likelihood that subordinate criminals will provide high-quality evidence against their bosses in exchange for leniency from the court. As discussed in Chapter 3, one of the difficulties that prosecutors face when prosecuting cases of disproportionate attack is that they must acquire testimony from witnesses near the commander or other insider information that can confirm the commander's criminal intent to cause

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<sup>526</sup> N. Ali, 93-95.

excessive collateral damage.<sup>527</sup> The ICC might therefore be able to prosecute more high-ranking individuals for command responsibility than they otherwise might by offering the right incentives for lower-ranking offenders to testify against their bosses. However, those incentives should not be so high as to change the 'price' of committing an offense on behalf of their boss.<sup>528</sup> The boss's incentives change, based on whether such a leniency programme makes the subordinate offender's defection public. If the prosecutor reveals the defection, leaders will likely retaliate against the defector, changing the subordinate's costs associated with defection, so they will be less likely to report the leader. However, if the prosecutor does not reveal the subordinate's defection, the leader will not have the information needed to retaliate against the subordinate who defected and will instead go after a random subordinate.

Based on the logic of her model, Ali argues that the ICC can discourage atrocities by raising the costs of committing an atrocity for the leader, because it is more likely that a leader will be convicted if there is a post-regime-change trial. This, in turn, means that the leader must pay their subordinates more to ensure they will participate in the criminal enterprise, given they must factor in the costs associated with possible arbitrary retaliation from their boss down the road, if they get caught. If these combined costs exceed the benefits associated with committing the atrocity, then the leader will choose not to engage in such conduct in the first place.<sup>529</sup> Ali also believes that the existence of a confidential leniency programme might also incentivise subordinates to collect high-quality information about atrocities *as they occur* to hedge against prosecution down the road.<sup>530</sup> Therefore, by merely looking at the costs and benefits incurred by a small number of actors (the ICC, the subordinate and the leader), making a small number of decisions (offer a leniency programme or not; collect info about atrocities/defect against leader or not; commit atrocities or not), Ali could

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<sup>527</sup> See Ch 3 at note 445. (This is my own connection to show the relevance of this literature to the present study. Ali used a generic leader accused of committing any of the RS crimes, rather than a military commander, per se.)

<sup>528</sup> That is, low-ranking offenders should not be encouraged to commit atrocities with the expectation that the ICC will give them a slap on the wrist in exchange for evidence against their bosses.

<sup>529</sup> N. Ali, 158-162

<sup>530</sup> Ibid, 194.

analyse the possible repercussions of several counterfactual paths through a decision tree to show under what conditions it might be beneficial for the ICC to offer leniency to low-ranking criminals.

To examine how an ICT might lure or compel indictees to appear before the court, Emily Ritter and Scott Wolford examined the only unilateral tool that courts have which might affect the behaviour of the accused: offering pre-arrest incentives to surrender.<sup>531</sup> They envisaged the interaction between indictees and prosecutors as a bargaining game and defined three equilibria to determine how the game would logically proceed if the court were to offer varying levels of leniency to entice the indictee to secure their surrender. In the 'high leniency' equilibrium of the game, they set the indictee's cost of surrender so low that any indictee would turn themselves over to the court rather than remain at large (and risk of being caught by one's enemies). A court may be willing to sacrifice tough justice to get a full historical account of past atrocities or to be seen as pursuing a full docket of cases, thus justifying their institutional maintenance costs. However, the court's efforts would end up incentivising crime because the payoffs of committing a crime and surrendering to the court would end up outweighing the payoffs of committing no crime at all. In the 'mid-leniency' equilibrium, the court would offer only as much incentive to the indictee as would be necessary to balance out the indictee's incentives of remaining at large. To avoid making offers that are too low, the 'mid-leniency' court would issue fewer warrants; instead, they would only target those individuals whose incentive to remain at large matched an acceptable bargain for the court. Finally, in the 'no-leniency' equilibrium, the court does not bargain with the fugitive at all, offering only a full sentence if the indictee is tried and found guilty. In response, the fugitive remains at large with the only pressure to surrender coming from third-party actors. This court would issue a high number of indictments with the expectation that only a few individuals will be brought before the bench, but it does not incentivise crime in the same way that the 'low-leniency' court does.

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<sup>531</sup> Emily Ritter and Scott Wolford, 'Bargaining and the Effectiveness of International Criminal Regimes' (2012) 24 *Journal of Theoretical Politics* 149, 149.

A court's type could be determined endogenously, by looking at the incentives of the court either to appear strict or to appear to have a full docket, or set exogenously by its institutional mandate. The latter is the case with the ICC, which has no authority under its mandate to offer pre-arrest deals. Ritter and Wolford suggest that this could be thought of as a signal to potential criminals about its willingness to pursue only strict sentences.<sup>532</sup> Formalising this game yields three important benefits for those researching court-indictee interactions. Firstly, it sharpens the logic of an argument, forcing the researcher to define precisely what is being held constant, what variables are of interest and the exact relationship between the variables in a game. Secondly, it also allows researchers to explore counterfactuals in a rigorous way. The ICC does not currently allow for pre-arrest bargaining, but by looking at the outcomes of the bargaining game at different equilibria, one can be reasonably confident about what would happen if it were to allow it. Finally, it also allows the researchers to develop testable hypotheses based on the model which can be explored empirically.<sup>533</sup>

Ritter and Wolford also developed a model of state-indictee interaction to complemented their earlier work on court-indictee interaction. They envisage this interaction as an iterated two-stage game. In the first stage, an indictee can either surrender to the court upfront or choose to remain at large. Then, in the second stage, if the indictee remains at large, a state authority must determine whether they should pursue them. The state authority will only do so if the anticipated political payoff of successfully apprehending the indictee outweighs the material and political costs of the effort. Through backwards-induction, one can then predict if the indictee, who is anticipating the costs of successfully matching the state's apprehension efforts, will consider it more advantageous to surrender to the court upfront or remain at large. Since the game is iterated, the actors are constantly assessing both their own costs and payoffs and those of their opponent. Through their analysis, Ritter and Wolford derived several

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<sup>532</sup> Ibid.

<sup>533</sup> Even counterfactuals can be open to empirical scrutiny through 'what-if' style interviews or experimentation.

testable hypotheses. Some seem quite intuitive. For example, they claim that the probability that states would apprehend indictees or indictees would surrender themselves to the court would increase when domestic support for the court's work is high or when international incentives to cooperate with the court are high. Furthermore, they reason that capture or surrender is more likely when the indictee is accused of multiple counts of international crimes. This is because indictees with fewer charges levelled against them may be more controversial targets for state actors to pursue and it may be difficult to secure a conviction against indictees with fewer charges; therefore, the political costs to the state are higher *vis-à-vis* other indictees with more charges. Moreover, indictees are more likely to be caught or surrender whenever they are charged with participation in crimes, rather than command responsibility. This is because those bearing command responsibility are more likely to have resources which allow them to evade the state authorities, which decreases the costs of evasion for the indictee and correspondingly increases the cost of pursuit for the state.

Compiling a database which included the Case Information Sheets of 144 ICTY indictees, Ritter and Wolford could then test these hypotheses by showing how long each indictee could remain at large. Indeed, they found that general support for the idea that democratic institutions in a state increased the chances that an indictee would be caught or would surrender, as did increased international pressure on a state.<sup>534</sup> Furthermore, as predicted, those who were accused of having minor roles in atrocities were more likely to surrender or be arrested opposed to those who bore command responsibility for them. Likewise, those who had more counts of crimes levelled against them were more likely to be caught or to surrender, but this was only the case for war crimes rather than genocide or crimes against humanity (suggesting again that those who commit bigger crimes have more resources to evade). However, Ritter and Wolford were unable to find evidence to support the hypothesis that international

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<sup>534</sup> They used the Unified Democracy Score to approximate the level of support that an international court would receive from a particular state. Emily Ritter and Scott Wolford, 'State Cooperation with International Criminal Tribunals: An Investigation of International Warrant Enforcement' (Annual Meeting of the American Poli Sci Association, Washington, 27-31st Aug 2014).

pressure influenced the length of time that indictees spent at large.<sup>535</sup> The work of Ritter and Wolford therefore shows the potential for using the strategic choice perspective to analyse the behaviour of international courts, the states and individual indictees and their empirical work provides support for previously unexamined assumptions.

When combined with empirical support, strategic-choice modelling forces researchers to be clear about their assumptions and logic, so it makes it much easier to see if what they predict will happen will actually occur more often than not. This analysis helps to unstick some of the old debates in the field of international law where the acolytes of each camp are able to construct convincing rhetorical arguments for either side, but the evidentiary bases for either might only consist of a handful of case studies.

#### *The Basic Model of Prosecutorial Strategy*

Of particular interest to the present study is the role that prosecutorial discretion plays in helping (or hindering) accountability for violations of proportionality and precautions in attack. The basic model of prosecutorial strategy, developed by William Landes, describes a prosecutor's decision to push forward with a prosecution as being contingent upon, *inter alia*, the number of cases a prosecutor has to deal with at any given point in time, the resources available to the prosecutor, and the likely sentence of the crime for which the defendant has been accused.<sup>536</sup> The prosecutor's motivation is to maximise the total value of the sentences issued to all defendants on the docket, so, all things being equal, they must allocate the most resources to those cases which are likely to end in conviction and to those which are likely to produce longer sentences.<sup>537</sup> Moreover, the prosecutor has a budget which constrains the maximum resource that they can bear for the whole caseload.<sup>538</sup> Roger Bowles formulated the resultant function which describes this motivation as:

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<sup>535</sup> Ibid.

<sup>536</sup> William Landes, 'An Economic Analysis of the Courts' (1971) 14 J of Law, & Econ 61, 62.

<sup>537</sup> Ibid, 63.

<sup>538</sup> Roger Bowles, 'Prosecutorial Strategies' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics* vol 3: Public Law and Legal Institutions (Oxford UP 2017), 373.

$$\text{maximise } \sum_j p_j(r_j) \cdot s_j \quad \text{such that } \sum_j r_j \leq R^{\text{max}}$$

Where  $j$  represents an index of the prosecutor's caseload,  $p_j$  is the probability of conviction for any particular case,  $r_j$  represents the resources allocated to a particular case and  $s_j$  is the sentence given to a particular defendant if the case is won;  $R^{\text{max}}$  is the prosecutor's total budget.<sup>539</sup> Therefore, it may be more efficient to drop those cases (or offer a plea bargain) where probability of conviction,  $p_j$ , is not high enough to justify the added resource expenditure needed to raise the probability high enough to achieve a particular sentence,  $s_j$ , given the context of the prosecutor's full caseload.<sup>540</sup> Even though the basic model is based on the criminal justice system, the fundamentals of this model can be applied to civil litigation as well.<sup>541</sup>

Though the most prominent extensions of this model explain the plea-bargaining process,<sup>542</sup> researchers have also built upon it by questioning whether it is appropriate to assume that a prosecutor's motivation is necessarily driven by the number and length of criminal sentences they accrue over the course of their tenure. As Bowles notes,

The Landes model is based on the assumption that prosecutors make their resource allocation decisions across cases in such a way as to maximize the product of the probability of a conviction and the sentence across cases. For this to be a reliable characterization of real-world behavior it is required that the agencies employing prosecutors construct employment contracts with incentives aligned with this objective.<sup>543</sup>

For instance, when comparing the incentives of prosecutors in most US jurisdictions with their counterparts in England & Wales, the former are often elected or politically appointed whereas the later are hired by a politically

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<sup>539</sup> The equation which describes the basic model and its constituent variables are taken directly from *ibid*, 373.

<sup>540</sup> Landes, 64-65.

<sup>541</sup> Landes also envisaged a similar model for civil courts, where the role of a prosecutor was replaced by a plaintiff. Instead of maximizing sentences, the plaintiff wanted to maximize the award for damages. As with the model of criminal prosecution, the decision to file a civil suit is likewise tempered by the likelihood that the case would be successful and the cost of investigating and trying the case. Unlike the sentences in a criminal case, however, the parties in a civil case are less likely to know what the award for damages will be ahead of time, so it is even less appropriate to assume that the actors have access to perfect information than in the criminal case. *Ibid*, 101.

<sup>542</sup> For a good review of the different plea-bargaining models, see Bowles, 375-376. Although helpful for understanding other types of pre-trial bargaining of the sort explored by Ritter and Wolford, ICTs are not normally able to issue plea bargains, so the application of this type of prosecutorial strategy for the present study is rather limited.

<sup>543</sup> *Ibid*, 378.

independent prosecution service. This has had the effect of making prosecutors in the US more likely to take cases to trial, even when taking advantage of plea deals would lead to a more socially optimal outcome. This is because a prosecutor who can show an impressive conviction record will be regarded by voters as one who is tough on crime. Therefore, to signal their quality to the electorate, prosecutors during an election season will take more cases to trial, even if offering more plea deals would have yielded higher overall sentences given the prosecutor's time and resources.<sup>544</sup> In contrast, the more bureaucratically-orientated nature of the Crown Prosecution Service motivates prosecutors to show their *peers* that they are working according to the standards demanded by the organisation (which are designed to be socially optimal) in order to secure further work.<sup>545</sup>

In war crimes cases, it is likely that the prosecutor will either work for an ICT or a national military justice system.<sup>546</sup> In either case, the prosecutor will probably not be an elected official, but they might nevertheless be receptive to the way that their office is perceived by civil society.<sup>547</sup> Although in broad strokes, the basic model correctly describes prosecutorial motivation in war crimes prosecutions, I would suggest that the acquittals are costlier for prosecutors in these cases than accounted for in the model. The only costs to the prosecutor in the basic model are those associated with running an investigation and presenting the case at trial, so once the prosecutor decides to go to trial, these costs are the same regardless of whether the case ultimately ends in a conviction or an acquittal. However, in a war crimes trial, the prosecutor must also consider the costs to their office's legitimacy for having brought a case that ends in an acquittal. This is for two reasons. Firstly, the

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<sup>544</sup> See generally, Siddhartha Bandyopadhyay and Bryan McCannon, 'The Effect of the Election of Prosecutors on Criminal Trials' (2014) 161 *Public Choice* 141.

<sup>545</sup> Bowles, 378-379.

<sup>546</sup> For instance, in the U.S. Manual for Courts-Martial, the first article of the preamble establishes military jurisdiction over violations of the law of war. *Manual for Courts-Martial United States* (Joint Service Committee on Military Justice, 2012), Part I-1.

<sup>547</sup> 'In many international courts, authority turns on judicial decisions. Yet in the context of international criminal courts, prosecutorial strategy is often at the core of the building or waning of authority. This is partly because of the power of prosecutors to make headlines with indictments, and it is partly because of the highly contentious and atypical political environments in which these courts operate.' Ron Levi, John Hagan and Sara Dezalay, 'International Courts in Atypical Political Environments' (2016) 79 *Law and Contemporary Problems* 289, 312.

victims may lose faith in judicial remedies for making amends,<sup>548</sup> and secondly, popular opinion in the accused's home country may turn against the prosecutor for having brought what the state and public perceive are vexatious charges against their service members.<sup>549</sup> Therefore, popular legitimacy may be a better measure of what motivates the prosecutor in war crimes cases, than the length of a defendant's sentence alone.

### *Empirical Support for Strategic Treaty Writing*

In Chapter 3, I identified the vagueness of the wording used to define proportionality and precautions in attack as one of the difficulties which have made accountability for violations of these rules so difficult. One possibility for why the law is so vague is that it allows delegates to international conferences to introduce some strategic flexibility in to how the law might eventually be applied by international courts.<sup>550</sup> This insight is broadly supported by the most empirically robust study of flexibility in international agreements, Barbara Koremenos' Continent of International Law project. In it, she examined several characteristics of a random sample of international agreements, including the degree to which the provisions in an international agreement were vague or precise. Koremenos predicted that the amount of vagueness in an international agreement would vary depending on the underlying cooperation problem that the accord was meant to address.<sup>551</sup>

Cooperation problems could be related to difficulties of coordination, difficulties of distribution, or some combination of the two. Coordination problems describe those issues where states need to agree on how to work

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<sup>548</sup> Though not specifically an acquittal, the ICC Prosecutor's request for an adjournment in the case against President Uhuru Kenyatta did not sit well with the victims of the 2007 post-election violence in Kenya: "Some victims' reactions were: "what have we done to make the Prosecutor mess with us like this?"; "They have forgotten the suffering that we faced during the Post-Election Violence. They do not care for us"; "we are crying for justice. Who will now hear us?" Betty Waitherero, 'After Application for Adjournment, Victims' Faith in the ICC Is Waning' *Daily Nation* (17 January 2014) <<http://www.nation.co.ke/oped/blogs/dot9/victims-faith-in-the-ICC-is-waning/1959700-2150186-h7q1n9z/index.html>> ; see also, Anna Holligan, 'Uhuru Kenyatta Case: Most High-Profile Collapse at ICC' *BBC News* (5 December 2014) <<http://www.bbc.co.uk/news/world-africa-30353311>> .

<sup>549</sup> For example, the fervour caused over the MOD's Iraq Historic Allegations Team (IHAT) having formally investigated false allegations of misconduct by British troops has turned the government against this quasi-prosecutorial body , 'Iraq UK Forces: May 'Won't Allow Vexatious Allegations' *BBC News* (21 September 2016) <<http://www.bbc.co.uk/news/uk-politics-37425863>> .

<sup>550</sup> See Ch 3, starting at note 427.

<sup>551</sup> Koremenos, 172.

together to solve a mutual problem (such as creating common air traffic control procedures), whereas distribution problems are those which describe how states are meant to reconcile differences in preferences (such as a border dispute).<sup>552</sup> In the case of treaties pertaining to human rights, the subject matter involves a distribution problem<sup>553</sup> with no underlying coordination problem. This means that states have different preferences as to what should be included as part of a human rights regime. Nevertheless, a human rights treaty can allow states to adopt varying standards and still fulfil the overall goal of the agreement (i.e. they do not necessarily need to coordinate their actions for the treaty to be successful).

Koremenos argues that the vagueness in the text of a human rights treaty arises as a way of dealing with the differences in the distribution of preferences between states regarding what should be included in the text.<sup>554</sup> For example, if two states want to signal their commitment to human rights to a third state, with the hopes of convincing the third state to adopt the same standards, they could sign a treaty which enshrines those standards in law. If the issue is unlawful aerial attacks, State 1 may prefer a strict liability for all civilian casualties in combat, State 2 may prefer a standard that makes an exception for all damage caused while attacking a military objective and State 3 rejects the idea that civilians ought to be kept out of the fight and wants full freedom to attack them during war.<sup>555</sup> Each state is prepared to accept a negotiated settlement which brings the others in line with its own regulatory preferences, but will not accept a settlement which deviates too far from its

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<sup>552</sup> Ibid, 166-168.

<sup>553</sup> There may be some confusion as to why Human Rights issues are a distribution problem, since distribution problems are typically thought of in terms of tangible goods. However, as Koremenos explains, 'Given the general challenges of coding the underlying cooperation problems, I elaborate the coding of Distribution problems in the issue area of human rights because for some readers Distribution problems imply that material or security goods are at stake. The nature and definition of a human right is very much determined by the political and cultural configuration of a state; thus, disagreement among states about the ideal cooperative solution is not surprising. Each state embraces a different understanding of human rights... Naturally, a state will usually (but not always) strive to establish the same set of norms or values that are already present in its own culture or codified in its own domestic laws, thereby keeping the costs of joining a human rights agreement to a minimum. If an agreement establishes norms that differ greatly from or contradict the "core values" of an individual state, it will be very costly for this state to join and comply with the agreement.' *ibid*, 178.

<sup>554</sup> *Ibid*, 166. This broadly agrees with what I found in my interviews in Ch 3.

<sup>555</sup> I've adapted Koremenos' original example found in *ibid*, 170 to apply it to the present study.

present stance. However, with some strategic vagueness like that found in the proportionality rule and the duty to take all 'feasible' precautions in attack, States 1 and 2 might reach an agreement which requires neither to support a standard which deviates too far from their current practice. In doing so, both can advance their shared preference for a general international norm of non-combatant immunity to contrast their position against that of State 3. So, the vagueness of the treaty does not indicate that 'anything goes' or that the provisions of the treaty are infinitely flexible, only that there will be some variation in how the treaty is applied by State 1 or State 2.<sup>556</sup>

To test the hypothesis that, without an underlying coordination problem, human rights treaties would use more vague language than other treaties that do require states to coordinate, such as economic treaties, Koremenos and her colleagues coded each of the 234 treaties in her sample on a four-point scale of vagueness.<sup>557</sup> Then, she compared agreements involving human rights against other issues, such as economics, security or the environment. As predicted, those treaties which had involved a distribution problem, but did not require states to coordinate their actions were vaguer than those which involved a coordination problem. For human rights treaties, this effect was even more pronounced as they had the least precise language out of all four issue areas included in the study. Moreover, states were far more likely to issue a reservation to a human rights treaty than an agreement from any other issue area.<sup>558</sup>

On a cautionary note, treaties based on LOAC and ICL do not map neatly on to Koremenos' issue areas. Though they may share some features with the human rights issue area, they also involve topics which bleed into the security issue area. Therefore, LOAC and ICL do require more state coordination than might be expected from a human rights declaration, which would be aimed at how the state conducts its domestic affairs. Nevertheless, her insight broadly corroborates what Lietzau had said about why he wanted

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<sup>556</sup> Ibid, 158-159.

<sup>557</sup> Ibid, 182.

<sup>558</sup> Ibid, 163.

further precision on the proportionality rule as a matter of ICL, compared with the standard as it found its way into LOAC.<sup>559</sup> API more closely resembles a human rights treaty than does the Rome Statute, which instead cuts deeper into the security domain by holding individual troops and leaders responsible for misconduct. Therefore, one would expect to see more precision in the Rome Statute compared to API.

In the context of the present study, Koremenos' work establishes the fact that state officials are strategic actors who use both the black letter of the law and its latent ambiguities to advance their preferred interpretation of the general principle that has been accepted by the international community. Moreover, it establishes that it might not always be in the state's interest to keep a provision vague; rather for coordination problems, such as figuring out who should be sent to prison for war crimes, it may be in the state's interest to resolve that vagueness in a way that ensures its citizens are not going to be the subject of the regime.

### *Conclusions*

Although it is surely helpful to consider doctrinal and procedural reasons why the law functions the way it does, this type of analysis can be complemented by also examining a tricky legal problem from a strategic-choice perspective. The logic behind this perspective has already provided some deep insights about the way international law affects the behaviour of actors in armed conflict from multiple levels of analysis. Though Morrow's ground-breaking application of the strategic-choice perspective to the study of LOAC helped to explain under what conditions the law would affect state behaviour, he did not see international criminal tribunals/courts as particularly significant actors. To the extent that he addressed the courts, he assumed that unsuccessful autocrats and legally-questionable democrats would end up in the dock for LOAC violations. The crime of disproportionate attack is an example of such legally-questionable behaviour, but to date, no state or non-state actors from neither democracies nor autocracies have ever been convicted of it, suggesting that there might be

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<sup>559</sup> See Ch 3 at note 430.

more at play than whether the accused came from a weak autocracy or a fastidious democracy.

The strategic-choice approach has also been used to show how the actions of the president and Congress in the US balance of powers system affect Supreme Court justices' decisions to hear cases and the content of their legal opinions. This suggests that despite their professed neutrality, court officials can still be influenced by strategic considerations. Although the literature on international courts is still nascent, the tools of this perspective — the use of economic modelling (such as game theory) and empirical testing — have been brought to bear on the question of whether elements of the ICL regime are effective at punishing or deterring wrongdoing on the part of leaders and their agents. The focus in the literature has been on cases of non-international armed conflict and the researchers involved have assumed that it would be the court which would apply pressure against the state's leaders or its subordinates, rather than the other way around. It would seem that any influence that the state might have had in designing the ICL regime is taken as exogenous to the games being played in these studies. However, Koremenos did examine how states drafted treaties with a certain level of strategic vagueness in order to maximise their utility from an agreement, but then she never discussed how that vagueness would be resolved by international courts.

Therefore, to understand why the criminal proportionality rule is so difficult to prosecute, I will propose a strategic-choice model of how state actors negotiate the content of ICL treaties, such as the Rome Statute and the grave breaches regime in API, given how those state actors expect prosecutors will respond to any particular allegation of unlawful attack. The results of this analysis may seem intuitive to many law scholars, just as it may seem obvious that the ICC has a deterrent effect on certain actors in non-international armed conflict. However, it is nevertheless useful to show the relationship between the reasons for the lack of prosecutions given by legal scholars and those reasons that are based on the interests of either the Court or those countries that regularly use air power. To that end, the following two Chapters will detail the characteristics of this strategic-choice analysis: Chapter 5 will cover the relevant

actors, their preferences, and beliefs, and Chapter 6 will describe the strategic environment.

## Chapter 5 State and Court Interests

In adopting a strategic-choice lens to examine the question of why violations of the rules on proportionality and precautions are so difficult to prosecute, one must first identify who are the relevant actors in a strategic interaction. The real world is chaotic and many different players interact across multiple levels of analysis to determine how case of disproportionate attack might conceivably be handled. However, some elements of the interaction must be held constant to simplify the logic of the analysis. Otherwise, if the actions of each actor are dependent on the actions of hundreds of others, it becomes difficult to establish the causal links that explain or predict how an actor will behave. Once the actors have been defined, then it is necessary to identify their motivations and the relationship between the different costs and benefits that are available to them in the strategic environment.

### *Defining State Officials & Their Motivation*

In Chapter 4, I presented several models that predicted how state leaders would behave, given what they believed court actors would do in response. Most often, the state actor was a head of state or government and the court actor was either a prosecutor or judge. Defining each actor allows the researcher to later describe what motivates them and what 'moves' are available to them in the game that the researcher believes most accurately represents the strategic dynamic in question. Therefore, for the purposes of this study, a state official is one who has the power to set state policy on LOAC. They will be able to argue for particular interpretations of international law and they have power to set state policy towards international courts. I make a further assumption that this state official represents a nation that relies heavily on air power during military operations (e.g. the United States or the United Kingdom).<sup>560</sup>

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<sup>560</sup> This analysis might also be extended to other democratic, air power-centric, countries like France and Israel. It would be a stretch, however, to generalise this discussion to semi-democratic or autocratic countries like Russia because the domestic legitimacy costs which could hobble a leader of a country with a free press will not be much of a concern for an autocrat or a leader of a country with a tightly-controlled press. For instance, according to Newsweek, despite the large number of casualties in the Battle of Aleppo, Russian media did not cover that aspect of the war and many Russians do not follow the conflict closely enough to form an opinion about the conflict, one way or the other. Marc Bennetts, 'Putin's War in

For those states that maintain large, well-equipped air forces,<sup>561</sup> air power provides its military decision makers with a unique set of capabilities for setting up attacks:

The height, speed, and reach of air power enable and enhance air power's additional attributes of ubiquity, agility and the ability to concentrate force rapidly. In combination, these provide air power's flexibility as a highly versatile and responsive form of military force, and its cost effectiveness as a force multiplier. Precision weapons, while not unique to air power have endowed it with an even greater flexibility and use.<sup>562</sup>

When fighting other, less well-equipped states or non-state actors, air power grants military decision makers the opportunity to achieve effects at the tactical, operational, and strategic levels of a conflict simultaneously.<sup>563</sup> As I shall consider in more detail below, military commanders and state policy makers, therefore, place a high value on maintaining freedom of action for their air forces, since impediments to its use, either legal or political, could theoretically deteriorate combat effectiveness and risk mission success on the battlefield.

As one of the most outspoken defenders of air power in the legal literature, the former US Air Force Deputy Judge Advocate General, General Charles Dunlap Jr, has argued that restrictions on its use often lead to problems in accomplishing mission objectives. Using the NATO air campaign in Afghanistan as an example of where war planners held themselves to a zero casualty rule for policy-based reasons, he claimed:

By replacing the proportionality standard of Protocol I, which permits attacks that cause incidental civilian casualties so long as they are 'not excessive in relation to the concrete and direct military advantage anticipated' with a 'zero casualty' rule, NATO evidently did not seem to comprehend the wisdom behind the Protocol's approach. In its approach, NATO telegraphed to the insurgents that all they needed to do to protect themselves from air attack was to surround themselves with civilians-and that is exactly what they did. If NATO had followed the Protocol, the insurgents would not have had as much incentive to shield themselves with civilians. Unfortunately, General McChrystal's decision in June 2009 to further restrict airstrikes proved disastrous for civilians. By June of the year following the implementation of the restrictive rules, Afghan civilian deaths had skyrocketed by 31 percent, and Coalition military casualties likewise rose sharply. Importantly, the astonishing increase in civilian deaths was not the result of the airstrikes that did take place. A study released in July 2010 showed that airstrikes were responsible for only a small percentage of the casualties caused by Coalition forces.

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Syria: Why Russians Don't Seem to Care About It. ' *Newsweek* (10 Oct 2016) <<http://www.newsweek.com/2016/10/21/why-russians-dont-care-putin-war-syria-508329.html>> accessed 24 Apr 2017.

<sup>561</sup> I use this term loosely to mean the entire air component of a state's armed forces, regardless of branch.

<sup>562</sup> *UK Air and Space Doctrine* (MOD, JDP 0-30, 2013) 1.3. The US Air Force Doctrine describes the advantages of air power in a similar fashion. *Basic Doctrine, Vol I* (Department of the Air Force, 2015), 70.

<sup>563</sup> See generally, Derek Read, 'Airpower in COIN: Can Airpower Make a Significant Contribution to Counter-Insurgency' (2010) 10 *Defence Studies* 126.

For example, traffic accidents involving U.S. and Coalition vehicles killed two and a half times as many Afghan women and children as did airstrikes.<sup>564</sup>

More recently, he has expressed concern that by restricting the use of air power to only those situations where commanders are confident that they will not endanger the civilian population, opposition forces have an incentive to use civilians to shield their movements, materiel and operations from aerial attack.<sup>565</sup> Such tactics exemplify what he calls 'lawfare' in which adversaries use (or misuse) LOAC to frame a state's behaviour as illegal in order to make political gains without having to pay a military price for those gains.<sup>566</sup> In his various writings, Dunlap has been careful to state that he is not opposed to the law on proportionality and precautions in attack as they have found their way into API, particularly because they can be seen as granting permission to cause civilian casualties so long as they are not excessive.<sup>567</sup> In my interviews with US

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<sup>564</sup> Charles Dunlap, 'Clever or Clueless? Observations About Bombing Norm Debates' in Matthew Evangelista and Henry Shue (eds), *The American Way of Bombing: Changing Ethical and Legal Norms from Flying Fortresses to Drones* (Cornell UP 2014). See also: Charles Dunlap, 'The Moral Hazard of Inaction in War' (*War on the Rocks*, 2016) <<https://warontherocks.com/2016/08/the-moral-hazard-of-inaction-in-war/>> accessed 4 July 2017

<sup>565</sup> Charles Dunlap, 'A Squarable Circle?: The Revised Dod Law of War Manual and the Challenge of Human Shields' (*Just Security*, 2016) <<https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/>> accessed 15 December 2016. In the same article, he shared some similar remarks by Colonel Hays Parks: 'If the U.S. rewards an enemy's use of civilians as human shields to protect lawful targets of attack by increasing constraints on their attack by U.S. military forces well beyond what is required by the law of war, it rewards (rather than condemning) the enemy for its illegal hostage taking. Ignoring history, President Obama's restrictions have placed innocent civilians at greater risk...In placing full responsibility on U.S. Military forces for civilian casualty avoidance, President Obama has assured enemy use of human shields, increased risk to U.S. Military forces, and risk of mission failure that otherwise complies with the law of war.' [ellipses in original]

<sup>566</sup> 'Lawfare describes a method of warfare where law is used as a means of realizing a military objective. Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does), in practice it too often produces behaviors that jeopardize the protection of the truly innocent. There are many dimensions to lawfare, but the one ever more frequently embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.' Charles Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Humanitarian Challenges in Military Intervention Conference, Washington, 29 Nov 2001), 4. Former Secretary of Defense Donald Rumsfeld was particularly worried about how allegations of war crimes in international legal fora could be used to hem in the US's freedom of action. Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W. W. Norton 2009), 58-59.

<sup>567</sup> 'To be clear, I am not suggesting that the law of war be anything other than strictly followed. Nor is anyone saying that there are not circumstances where for any number of legitimate political and strategic concerns that the require the application of force – drones or anything else – to be limited more than what the law might permit. Rather, in the face of adversaries who as a matter of course inflict the most unthinkable atrocities on civilians, it's time to formally incorporate (by whatever name) a "moral hazard" assessment into our use-of-force policies. And, indeed, we ought to consider holding accountable those who yield to inaction when it results in unnecessary misery to others. Dunlap 'The Moral Hazard of Inaction in War', 'The Moral Hazard of Inaction in War'; see also: Dunlap, 'The American Way of Bombing: Changing Ethical and Legal Norms From Flying Fortresses to Drones', 123.

policy officials, they confirmed that generally-speaking, the US is apprehensive about curtailing its freedom of action when it comes to the use of air power.<sup>568</sup>

Besides the humanitarian concern of encouraging the enemy to use human shields or to co-locate military objectives within civilian population centres, in my interviews with state officials and others, they have identified several mechanisms for how strict interpretations of the rules of proportionality and precautions in attack might compromise the success of a state's own military operations. Firstly, the content of the rules affects the benchmark against which an attack will be deemed *prima facie* unlawful. This benchmark, in turn, determines how favourable media coverage will be towards the attacking state, since the mere act of opening an inquiry into a state's actions, either by national or international investigators adds political legitimacy to its enemy's narratives and benefits their information operations campaigns. Secondly, any attempts to investigate *prima facie* disproportionate attacks may reveal intelligence or procedures that the state wishes to keep secret to preserve its freedom of action in future missions. Finally, opening investigations or prosecuting individual commanders for *prima facie* unlawful attacks may send a chilling signal to other commanders which may dampen their enthusiasm for pursuing the enemy.

The political fallout from an allegation of unlawful attack may not necessarily weigh on a commander ordering a strike, but the 'CNN effect'<sup>569</sup> does factor into the calculus of those policy makers whose job it is to determine state policy on LOAC. For example, in my interview with the US delegate to the Rome Conference, Bill Lietzau, he showed some sensitivity to how allegations of war crimes play out in the press during our discussion of the *Kunduz Hospital Bombing* incident. When I asked him about appropriateness of the punishments

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<sup>568</sup> Interview with Former US Policy Official & ICTR Official . Interview with Lietzau.

<sup>569</sup> The CNN effect describes the media's ability to influence state policy. As Steven Livingston asserts, policy makers fear that media coverage of casualties can undermine support for military operations, particularly in peacekeeping operations. Steven Livingston, *Clarifying the Cnn Effect: An Examination of Media Effects According to Type of Military Intervention* (Research Paper R-18, Shorenstein Center, 1997).

meted out to those involved in the incident, given what the CENTCOM report had revealed,<sup>570</sup> he mused:

So, I'm going to assume, for the sake of this discussion, that the NJP<sup>571</sup> [non-judicial punishment] decision was the correct one, because the commander usually cares about their people and tries to make the right decision. He's already ruining careers with the NJP and it's a question of whether they do jail time or not. He doesn't lose anything if they go to jail, so he would put them in jail or try to court-martial them if he thought that was appropriate. Because he thought it wasn't appropriate, I think what was inappropriate was then calling them 'war crimes' in their [the CENTCOM] report... And to me, as a public affairs matter for the United States, I am not going to call a non-grave breach, technical violation... a 'war crime'. I'm going to call that a violation. So, the mistake was calling it a 'war crime'.<sup>572</sup>

Likewise, the former US state official, Hays Parks, has argued that: 'A key lesson learned from Vietnam and subsequent conflicts, including present military operations against the Islamic State, is: "If you wish to assume responsibility for each civilian casualty incidental to a lawful attack, your enemy and others will let you".'<sup>573</sup> Indeed, state officials are keenly aware of the way that perceived LOAC violations affect their ability to set a narrative which legitimizes combat actions, both to the local population, whose trust will be vital to post-conflict reconstruction, and to sceptical international audiences.<sup>574</sup> Officials often struggle to justify such high-casualty attacks, even when they are within the bounds of what could be considered lawful by either LOAC or ICL:

The military's difficulty in accounting for the civilian casualties — exacerbated by classified regulations and a complex process for airstrikes — has allowed the Islamic State to advance its own version of the events. The group has accused the United States of killing hundreds of residents of Mosul and decried what it has said are 'continuous American-Iraqi massacres' in that city and elsewhere. 'We're ceding space to the adversary who wants to create the perception of disregard for civilian life,' said

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<sup>570</sup> See Ch 2 starting at note 340.

<sup>571</sup> The use of the term NJP was my mistake. The service members involved with the attack were given administrative punishments, rather than NJP specifically. I was the one who stated that they received NJP, believing it to include letters of reprimand, and Lietzau merely repeated back what I had stated earlier in the interview.

<sup>572</sup> Interview with Lietzau. At press briefings General Joseph Votel, who oversaw the investigation, concluded that the strike did not amount to a war crime because there was no intent to strike the hospital. See generally, I. Ali. However, taken in context with the rest of this interview, Lietzau's main objection was that the wording of the report suggested US forces had violated the principles of proportionality and precautions, which could lead others to believe that US forces had committed war crimes.

<sup>573</sup> Parks in Charles Dunlap, 'Exclusive: Hays Parks on Human Shields and Restrictive Rules of Engagement' (*Lawfire*, 17 Oct 2016) <<https://sites.duke.edu/lawfire/2016/10/17/exclusive-hays-parks-on-human-shields-and-restrictive-rules-of-engagement/>> accessed 4 July 2017.

<sup>574</sup> *Limited Accountability: A Transparency Audit of the Coalition Air War against So-Called Islamic State* (Airwars & Remote Control, 2016) 6, 14.

David Deptula, a retired Air Force general who heads the Mitchell Institute for Aerospace Studies.<sup>575</sup>

Therefore, it is safe to assume that state officials are wary of strict understandings of proportionality and precautions in attack, because they believe such interpretations undermine their ability to garner public support for the state's political goals — even if no defendant is ever brought before a domestic or international court.

If the state or a third party, such as an ICT later opens an investigation into a *prima facie* unlawful attack, the state must deal with the legitimacy costs that come from not only the original allegation of unlawfulness, but also the credibility that the opening an formal investigation lends to those allegations.<sup>576</sup> State officials may be pressured into opening an investigation into an event, even when they have no legal obligation to do so, which not only increases the legitimacy costs for the state, but it also increases the expectation in the eyes of the public that future investigations *must* take place.<sup>577</sup>

Beyond the legitimacy costs associated with investigations, there is also a fear among state officials that investigations will compromise state secrets, leading to difficulties in either mission success or force protection in the future.<sup>578</sup> Therefore, officials stress that greater transparency should not come

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<sup>575</sup> Missy Ryan, 'After Reports of Civilian Deaths, U.S. Military Struggles to Defend Air Operations in War against Militants' *Washington Post* (Washington, 10 Apr 2017) <<http://wapo.st/2okUStP>> .

<sup>576</sup> '...[C]oincidentally, besides being familiar with the ICC, I was also the Head of Detention Policy and the only active pre-investigation going on right now is into Afghanistan's detention policies. Now, I'm not going to say that no crime has ever been committed in detention policy. I think we've had over a hundred courts-martial related to detention policies, but certainly not the widespread and systematic kind of things that the ICC is supposed to have jurisdiction over. There's certainly not the unwillingness or inability to prosecute or to investigate that the ICC is supposed to fill the gap of. Yet, they keep pursuing this and they've made a public announcement — the Prosecutor's office says that they have reason to believe that the United States committed war crimes in Afghanistan. What? When the International Criminal Court prosecutor says that, that carries more weight than some Amnesty International allegation.' Interview with Lietzau. See also Goldsmith, 63.

<sup>577</sup> Alon Margalit has explored in detail the legal obligations for states to conduct either command or criminal investigations of different types of facially unlawful attacks. His main concerns with states investigating every civilian causality incident was that it might set up unrealistic expectations for states to investigate every civilian casualty, even in circumstances where such investigations are just not practical because of the scale of the conflict. Furthermore, he argues that such fastidiousness with investigations may lead some to conclude that those countries which are not so forthcoming, may be in contravention of the law. Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' in Terry Gill (ed), *Yearbook of International Humanitarian Law*, vol 15 (Asser Press 2012) 172. There is at least some evidence of this effect in the current campaign against Islamic State, with advocacy groups, such as Airwars, ranking different coalition partners on their investigatory mechanisms and civilian casualty reporting procedures. *Limited Accountability: A Transparency Audit of the Coalition Air War against So-Called Islamic State*.

<sup>578</sup> See Ch 3 at note 452.

at the cost of national secrets. For instance, when the ICTY Office of the Prosecutor opened a preliminary investigation into NATO's bombing campaign during Operation Allied Force, Ambassador David Scheffer recalls how fiercely his colleagues at the US Department of Defense defended their organisation from what they perceived as an outside influence:

The military fiercely resisted this particular prosecutorial initiative. The Pentagon and NATO allies objected to any effort by an international court to force them to reveal targeting decisions and the processes and procedures behind selected decisions in order to comply with law of war and international humanitarian law principles, which involve considerations of military necessity, distinction between combatants and civilians, and the proportionality of military actions.<sup>579</sup>

Indeed, when conducting their research into the transparency of civilian casualty reporting for the 14 members of the coalition fighting Islamic State, Airwars found that: 'The most widely cited reason given by nations when refusing to disclose the dates and location of their airstrikes is national security or domestic security concerns'.<sup>580</sup> Even when states investigate and report on *prima facie* unlawful attacks in good faith, much of what is written is only presented to the public behind a veil of redaction. Such was the case with CENTCOM's final report on the *Kunduz Hospital Bombing*, which was so thorough that Garraway, who is a member of the International Humanitarian Fact-Finding Commission (IHFFC) thought it would have been difficult to improve upon.<sup>581</sup> However, although its damning conclusions were made

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<sup>579</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton UP 2012) 291. Similarly, states may signal a willingness to investigate facially unlawful attacks, even in politically sensitive operations, such as in areas outside of active hostilities, but officials are quick to make sure that such transparency is conditional. For instance, in President Obama's executive order on greater transparency for airstrikes, he stipulates: 'The Director of National Intelligence (DNI) or such other official as the President may designate, shall obtain from relevant agencies information about the number of strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities from January 1, 2016, through December 31, 2016, as well as assessments of combatant and non-combatant deaths resulting from those strikes, and publicly release an unclassified summary of such information no later than May 1, 2017. By May 1 of each subsequent year, as consistent with the need to protect sources and methods, the DNI shall publicly release a report with the same information for the preceding calendar year. [my emphasis] Executive Order 13732—United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the use of Force §3(a).

<sup>580</sup> *Limited Accountability: A Transparency Audit of the Coalition Air War against So-Called Islamic State* 1.

<sup>581</sup> 'I think that the US did very, very, very well on Kunduz. I know that there was still demand for us to be called in, but in fact, it got less and less simply because the US, I think, did a very good job and even if we [the IHFFC] had been called in, in my view, our starting point would've been the US investigations'. Interview with Garraway.

public,<sup>582</sup> great care was taken not to reveal too much about the way that US forces collect intelligence or conduct airstrikes.<sup>583</sup>

The perceived need for states to investigate high-casualty strikes puts state officials in a difficult position where providing information about a strike might compromise state secrets, but its reticence might incur legitimacy costs as critics claim the state is not being transparent in its operations. Yet, often states will choose to withhold information unless absolutely necessary and only under pressure, suggesting that the costs of revealing the information are higher in most cases than the legitimacy costs associated with reticence. For example, when initially asked to volunteer information to the Goldstone Commission, Israel declined to cooperate with investigators and it was only after the Goldstone Report was published that state officials elected to report their side of the story.<sup>584</sup> In a more recent operation, while responding to a report by Human Rights Watch which claimed that US forces failed to take all feasible precautions to avoid striking a mosque in al-Jinah, Syria,<sup>585</sup> CENTCOM merely asserted that its actions were lawful, without offering any supporting evidence to substantiate its claim.<sup>586</sup>

In addition to the legitimacy costs and the fear of compromising mission success by exposing classified information, state officials are also concerned with the possibility that military commanders may find themselves subject to disciplinary actions for decisions made in combat. Turning once again to CENTCOM's report on the *Kunduz Hospital Bombing* case, the names of all the individuals involved with the airstrike were redacted, even though many were

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<sup>582</sup> See Ch 3 starting at note 340.

<sup>583</sup> The report was heavily redacted.

<sup>584</sup> Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes'.

<sup>585</sup> *Attack on the Omar Ibn Al-Khatib Mosque: US Authorities' Failure to Take Adequate Precautions* .

<sup>586</sup> 'So, where are we left? Largely in the dark except for the light shined on this incident most brightly by the highly researched reports of the three nongovernmental organizations. The issue here is not simply one of legality. The more critical question is: did the United States attack a mosque resulting in significant civilian casualties? If so, were there senior-level AQ fighters killed as well, and what would be the explanation for any military and intelligence officials having gotten this so wrong? It is important for Secretary Mattis to wrestle these questions to the ground expeditiously and, as Secretary Ash Carter did with the Kunduz strike, own up to the mistake if that's what occurred here. It is equally important for Secretary Mattis to wrestle these questions to the ground, and publicly explain if the answer reached is that the three groups' factual conclusions are fundamentally mistaken.' Ryan Goodman, 'Making Sense of the Allegations That U.S. Military Struck a Mosque in Syria' (*Just Security*, 21 Apr 2017) <<https://www.justsecurity.org/40185/making-sense-allegations-u-s-military-struck-mosque-syria/>> accessed 21 Apr 2017.

later given letters of reprimand.<sup>587</sup> This suggests that officials wanted to spare these individuals from the sort of public scrutiny that would have come with a criminal prosecution. The prospect of being held criminally liable for LOAC violations hangs heavily on commanders, perhaps even more so than the political fallout from a high-casualty strike as a UK commander explained:

So, when we first started, we had zero CDE [collateral damage estimate]. No civilian casualties whatsoever and people like me went back and said you cannot operate effectively in — [Trew: Zero civilian casualty?] Yeah. But, then we went from 0 to 3 and then 3 to 30, then from 30 to 300. Well, you're never going to get 30-300 [authorised] and I think we operated in the 3-30 range for about half the time. But even then, if you end up killing 30 civilians, there would have been questions asked. Let me put it this way, I had more visits from military policemen and lawyers about incidents that my people were involved in than anybody ever asked on the policy or political level. It was all legal enquiries.<sup>588</sup>

Amongst state policy officials, there seems to be an assumption that their own military commanders will act in good faith with the law and that their own municipal systems of justice will be adequate to hold rogue commanders to account.<sup>589</sup> Therefore, depending on how state officials value legitimacy versus the success of future military operations, the potential legitimacy benefits to the state for cooperating with ICTs might be outweighed by the substantial costs associated with having their commanders indicted or prosecuted.

If anything, there is a strong sense among some state officials and commanders that this sort of independent review unnecessarily compounds the stresses of combat for their troops. For instance, in his 2016 speech to the Conservative Party Conference, the UK Defence Secretary, Michael Fallon, promised to derogate from the European Convention of Human Rights ostensibly to protect UK service members from 'vexatious' claims:

I also know how much stress is caused by legal claims years after conflicts have ended. It is right that we investigate serious allegations but we've seen our legal system abused to falsely accuse our armed forces. So we're taking action. Of more than 3,000 claims about half have already been discontinued — and another 1,000 further cases will be thrown out by January. Already one of the firms that filed thousands of these claims, the so-called 'public interest lawyers' — has had its legal aid contract terminated

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<sup>587</sup> *Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015*, 6.

<sup>588</sup> Interview with Former UK Commander. This comports with what was said in Interview with Former US JAG & ICTY Defence Counsel: 'It scares commanders. I will tell you this isn't something that they take lightly. There is some anxiety about being second-guessed on this. I suspect that's why you see them make relatively safe calls. In my experience, they never get anywhere near the line of what a reasonable person would call disproportionate, at least as we understand the standard.'

<sup>589</sup> Interview with Former US LOAC Policy Official (2).

and shut down in August. It won't be missed... But much of the litigation we face comes from the extension of the European Convention on Human Rights to the battlefield. This is damaging our troops, undermining military operations, and costing taxpayers' millions. So I can announce today that in future conflicts we intend to derogate from the Convention. That would protect our Armed Forces from many of the industrial scale claims we have seen post Iraq and Afghanistan.<sup>590</sup>

Along with being an end in its own right, state officials value shielding commanders from judicial scrutiny as a way to ensure that they will be willing to wage an aggressive air campaign, safe in the knowledge that their decisions will not be second-guessed. Therefore, in addition to the general concern that LOAC may be used to restrict the *state's* freedom of action, state officials specifically worry that commanders who fear prosecution will become too skittish to do their jobs properly, making it impossible to effectively fight the state's enemies:

It may be hard to believe that executive branch officials, many of whom risk their lives to protect the nation, really care much about criminal law, investigation, and possibly, jail. But they do care — a lot. In my two years in government, I witnessed top officials and bureaucrats in the White House and throughout the administration openly worrying that investigators acting with the benefit of hindsight in a different political environment would impose criminal penalties on heat-of-battle judgment calls. These men and women did not believe they were breaking the law, and indeed they took extraordinary steps to ensure that they didn't... Why not play it safe? Many counterterrorism officials did play it safe before 9/11, when the criminalization of war and intelligence contributed to the paralyzing risk aversion that pervaded the White House and the intelligence community. The 9/11 attacks, however, made playing it safe no longer feasible.<sup>591</sup>

Indeed, in my interview with a former UK commander, he expressed frustration with the performance of the troops from some of the more highly-constrained NATO countries: '[They'll] turn up on the day, but are so heavily caveated that you can't use them for a great deal and, actually, what would you want to use them for anyway? They're not properly trained or equipped to do stuff.'<sup>592</sup> For states that use air power regularly, one would expect that state officials would be particularly concerned about commanders deciding to 'play it safe' with

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<sup>590</sup> , 'Read Defence Secretary Michael Fallon's Speech to the Conservative Conference' *International Business Times UK* (London, 4 Oct 2016) <<http://www.ibtimes.co.uk/read-defence-secretary-michael-fallons-speech-conservative-conference-1584745>> accessed 25 Apr 2017. Similarly, the outcry to free Sergeant Alexander Blackman, who killed a wounded Taliban prisoner, from right-wing news sources in the UK suggests that state officials may suffer a legitimacy cost from proceeding with war crimes investigations in good faith rather than trying to keep violations quiet. Steven Morris, 'Judges Quash UK Marine Alexander Blackman's Murder Conviction' *The Guardian* (15 Mar 2017) <<https://www.theguardian.com/uk-news/2017/mar/15/alexander-blackman-royal-marine-a-judges-quash-murder-conviction>> accessed 25 Apr 2017.

<sup>591</sup> Goldsmith, 69-70.

<sup>592</sup> Interview with Former UK Commander.

ordering airstrikes in the fear that their decisions will be later dissected to ensure compliance with proportionality and precautions in attack.

My purpose at this stage is not to pontificate about whether endorsing certain interpretations of the law based on a strict liability for civilian casualties actually makes it difficult for the state to achieve its political ends. This is an interesting question and has yet to be subjected to robust empirical testing, but its answer is immaterial for the purposes of this analysis. Instead, what the previous statements reveal is that state officials *believe* that introducing a stricter liability for civilian casualties than the one that is currently in place will adversely affect the state's freedom of action in times of armed conflict. Furthermore, I submit that rather than being the whims of a particular political party or a new trend in response to recent operations against non-state actors, such as Al-Qaeda or Islamic State, this belief represents an enduring consensus view amongst state officials and informs state policy on LOAC. To explore this further, I shall examine the negotiation positions of the United States and the United Kingdom at the CDDH and the Rome Conference.

#### *State Negotiating Position at the CDDH*

As the director of the US Department of Defense's Law of War Working Group, tasked with reviewing the impact of the Additional Protocols,<sup>593</sup> Parks had an inside view into some of the challenges that faced the US at the CDDH. In particular, he noted in his seminal treatise, 'Air War and the Law of War', that third world countries and non-state actors, who did not have access to air power, saw enshrining a total prohibition against collateral damage as a way of negating the huge tactical advantage that countries like the United States enjoyed from air power:

Third World nations that had waged anti-colonialism wars since 1945 had much the same experience as their pre-war predecessors in being confronted with the threat of airpower. The Vietminh... admitted that one of the greatest advantages held by the French during their war was airpower, as also was the experience of the Front de Liberation Nationale (FLN) in the 1954-1963 Algerian war for independence from France, and North Vietnam and its proxy, the Viet Cong, in the war against the government-of-the Republic of Vietnam (South Vietnam). Third World concern regarding airpower was fueled by the Israeli victory in the 1973 Yom Kippur War, which took place

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<sup>593</sup> Lawrence Rockwood, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility* (U of Mass Press 2007), 156.

between the second session of the Conference of Government Experts and the opening of the Diplomatic Conference in 1974. The comments of the senior U.S. representative to the first session of the Conference of Government Experts were insightful in recognizing the desire of Third World nations to negate the air power advantage of the developed nations, permitting the labor-intensive Third World nations to fight in terms of manpower rather than firepower: Third World desire to negotiate a new law of war treaty clearly had as much if not more of an arms control angle than a humanitarian interest.<sup>594</sup>

Likewise, he claimed that some non-aligned Western governments also saw a strict proportionality rule as a cost-effective way of defending themselves from aerial attack.<sup>595</sup> Lawrence Rockwood cautions that Park's scepticism marked a departure from a traditional US policy preference, which was to increase non-combatant protection, and instead was informed by his own ideological preference for Clausewitzian realism:

For Parks, the main problem with Protocol I was its relation to the Clausewitzian tenet of friction in war. The ICRC, by its 'unrealistic interpretations of the Just War principle of proportionality' and its obsession with limiting aerial bombardment, created friction by limiting the natural tendency of war to expand toward its natural maximum intensity.<sup>596</sup>

However, even if he did not share the particulars of Park's critique, Ambassador George Aldrich, the head of the US delegation at the CDDH and one of the proponents of API within the US government,<sup>597</sup> did share some of Park's general scepticism of the motivation behind the conference:

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<sup>594</sup> Parks, 74. Similarly: 'You're going to have that dynamic between the haves and the have-nots and I think that that's the reason why the US is not ratified API and, in my opinion, probably never will ratify API, although that lack of ratification is turning out to be... [Trew: Moot?] yeah – of no effect. I think that we are justifiably alarmed by Article 44 and 44.3 and 44.4 that gives POW status — treatment just as POWs — to those who have not fulfilled the four preconditions for POW status. In direct answer to your question: yes, that tension remains, but we (the US) have learned to live with it and we found that it hasn't had a great constraining effect on our military operations. So yes, there is still tension, but no effect. Interview with Former US Military Judge.

<sup>595</sup> 'During the two decades preceding the Diplomatic Conference, the ICRC and its supporters, neutral, nonaligned nations such as Switzerland, Finland, Austria and Sweden, had become so impressed by modern firepower that they began to advocate unconditional protection for individual civilians and the civilian population as such, unrealistic interpretations of the Just War principle of proportionality (expressed by these advocates as the rule of proportionality), and strict liability standards for the consequences of command decisions made in the heat of battle. In addition to altruistic purposes, three other motives influenced their advocacy: a. Inferior military powers in the isolated role of a neutral or nonaligned nation regarded the "humanitarian" law movement as another vehicle for the conventional disarmament of the superpowers... b. The same nations, and to some extent some members of the North Atlantic Treaty Organization (NATO), believed (and continue to believe) that a key influence for compliance with the law of war is the construction of a well-publicized regime of law that will serve as a means for bringing international public opinion to bear in time of war, which, in turn, will cause a belligerent to refrain from certain tactical options, even where they are lawful... That framework was to be Protocol I... c. Correlative to these two arguments was an economic interest in the continued minimization of the national defense budget in order to permit greater expenditures on more popular domestic social programs; hence, that which could be accomplished to limit the actions of any potential threat was "money in the bank." Parks, 81-82.

<sup>596</sup> Rockwood, 161.

<sup>597</sup> Ibid, 159.

We agreed in Istanbul in 1969 to the ICRC effort that laid the foundation for this Conference, but we did so with considerable misgivings. As a country that relies for its military effectiveness more on technology, modern equipment, and firepower than on massed manpower, the United States had to approach this Conference with caution and concern. Moreover, we had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority of which all too often seems to be led by radical states bearing grudges against the wealthy countries and against the United States in particular. These concerns were, in fact, justified.<sup>598</sup>

In a confidential Department of Defense preparation memo for second session of the CDDH, which was intended to help guide the delegates during negotiations, it was clear that the DoD was wary about giving the impression that, in built-up areas, attackers had to confine the effects of airstrikes to military targets. However, even internally, there was not a flat-out rejection of the proportionality rule in principle:

The US Delegation should support a reaffirmation of the principle that the civilian population as such, as well as individual civilians, shall not be made the object of attack ([draft] Article 46). It should, however, oppose any rule derived from this principle which might create the illusion that civilian casualties incidental to attacks against military targets located in populated areas can be avoided. Prohibition against indiscriminate means of combat should not extend beyond restrictions against:

1. Those which are intended to attack indiscriminately the civilian population and military targets, and
2. Those for which there is a high probability of incidental civilian casualties known to be disproportionate to the military advantage anticipated ([Draft] Article 46).<sup>599</sup>

Dill clarifies that the US delegation championed the proportionality rule at the CDDH precisely because they saw it as *permitting* collateral damage in some circumstances.<sup>600</sup> Recalling the motivation of some of the members of his team,

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<sup>598</sup> Aldrich in Parks 80. See also: George H. Aldrich, 'Some Reflections on the Origins of the 1977 Geneva Protocols' in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff 1984), 132.

<sup>599</sup> William Clements, *Preparation for the Second Session of the 1975 Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict* (US National Archives P750015-1368, 1975) 8. Draft Article 46 was the article on the protection of the civilian population and generally covered the principle of distinction (para 1), the idea that civilians can only be targeted if they take a direct part in hostilities (para 2), the prohibition of indiscriminate and disproportionate attacks (para 3), the prohibition of reprisals against the civilian population (para 4), the prohibition of using human shields (para 5), and a reaffirmation that violations by one side of the conflict do not release the other side from their obligations (para 6). *Law of War Conference* (US National Archives, P750055-1167, 1975), 1-2.

<sup>600</sup> 'At the same time, several delegations presented proportionality as without alternative, upholding that an absolute prohibition on inflicting civilian casualties as a side effect of military operations was impossible to honour and unlikely to be obeyed. The US was one of the principle's greatest advocates. The delegation emphasised that "collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go". It is the limited ambition of the provision that appears to have appealed to the US. The delegation was adamant that "[t]he task of the Conference was not to prevent the consequences of war, but to moderate them as much as possible. The rules should be capable of acceptance by

Aldrich explained that they saw the CDDH as an opportunity to recalibrate public expectations regarding civilian casualties and to restore the US's freedom of action after the Vietnam War:

Among the military lawyers who worked with me during the negotiation of the *Geneva Protocols I*, I detected a desire to prove that the armed forces of the United States had acted in Vietnam in accordance with international law — not merely the law of the old *Hague Conventions*, but also wanted, I believe, to have it demonstrated that the restrictions under which the military chafed in Vietnam were *not* required by law.<sup>601</sup>  
[italics in original]

Moreover, rather than instructing the delegation to keep the wording of the rules on proportionality and precautions vague, the DoD preparation memo instead argues that: 'The rules limiting military operations with a view to providing reasonable protection of the civilian population and civilian objects against the effects of hostilities should be stated more clearly so that they can be easily and readily understood ([draft] Articles 46-50)'.<sup>602</sup> However, the DoD also supported the idea of attackers having to take 'reasonable precautions' in setting up an attack, without specifying what sorts of actions would be considered reasonable.<sup>603</sup> Therefore, state officials may very well have wanted the

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Governments and of practical application ... [Proportionality] set out the maximum protection that could be provided." Many delegations agreed. The flexibility of the principle was considered an asset. Dill, 98-99.

<sup>601</sup> Aldrich, 132. The problems that plagued US forces in Vietnam, which inspired the US's involvement in the CDDH seem nearly identical to the claims being made by the proponents of a minimally restrictive air campaign against Islamic State today: 'By the early 1970s another development had affected American attitudes and, I suspect, those of most western countries, and that was the extensive coverage of the war in Vietnam by the news media, particularly television. Every evening for years the horrors of war were displayed graphically in every living room and the suffering of the civilian population in a war of guerrillas and high technology was often emphasized. A free press also gave a platform to propogandists of all persuasions, and the Government of the United States became sensitive to charges of indiscriminate bombardment, attacks on civilians, attacks on dikes and the environment and similar charges. In fact, the American forces in Vietnam operated under more restrictions than, I suspect, any other armed forces in history — restrictions that went far beyond what the law required and were imposed strictly for political reasons... This strange combination of severe political restrictions on the use of force and a pervading sense of defensiveness, if not guilt, about the suffering caused by the war, and by aerial warfare in particular, resulted, I believe, in an increased American willingness to participate in the review and improvement of the part of international law that deals with the conduct of hostilities.' *ibid*, 132.

<sup>602</sup> Clements, 8. A few years later, during the US Joint Chiefs of Staff Review of the 1977 protocols, DoD officials explained what parts of the rule seemed unclear: 'Paragraphs 4 and 5 of Article 51, for example, prohibit indiscriminate attacks, and are vague and ambiguous. They can be interpreted as excluding use of tactical nuclear weapons. They make no allowance for time constraints, weapon availability and cost, and projected loss of US troops using various weapons or means of attack. Further, how far apart must separated military targets be in order for the restrictions in paragraph 5 to apply? How large a concentration of civilians constitutes "a similar concentration" referred to in paragraph 5(a)? Does "direct military advantage" accrue to the military unit inflicting the damage or is it sufficient that a direct military advantage accrue to the force as a whole? It is recognized that these matters cannot be calibrated and defined with great specificity in these protocols, but the language used should at least point the way for the commander.' *Report by the J-5 to the Joint Chiefs of Staff on Jcs Review of the 1977 Protocols Additional to the 1949 Geneva Conventions* (Department of Defense, JCS 2497/24-6, 1982), 31.

<sup>603</sup> Clements, 10.

operational details of these rules to be easy to understand, but that did not stop them from endorsing the ambiguous language of reasonableness to describe the right balance between precautions that were technically possible, but overly tedious, and those that were too cursory to make a real difference in reducing civilian suffering.<sup>604</sup>

Similarly, in a restricted UK Ministry of Defence memo to its delegation, the MoD warned that draft Article 46 posed the greatest threat to the future UK operations: 'In terms of limitations of tactical freedom of the armed forces it is the most important article.'<sup>605</sup> For instance, when discussing the paragraph on indiscriminate attacks, the memo warned the UK delegation that:

[T]he principle of the prohibition of indiscriminate attacks is acceptable, but not the prohibition of employment of indiscriminate 'means of combat and any methods which strike or affect indiscriminately'. It is likely that this is a back door method of attempting to prohibit nuclear and neo-conventional weapons... It would mean that an attack launched with a weapon which by its nature was indiscriminate as between civilians and soldiers would be prohibited. It is essential to introduce the element of intention into this prohibition to avoid prosecutions for war crimes of soldiers who launched an attack bona fide believing that it would not have indiscriminate effects but which did in fact have such effects.<sup>606</sup> [emphasis in original]

Even though UK officials believed that one must take into account the mental state of the commander when deciding if an attack were indiscriminate, it also opened the door to include mental states other than direct intent, adding: 'However the criterion of intention would include a reckless disregard.'<sup>607</sup> The UK was also generally satisfied with the provisions that required states to take precautionary measures,<sup>608</sup> but as later MoD guidance for the final session reveals, its position was conditioned on the purposeful ambiguity that was put

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<sup>604</sup> Even if the US delegation would have been satisfied with a reasonableness standard in principle, Dill claims (consistent with other literature) that: 'The same reluctance to establish objective standards that could be used to judge the consequences of an attack, and hence pin its illegality on its outcome, is visible in the negotiations for precautionary measures in attack. That Article 57 was meant to concretise the implications of the obligations to distinguish and to observe proportionality should have created a strong case for formulating the provision as clearly and precisely as possible. Yet the ICRC went on record to state that it had "deliberately proposed a flexible wording ... as ... it was for the parties concerned to make it more precise, in terms of the organisation of their armed forces and of the kind of troops engaged". The negotiations revolved around the extent of belligerents' duty of care. Most delegations ultimately preferred the prescription to do everything 'feasible' in order to do justice to proportionality and distinction to an obligation to do everything "reasonable". Of course, both terms acknowledge situational contingency, but reasonableness is a legal category generally used to judge behaviour with hindsight.' Dill, 101-102.

<sup>605</sup> *Brief for 1974 Diplomatic Conference – Humanitarian Law in Armed Conflict*. (UK National Archives UM 48/3, 1974), 44.

<sup>606</sup> *Ibid*, 44-45.

<sup>607</sup> *Ibid*, 45.

<sup>608</sup> *Ibid*, 52-53

into the language of the article during the negotiations: 'This Article goes further than the UK would have wished in the obligations it places on soldiers. But it is substantially qualified by phrases like "do everything feasible ..." and "unless circumstances do not permit" etc. These so soften the obligations as to make the Article acceptable as a whole.'<sup>609</sup> [ellipsis in original] Therefore, on the one hand, the ambiguity of the language used to define the proportionality and precaution rules frustrated state officials, but on the other, it also allowed them to re-insert some flexibility into the provisions so they would have a minimal impact on future operations in practice.

However, even with the ambiguous language and despite the assurances of other western governments, an MoD official reported that the West German (FRG) delegation was nervous about the potential problems that the new restrictions would pose its forces, particularly because of the way that API would be imported into domestic FRG law:

Protocol I will introduce several new provisions on the methods and means of combat. The FRG considers that these rules, and particularly those relating to the protection of civilians and civilian objects, are incompatible with NATO planning. Under the FRG constitution the Protocol will form part of German domestic law, and will be enforceable in their domestic courts. They are concerned that NATO planning may become the subject of court actions.<sup>610</sup>

In the same memo, the official mused that they might feel the same way, were these rules to be imported directly into UK law. It would seem that as long as the rules of proportionality and precautions remain an aspiration, there was no problem with including them in the protocol, but if there were a chance that they might be used to form the basis of prosecutions, then those officials would become more circumspect about the language used to couch the same provisions.<sup>611</sup>

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<sup>609</sup> *Draft Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts* (UK National Archives, DS 22, 1977), 6.

<sup>610</sup> *Humanitarian Law - Brief on Nato Study* (UK National Archives, DS 22, E7, 1977).

<sup>611</sup> The DoD even said as much during the JCS review of the Additional Protocols: 'Article 48, for example, requires that the commander "at all times distinguish between the civilian population and combatants...." Combatants are frequently indistinguishable from civilians, as proven in Vietnam. Similarly, to distinguish between military objectives and civilian objects is often impossible, as military objectives often appear to be civilian objects and civilian objects often are used for military purposes. Even so, if these principles represented mere goals which Parties were obligated to strive toward, they would not be objectionable. When they are prohibitory, however, and their violation constitutes a war crime, they should be more explicit in stating that good faith effort is all that is called for.' *Report by the J-5 to the Joint Chiefs of Staff on Jcs Review of the 1977 Protocols Additional to the 1949 Geneva Conventions*, 31.

These behind-the-scenes memos present an even clearer picture of the concerns that US and UK officials had whilst negotiating the Additional Protocols than even their official reservations might reveal. Although it is not clear as to how much of the ambiguity of the rules on proportionality and precautions can be attributed to state officials' desire for them to be so, what is clear is that those officials eschewed any formulations of the law that would impose anything approaching strict liability for violations of the rules.<sup>612</sup> Furthermore, they seemed more concerned about how the rules might be applied in the court room, than how they might be argued over in the court of public opinion. Two decades later, at the Rome Conference, these preferences had changed very little.

#### *State Negotiating Position at the Rome Conference*

There was a remarkable stability in the preferences of those who negotiated the US and UK positions at the CDDH and those who negotiated the same at the Rome Conference.<sup>613</sup> Even after two decades of advances in weapons technology that enabled those who plan or conduct operations to have access to better intelligence and to attack with greater precision, state officials were still wary of the possibility that the use of air power could be scrutinised by either domestic<sup>614</sup> or international courts.

One key difference between the attitudes of those officials who negotiated the Additional Protocols and those who negotiated the Rome Statute was that the latter were less willing to use ambiguous language to define which actions would constitute unlawful attacks, as Lietzau explained:

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<sup>612</sup> See Ch 3 at notes 428-431.

<sup>613</sup> This stability is important in for the strategic-choice approach because, as Frieden argues, preferences must be held constant for at least one 'round' of a game-theoretical analysis: 'If we are interested diplomatic relations between two countries, it does little for our analysis simply to assert that one of the countries' preferences changed in the middle of the interaction. Of course, this may well have been the case – governments are overthrown or voted out of office and replaced by others with different preferences – but this is better regarded as changing the character of the interaction so that it is another round or game.' Frieden, 46. By showing that the US and UK government preferences on this issue are stable, I can model the historical interaction that has taken place between state officials and prosecutors, even if the whole game takes several years or decades, rather than the span of one administration. This is because I can assume that the government officials of one administration have, broadly-speaking, the same preferences on this issue as the one that came before it.

<sup>614</sup> The complementarity principle would have compelled states to take measures to implement the provisions of the Rome Statute in their respective domestic laws.

There was purposeful ambiguity then and that ambiguity is fine. It's actually helpful if you're the superpower. If you're the superpower of the world and the provision is ambiguous, your freedom of action hasn't been particularly highly constrained. If you're an individual human being and the powers of the world are able to prosecute you, ambiguity is *not* your friend. You want to rely on the law, especially if you're a representative of the superpower of the world.<sup>615</sup>

Lietzau explained further that his motivation for pinning down the law was not just to keep US personnel safe from prosecution as its own end, but rather he was also worried that ICC prosecutions could be used to influence the US policy, effectively reining in its freedom of action in foreign affairs and on the battlefield:

So, if the Secretary of State knows, or the Chairman of the Joint Chiefs of Staff knows that by targeting this location, he can be personally prosecuted, you are influencing our foreign policy with this court and that is more true for the United States than it is for other countries and so, the need for precision is greater for us, because we wanted it to be rigid enough that this guy can at least feel somewhat comfortable that: 'I'm doing the right thing; I will make this decision and I'm not really risking a successful prosecution against me', because we have that precision. That's why you'd have a completely different purpose in an ICC negotiation then you'd have in a Protocol I negotiation.<sup>616</sup>

Of all the crimes listed in the Rome Statute, it was Article 8(2)(b)(iv) that the US delegation believed would have the greatest possibility for opening up US personnel to politicised prosecutions.<sup>617</sup> In this case, though, rather than clarifying the thorny issues of how to calculate proportionality or which precautions must be taken before launching a strike, the emphasis for the US delegation was to clarify the elements of the crime in such a way that it would be very difficult to prosecute it.

Pfirtier diplomatically explains that: 'The lengthy elements with two footnotes indicate the complex nature of this crime, in which the mental elements are of crucial importance. As was the case with the negotiations concerning the exact wording of the crime in the statute, the negotiations of its elements were difficult and at times rather 'heated.'"<sup>618</sup> He recalled that during the negotiations of the elements for the crime of disproportionate attack, it was the representatives from various NATO countries who were arguing against the imposition of a strict *mens rea* for the crime. The United States, in particular,

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<sup>615</sup> Interview with Lietzau.

<sup>616</sup> Ibid.

<sup>617</sup> 'We thought: "what are the crimes that could actually be used against us in some kind of a political trial?" and this was the big one.' *ibid*

<sup>618</sup> Pfirtier, 'Article 8(2)(b)(iv)' 151.

fought for the inclusion of a statement that would require the commander to have made the value judgement that attacking a particular target would result in civilian death and loss that was clearly excessive in relation to the anticipated military advantage before the court could find the accused guilty.<sup>619</sup>

Indeed, the US motivation for raising the standard of liability for proportionality rule at Rome mirrored the other battle that the US fought regarding the court's ability to try the personnel of a state that was not a party to the treaty. As Ambassador David Scheffer recalls, the DoD was intransigent on the issue of protecting US service members from *any* possibility of prosecution by the court. Despite personally holding a different view on the matter, in his role as a US state official during the Rome Conference, he tried to argue for a regime that would make it nearly impossible for the court to prosecute Americans:

Other governments understandably were confused and annoyed with the U.S. strategy in the talks for the International Criminal Court... [T]hat strategy ended up seeking to protect the United States as a nonparty to the treaty regardless of how its military might wage warfare on foreign territory. Because the United States deploys its armed forces globally, the Pentagon understandably has been concerned that an international court exercising its jurisdiction on the territory of any state party to the treaty might try to prosecute U.S. soldiers who have to fight on such foreign land... Foreign negotiators found it difficult to square the U.S. position on nonparty protection with how that same privilege would be used by civilian and military leaders of other nonparty states and rogue elements to shield themselves from the court's jurisdiction and perpetrate atrocity crimes at will on the territories of states parties. The confusion only multiplied when I walked into the negotiating room to argue for Washington's prior consent to any prosecutions of Americans, even if the United States were to join the court. I appeared as the guardian of impunity, rather than its slayer.<sup>620</sup>

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<sup>619</sup> Ibid, 150. Lietzau confirmed that the US wanted to make the mens rea for the crime of disproportionate attack as difficult as possible to prosecute out of a fear of what the prosecutor might do if it were any different: 'I mean, we came up with the knowledge element because we didn't trust how that standard [the reasonable military commander standard] would get implemented and I don't know that it was clear what the standard would be. There's no doubt that there were other standards being offered like the "reasonable man standard" and sometimes they were being offered clearly to promote more prosecutions. There is clearly a group of people at an ICC whose goal is well-meaning: to stop warfare in general and the way that they're gonna stop warfare... [Trew: ...is by prosecuting everybody?] ...is by prosecuting everybody and somehow they'll be doing good by doing that. Obviously, there is another view that: no, there wouldn't be a war in the first place if there wasn't something really bad to try to stop and harming the ability to prosecute that war effectively by a threat of prosecution is not going to help the world. With that in mind, we went with a knowledge element as a more protective device, but if we had to go with a standard, I think that the 'reasonable military commander' is the only reasonable standard that you could use.' Interview with Lietzau. See also Ch 2 at note 197.

<sup>620</sup> Scheffer, 167-168.

This has led scholars to believe that the law, as it is articulated in the Rome Statute, was intentionally drafted to be more difficult to apply than its equivalent customary formulations. For example, Robert Cryer concludes:

States drafting the Rome Statute were not merely setting down law to deal with anyone else, but law that could be applied to both them and their allies. Also, this law is to be enforced by a court which is to be independent of the creating States. This meant that the way to rein in the court was by ensuring that all the law to be enforced was defined by the States themselves, leaving as little discretion as possible in the Court. This setting down of the law need not necessarily be unwelcome, primarily because parts of international criminal law had, at least up until recently, been rather open-textured, and without authoritative interpretations legitimacy was affected. The problem with the Rome Statute is that definitions of crimes are sometimes narrower than customary international law permits (or, in some cases, requires). This is particularly the case for war crimes, with a closed list of crimes which are frequently defined in a limited fashion.<sup>621</sup>

Nowhere is this effect clearer than with the drafting of RS Article 8(2)(b)(iv).

Given the consistency with which state officials, across different administrations, have defended the state's right to use air power with as few restrictions as possible, particularly when it comes to war crimes prosecutions based on the proportionality rule, for this project, it will be safe to assume the following:

- State officials value mission success as its own end.
- State officials' primary concern is with maximising the likelihood of mission success for any particular military operation;
- State officials believe that prosecutions of their personnel will decrease the likelihood of mission success because of indecision;
- State officials believe that investigations of their actions will decrease the likelihood of mission success because they may have to reveal state secrets;
- State officials believe that investigations and prosecutions decrease public support for military operations, decreasing the chances of mission success, regardless of whether they are triggered by an international court or a domestic court.

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<sup>621</sup> Robert Cryer, 'The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and Their Statutes' in Caroline Harvey, James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge UP 2014), 287.

- State officials believe that failure to investigate or prosecute the individuals responsible for a *prima facie* unlawful attack will decrease the state's legitimacy in the eyes of the public.

With these assumptions in mind, I posit that state officials believe that the probability of mission success is inversely related to the probability of a successful prosecution against a military commander for violations of the rules on proportionality or precautions in attack, but that failure to address *prima facie* unlawful attacks will incur a legitimacy cost. Again, it is important to stress that I am not stating whether successful prosecutions of violations of the rules on proportionality or precautions actually constrain a state's freedom of action, but rather that state officials believe this to be the case and that they will make rational decisions based on this belief.

#### *Defining Court Officials*

Although many strategic models of court and state interaction take judges to be the actor of greatest interest, in the current analysis of why it is difficult to achieve accountability for violations of the rules on proportionality and precautions in attack, it may be more fruitful to look at prosecutors. This is because, with the exception of the ICTY *Gotovina* case, no cases of disproportionate attack have ever made it to trial<sup>622</sup> and even in that case, the defendants were eventually acquitted on appeal because the judges did not have a good way to examine the reasonableness of the attack without resorting to an arbitrary standard.<sup>623</sup> However, for many cases of *prima facie* disproportionate attack, such as those during the NATO bombing campaign in Operation Allied Force,<sup>624</sup> the *Kunduz Fuel Tankers Bombing*,<sup>625</sup> or the *Shelling*

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<sup>622</sup> [This is] the biggest problem we've seen, for decades now and certainly since the ICC was established or since international jurisdiction has taken a greater role via hybrid courts or a variety of other mechanisms. We haven't so often been in the situation where cases get to court, it is proven that the crime has happened, but the problem is proving intent. That has happened in a few cases, but the biggest problem we have when thinking about how to deal with impunity is still the number of cases that even make it to the stage of judicial proceedings – the principle being accepted that for these crimes, they need to be prosecuted, whether it's by a national court or a hybrid court or by an international special court or by the ICC; it doesn't matter. Interview with Amnesty International War Crimes Investigator.

<sup>623</sup> See Ch 2 at note 238.

<sup>624</sup> See Ch 2 starting at note 227.

<sup>625</sup> See Ch 2 starting at note 269.

of *Yeonpyeong*,<sup>626</sup> the decision to open an investigation or to prosecute an individual commander rested with either an *ad hoc*, domestic or ICC prosecutor, respectively. Though the legal rules which constrain prosecutors from each of these legal regimes differs slightly, each type of prosecutor is drawing conclusions about the likelihood of successfully prosecuting a case, given a corpus of law on proportionality or precautions in attack that is largely based on either the Additional Protocols or the Rome Statute. Even in the United States, where war crimes are typically couched in terms of violations of the Uniform Code of Military Justice (UCMJ),<sup>627</sup> rather than violations of international law, the report on the *Kunduz Hospital Bombing* cited API and borrowed the language used in API to describe what its authors believed were violations of LOAC<sup>628</sup> and it was in his quasi-prosecutorial role that the CENTCOM commander made the decision not to prosecute those involved. This is not to say that prosecutors have a completely separate set of interests from judges. Indeed, it can be helpful to examine some of their shared institutional interests, but ultimately it was the prospect of the *prosecutor's* ability to pursue a case that most concerned state officials at the CDDH and at the Rome Statute which lead to their own decision to fight against a strong liability for the crime of disproportionate attack.

For the purposes of this study, I define court officials as those with the authority to indict, or otherwise refer to trial, a commander for a *prima facie* disproportionate attack and most likely, this will be a prosecutor. Under the following assumptions, I believe one can use the same analytic frame to examine the strategic interaction between state officials and prosecutors at either the domestic or the international level. Firstly, I assume that the state in this analysis has some mechanism to import the provisions on proportionality and precautions in attack either into its own criminal code or as military orders

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<sup>626</sup> See Ch 2 starting at note 246.

<sup>627</sup> Interview with Former US Military Judge. Since the US is not a party to the Additional Protocols or to the Rome Statute and there is not another vehicle to import customary international law directly into US domestic law, the UCMJ would likely be the way to 'convert' the requisite international law into something that could be used to hold troops to account for LOAC violations.

<sup>628</sup> For example, see *Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015*, 61-63.

for which commanders can be held criminally accountable. Secondly, I also assume that the court is sufficiently independent of the political branches of government as to grant the prosecutor enough freedom of action to choose their own cases.<sup>629</sup>

### *Prosecutorial Motivation*

I submit, perhaps uncontroversially, that the prosecutor's primary motivation is to win cases. Of all the pressures put upon the prosecutor, this seems to be the most salient, based on what court officials had told me in my interviews. For instance, when I asked Richard Goldstone what he thought were the procedural and political barriers to prosecuting disproportionate attacks, he replied:

Well, you know there's really only one barrier and that is the availability of evidence. No prosecutor is going to issue an indictment (and let me tell you it's a huge responsibility to issue an indictment alleging that somebody has committed war crimes) if there isn't sufficient evidence available and not only sufficient evidence, but sufficient available evidence that the prosecutor knows — reasonably — is going to be available should the matter come to trial.<sup>630</sup>

Clearly if a prosecutor wishes to secure a conviction, they must build their case upon a sturdy evidentiary base.<sup>631</sup> If a prosecutor does not have evidence to prove all the elements of the crime or if they do not believe that the law is clear enough, then there is no rational reason for investing the time or resources to launch a formal investigation or to try to take the case to trial. As one court official put it to me: 'It's supposed to be clear. You should only be prosecuting the clear-cut cases because it cost too much money!'<sup>632</sup> Particularly if there is

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<sup>629</sup> This assumption will limit the generalisability of this analysis to the US, since in that state it is the commander who refers cases to courts-martial and despite a prohibition against unlawful command influence (UCMJ Article 37), it is more likely that the convening authority will at least share the institutional interests of the executive branch, rather than the judiciary.

<sup>630</sup> Interview with Goldstone.

<sup>631</sup> Though there are several challenges to this as mentioned in Ch 3 at note 436.

<sup>632</sup> Interview with Former ICTY Official. Similarly, Allison Danner believes that financial constraints will lead the prosecutor of the ICC to similarly prioritize their caseload to make the most of scant resources: 'The experience of the ad hoc tribunals has made clear that, owing to their length and complexity, international prosecutions cannot be undertaken for all crimes associated with a particular conflict. Justice Arbour has observed, on the basis of her experience, that the real challenge faced by the ICC Prosecutor will be "to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones." The ICC's first budget, for example, allocates only €3,961,200 to the Office of the Prosecutor, out of a total budget of €30,893,500. The budget also states that, during the first financial period, "it is to be expected that the Office of the Prosecutor will receive many communications" asserting that crimes within the Court's jurisdiction may have been committed. The Prosecutor must prioritize these investigations and determine how to allocate his limited resources—a difficult problem on which the Rome Statute is completely silent.' Allison Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *The American J of Intl Law* 510 519-520. Cryer similarly noted that during the Čelebići Appeal the judges expressly recognised that

lower-hanging fruit, then it is rational for the prosecutor to select those cases which provide a conviction in exchange for the resource costs associated with running an investigation.

Having examined the possible political forces that could influence the ICC Prosecutor, David Bosco believes that the legalist ideal of an apolitical court should not be dismissed out of hand:

The legalist expectation forms an important baseline possibility: that the ICC prosecutor will be essentially apolitical. On this view, the court should examine information about potential crimes with little reference to the political realities surrounding them and to the preferences of major powers. The prosecutor's only job is to determine whether crimes of sufficient gravity have been committed, whether the court has jurisdiction, and whether relevant domestic judicial institutions are handling the matter adequately.<sup>633</sup>

However, given the work that has been done on strategic deference in international courts, he also believes that the most likely route that states would use to influence court behaviour is to withhold support for their work:

An alternative, more pragmatic view is that the prosecutor has no choice but to consider diplomatic realities in selecting situations, if only to ensure that an investigation will be feasible. In most cases, some level of support from the state where the alleged crimes had occurred, or at least from neighbouring states, would be necessary to conduct complex investigative work... Without this official support, an investigation could be a futile gesture. On this view, the prosecutor should include an assessment of likely state support before launching an investigation. He or she might choose not to open an investigation if the prospects for that support appeared weak. Pursuing an ideal apolitical form of justice by ignoring the need for state support would only sap the institution's credibility.<sup>634</sup>

Even if the prosecutor believes that there is a good evidentiary basis for prosecution, because of the ambiguous wording of proportionality and precautions in attack, it would not take much mitigating evidence to acquit the accused. For instance, when discussing the possibility of referring the *Kunduz Hospital Bombing* case to courts-martial using US domestic law, one former

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because the ICTY had finite resources, it needed to exercise some selectivity in pursuing cases. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 194.

<sup>633</sup> David Bosco, *Rough Justice* (Oxford UP 2014), 18. The legalist baseline is written directly into the Rome Statute in Article 42: 'The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.' Rome Statute of the International Criminal Court of 1998. The ICTY and ICTR have similar independence articles: Article 16(2) ICTY Statute, Article 15(2) ICTR Statute. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 194. This baseline also describes the ICC's recent guidelines on case selection which stress that independence, impartiality and objectivity are their general principles for case selection. *Policy Paper on Case Selection and Prioritisation* (ICC Office of the Prosecutor, 15 September 2016), 7-9.

<sup>634</sup> Bosco, 19.

military lawyer explained that even with the full cooperation of the US military and access to classified information, the prosecutor's case might not survive first contact with the defence counsel:

Now obviously, we don't know everything because it [the CENTCOM report] is a heavily redacted report and there may be other information that we aren't aware of and of course, one thing to keep in mind is (and that anybody you talk to who has been a military prosecutor will tell you): if you think the facts in a fact-finding investigation like this end up being the facts that actually get presented at trial, you're deluding yourself. Because (let's be honest here) the one piece of this where there has been no influence has been an advocate that has been working on behalf of the defendant trying to develop alternate facts, right? So, if you try to charge one of these guys with a criminal homicide and I'm their defence lawyer, I might find tons of other stuff that wasn't in the report. We have no idea how that would turn out.<sup>635</sup>

Therefore, in deciding whether to investigate or issue an indictment for a *prima facie* disproportionate attack, prosecutors could still be deferring to the political whims of those states that use air power regularly, not necessarily because they fear material retribution,<sup>636</sup> but rather because they fear the professional legitimacy costs that come with taking a case to trial without the necessary resources to back it up.

#### *Prosecutor's Discretion in Case Selection*

Although most legal systems grant prosecutors some level of discretion to choose which cases to take to trial,<sup>637</sup> the legitimacy of the prosecutor's actions in the eyes of society depends upon their ability to exercise that discretion in a coherent and consistent way: 'A rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system. Consistency requires that a rule, whatever its content be applied in a "similar" or "applicable" instance'.<sup>638</sup> Some amount of discretion to dismiss cases will be tolerated by those who fall within the prosecutor's remit if the prosecutor's reasoning is stated clearly and is based on technical issues, such as lack of evidence<sup>639</sup> and not on political issues, such as whether the prosecutor believes a state under investigation will publicly denounce the court.

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<sup>635</sup> Interview with Former US LOAC Policy Official (1).

<sup>636</sup> Although this certainly is a possibility. For instance, a number of African countries have threatened to withdraw from the Rome Statute in order to influence the court's behaviour. , 'The Gambia Joins African Queue to Leave ICC' *BBC News* (26 October 2016) <<http://www.bbc.co.uk/news/world-africa-37771592>> .

<sup>637</sup> Thomas Frank in Cryer, 'The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and their Statutes', 192.

<sup>638</sup> *Ibid*, 196.

<sup>639</sup> See generally, *ibid*, 209.

However, if states have purposefully raised the standard of liability that is required to convict a commander of criminal behaviour by insisting that the prosecutor prove direct criminal intent, then this technical issue allows prosecutors to dismiss cases which otherwise might merit a full investigation or a trial. Even if a prosecutor were not consciously deferring to major powers, the result will be a *de facto* deference to states that employ air power, since the OTP will prioritise other, more easily provable crimes that do not have such a high *mens rea* hurdle to pass.

The ICC Prosecutor has, in practise, tended to prioritise cases in a way that keeps the court from antagonising major powers, and in each case, the OTP has offered non-political rationales for why it has decided to drop a case that could come within its remit:

That pattern of deference is also evident in the prosecutor's critical decisions about where to start full investigations. There is strong circumstantial evidence that the court has used its discretion in opening investigations to avoid entanglement with major powers and to reassure them about the court's intentions... There is no "smoking gun" evidence that the prosecutor has made these choices because of perceived major-power preferences or out of a desire to avoid entanglement with them. There are plausible nonpolitical arguments against investigations in each of these cases. Because the prosecutor has only infrequently explained a decision not to open an investigation, moreover, there is little documentary evidence to assess. But the overall pattern strongly suggests that the prosecutor's office has, to this point, used its discretion on where to open investigations strategically.<sup>640</sup>

Indeed, commentators such as Bill Schabas have suggested that the Prosecutor uses the 'gravity' threshold for determining which situations are worth investigating as a way to screen out cases that would put it in conflict with major world powers. As an example, he noted that the Prosecutor's choice to not investigate the situation in Iraq in 2006 seemed more motivated by political pressure than any objective measures of gravity.<sup>641</sup>

Perhaps in response to such criticism, the ICC OTP released its *Policy Paper on Case Selection and Prioritisation* in 2016 and it sheds some light on how the OTP justifies the use of the Prosecutor's discretion. In the document, the OTP stresses that it will not exercise the Prosecutor's discretion to appease certain states: '[T]he Office of the Prosecutor shall act independently of

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<sup>640</sup> Bosco, 185-186.

<sup>641</sup> William Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 J Marschall L Rev 535, 547-549.

instructions from any external source. Independence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any external actor.’ Furthermore, as Goldstone mentioned above, this document explains that the exercise of the Prosecutor’s discretion is primarily a function of the availability of evidence:

Case selection is an information and evidence-driven process. This means that the Office will select and pursue cases only if the information and evidence available or accessible to the Prosecution, including upon investigation, can reasonably justify the selection of a case. As part of the case selection process, the Office will balance the strength of a case theory against its weaknesses... The case hypothesis will be reviewed on a continuous basis taking into consideration the evidence collected. Both incriminating and exonerating evidence will be fairly and objectively evaluated and the case hypothesis may be adjusted or rejected on the basis of further investigations.<sup>642</sup>

Legally, there is no requirement for the ICC OTP to release the criteria it uses to determine which cases to pursue and how they ought to be prioritised.<sup>643</sup>

Therefore, the fact that it has released such guidelines shows that the Prosecutor is sensitive to the way that its discretion is perceived by the public. Specifically, since the Prosecutor felt that it was necessary to publish these internal guidelines, she must fear that her office will suffer a legitimacy cost when it is accused of dropping a case for political, rather than strictly legal reasons. Struett suggests that the ICC OTP must be aware of how extra-legal factors affect its work, but should never mention those factors when explaining its decision-making process in order to preserve the institution’s legitimacy.<sup>644</sup>

To explore this further, I shall examine a couple of high-profile instances of

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<sup>642</sup> *Policy Paper on Case Selection and Prioritisation*, 8-9.

<sup>643</sup> Indeed, the OTP stresses that: ‘This is an internal document of the Office and as such, it does not give rise to legal rights, and is subject to revision based on experience and in light of evolving jurisprudence and/or any relevant amendments to the legal texts of the Court.’ *ibid*, 3.

<sup>644</sup> ‘Trials that are not likely to lead to successful prosecutions should be avoided. This includes areas that might be technically within the legal jurisdiction of the court, but where mounting a successful prosecution is unlikely. The use of this type of discretion can be justified on legal grounds, even though it might be subject to pragmatic political considerations as well. For example, the court is unlikely to have a successful conviction in a case where the national of a permanent member of the Security Council not a party to the Rome Statute commits a crime on the territory of a state party but then escapes to his home territory. In such a circumstance, the ICC should pretend that its decision not to pursue the crime has an entirely legal logic—namely, that insufficient evidence is available to ensure conviction. For the ICC to admit that it thinks it would be politically foolish to challenge a powerful state could be devastating to the overall integrity of their office... Prosecuting crimes that are not “the most serious” violations of international criminal law should not be pursued. Many war crimes that arise out of neglect rather than a systematic pattern of abuse will fall into this category. But here, too, some pretending is required. It would not be ethical for the ICC prosecutor to announce a general policy that war crimes committed due to a lack of proper training at a fairly low level of command will not be pursued. Instead, prosecutors must limit themselves to saying that they chose to stop pursuing a particular case because, given the gravity of the crime, doing so would not serve the interests of justice.’ Michael Struett, ‘Why the International Criminal Court Must Pretend to Ignore Politics’ (2012) 26 *Ethics and International Affairs* 83, 89.

court officials deferring to state interests and how they tried to avoid incurring legitimacy costs for doing so.

### *Strategic Deference in International Courts*

When examining court actors' motivations, particularly the court's appetite to weigh in on polemic, yet highly ambiguous law, it may be helpful to think about the effect that institutional interests may have on a prosecutor's decision to issue an indictment. In Chapter 4, I reviewed the small, yet growing body of strategic-choice literature as it has been applied to decisions made by domestic and international courts. These studies suggested that both judges and prosecutors will sometimes make strategic decisions counter to their professed ideological preferences in order to obtain the best outcome for their institution, given what other actors may do in response. Choices in how to structure an investigation or on how to rule in a particular case are strategic decisions and it is a safe assumption that the actors in an international or domestic court, be they prosecutors or judges, would like to do what they were trained to do — apply the law to the particular facts of a given case. However, if their institution is to survive, their actions must take into account what they believe other domestic or international actors might do in response to their decisions.

As a case involving a highly political issue and ambiguous law, the contentious 1996 International Court of Justice (ICJ) advisory ruling on the *Legality of the Threat or Use of Nuclear Weapons* provides an example of how judges might react in such circumstances.<sup>645</sup> In their *dispositif*, the judges voted on several replies to the UN General Assembly concerning the legality of the threat or use of nuclear weapons, and for four out of six of their replies, the judges were able to find unanimous agreement.<sup>646</sup> However, on the crux of the

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<sup>645</sup> *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice).

<sup>646</sup> For example, the judges were in unanimous agreement that: 'A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.' *Legality of the Threat or Use of Nuclear Weapons*, 44. On the face of it, this statement seems a bit banal and tautological — in essence, a legal use of nuclear weapons must comply with international law. However, it did clarify that the use of nuclear weapons was not in a legal category of its own, divorced from IHL requirements of distinction, proportionality, etc.

matter—whether the threat or use of nuclear weapons was allowed under international law *in extremis* — the court issued a *non-liquet* response:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.<sup>647</sup>

This response divided the court eight to seven. Those who dissented, such as Judges Schwebel (USA) and Higgins (UK) criticised the *non liquet* on the grounds that the law *is* sufficiently clear and that it *does* authorise the use of nuclear weapons *in extremis*.<sup>648</sup> In his opinion, Judge Schwebel lambasted his colleagues for not coming to a decision one way or the other about the issue and hinted that the decision said less about the true state of international law, than the state of international politics:

When it comes to the supreme interests of the state, the Court discards the legal progress of the Twentieth Century, puts aside the provisions of the Charter of the United Nations of which it is the 'principal judicial organ', and proclaims, in terms redolent of Realpolitik, its ambivalence about the most important provisions of modern international law.<sup>649</sup>

The strategic nature of the *Nuclear Weapons non liquet* has not been lost on scholars either. Kati Kulovesi claimed that, in the absence of specific international rules regulating nuclear weapons, those looking to LOAC for further guidance were able to find convincing legal arguments for either side of the *Nuclear Weapons* debate.<sup>650</sup> Even so, the ICJ had managed to rule on politically sensitive topics before and the judges were certainly no strangers to the tricky problem of finding applicable legal principles to fill in lacunae. Why,

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<sup>647</sup> Ibid, 44.

<sup>648</sup> Some of the other judges who dissented with the *non liquet*, such as Judges Koroma (Sierra Leone) and Weeramantry (Sri Lanka), likewise argued that the law was clear, only that instead of allowing the use of nuclear weapons, they should have been declared unlawful. 108-152, 334. There's no doubt that this division helped to reinforce the majority's view that the state of the law was unclear.

<sup>649</sup> Schwebel in Kati Kulovesi, 'Legality or Otherwise? Nuclear Weapons and the Strategy of Non-Liquet' in Martti Koskeniemi and Jarna Petman (eds), *Finnish Yearbook of International Law, 1999*, vol 10 (Martinus Nijhoff 2002), 70.

<sup>650</sup> 'The legal problem of nuclear weapons does not exist in isolation of the moral and political problem of nuclear weapons, and thus a legal solution to the question cannot overlook other aspects of the problem. This can be understood by analysing the decision of *non liquet* in the *Nuclear Weapons* case in light of both the available interpretations of the existing international law, and the prevailing atmosphere in the international community' *ibid*, 78.

after decades of delivering definitive judgements on other political issues did the Court refuse to rule on this one?<sup>651</sup>

Kulovesi suggests that definitively ruling on the legality of nuclear weapons would have severely damaged the court's *legitimacy* in the eyes of the states, particularly those on the losing side. A *non liquet* provided the court with a way out of this high-stakes problem:

[I]n order to avoid an open conflict with either side [of the debate], the Court then decided to formulate its answer in an indefinite manner. The impression that the *non liquet* was due to strategic reasons is reinforced by the fact that most judges in fact expressed in their added opinions [--] the view that international law does give a definitive answer to the question before the Court. As Kohen has noted, only three of the judges agreed with the conclusion in paragraph (2)E of the *dispositif*. All the others either conclusively defined what in their view was the legal status of the threat or use of nuclear weapons under international law, or claimed that the court should have refused to answer the question.<sup>652</sup>

Former Finnish diplomat, Martti Koskenniemi, concurs with this position, claiming that a ruling coming down definitively in favour of, or in opposition to, the use or threat of nuclear weapons would not have been in the Court's institutional interests:

Both would have entailed a collision between law and politics, politics being understood either as the structure of the world's politico-military system or generally shared politico-humanitarian ethic. In neither of these conflicts could it confidently have been expected that law would have prevailed.<sup>653</sup>

Had either the law been better defined, or had the issue of nuclear weapons not been so clearly the domain of high politics, the judges may have felt more confident in prescribing a legal remedy to the General Assembly. The *non liquet* allowed the court to acknowledge the valid legal arguments of both sides of the nuclear debate without alienating the other, thereby maintaining their legitimacy as a neutral arbiter for future cases.

Similarly, when presented with reports of LOAC violations committed by NATO in its air campaign against Serbia during the Kosovo War, the Office of

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<sup>651</sup> To be sure, the Court could have refused to even hear the case outright. However, it found that the benefits of taking the case outweighed the risks: 'On the one hand, the court, despite significant opposition, decided to comply with the request for an advisory opinion by the General Assembly. By doing so, the court indicated that it had both the competence and the courage to tackle with such a politically controversial question. On the other hand, the Court tried to balance the political tension between the pro-nuclear and anti-nuclear parts of the international community, attempting to send a message that is capable of taking into account the interests of both sides.' *ibid*, 87.

<sup>652</sup> *Ibid*, 86.

<sup>653</sup> Koskenniemi in *ibid*, 131.

the Prosecutor (OTP) at the ICTY was obliged to consider the matter to head off the legitimacy costs that would be incurred for pursuing prosecutions against one party to the conflict, but not the other.<sup>654</sup> However, as with the *Nuclear Weapons* case, the subject matter for this investigation, NATO's use of air power, was fraught with risk for the continued operation of the court. The chief prosecutor at the time, Carla Del Ponte, tasked William Fenrick to head a committee to assess the legality of the alliance's actions, including the proportionality of several airstrikes.<sup>655</sup> Though not directly threatened by NATO to cease her preliminary investigation, Del Ponte and her committee faced an uphill battle for information on the incidents her committee was researching:

I quickly concluded that it was impossible to investigate NATO, because NATO and its member states would not cooperate with us. They would not provide us access to the files and documents. Over and above this, however, I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. If I went forward with an investigation of NATO, I would not only fail in this investigative effort, I would render my office incapable of continuing to investigate and prosecute the crimes committed by the local forces during the wars of the 1990s.<sup>656</sup>

Since the CDDH, the United States, in particular, has had concerns that the proportionality rule could be used to limit its freedom of action with regards to the use of air power, which it regarded as an unacceptable way of levelling the playing field vis-à-vis less technologically capable countries. Del Ponte and her committee now found themselves in a position to weigh in on the application of the proportionality rule in precisely the way that the US had feared. Scheffer recalls the diplomatic pressure that US state officials put upon the Prosecutor to get her to relent:

During the entire period that Washington responded to the Kosovo bombing inquiry and up until the report issued by Del Ponte announcing the decision not to investigate NATO or the United States, Del Ponte was persona non grata in Washington... I understood but disagreed with the strategy of Berger, Albright, and Cohen to isolate and annoy Del Ponte at a time when we needed to cultivate a cooperative spirit during a highly sensitive and potentially risky inquiry into the NATO targeting strategy over Kosovo and

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<sup>654</sup> 'My inbox had filled with letters from all over the world calling for investigation of NATO's bombing campaign against Serbia in 1999... Some letters argued that NATO's bombing campaign violated international law and that NATO aircraft had deliberately attacked civilian targets and disregarded the rule of proportionality... Reports of one particular incident, an air attack on a passenger train that was crossing a railroad bridge, piqued my prosecutorial interest. Why, I wondered, would a pilot try a second time to down a bridge when he knew that his first bomb had struck a passenger train as it was on the bridge?' Carla Del Ponte and Chuck Sudetio, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Yvonne Cárdenas ed, Other Press 2009), 77-79.

<sup>655</sup> *Ibid*, 80.

<sup>656</sup> Del Ponte in Bosco, 66.

Serbia. They decided to play hardball with her, clearly resenting how she shamed the United States for what we all considered to be a singular achievement in liberating Kosovo from the clutches of Serb criminality.<sup>657</sup>

To give the ‘wrong’ answer in her report would risk alienating NATO, but to not say anything would weaken the ICTY’s legitimacy, making it difficult to be seen as an impartial adjudicator of international justice. This realisation caused her to accept the committee’s assessment that the law regarding proportionality was unclear as a way to defuse the tricky political situation:

I felt the committee members had drawn restrictive interpretations [of LOAC] to avoid being obliged to go on. I must confess, however, that I knew going on was impossible, both technically and professionally. We had no cooperation, none, from anybody—this was the technical problem. And it was impossible to go on politically without undermining the rest of the tribunal’s work. *I could discount the political considerations, because of the technical impediment.* This is why I went public with the committee’s report.<sup>658</sup> [emphasis added]

The ‘restrictive interpretations’ of LOAC to which the committee held could not give clear guidance on the legality of the incidents under investigation. However, in my interview with a member of that committee, they pushed back against the idea that the report’s contents were influenced by NATO’s combative stance, instead arguing that even if the alliance had cooperated with the court, it would have been difficult to sustain a conviction:

There may or may not have been pressure exerted on *The Prosecutor*, meaning the senior person in the organization, not the person who prosecuted a particular case. But I think it was their job to keep it off our backs. Certainly, no prosecutor while I was there said, ‘we can’t do this because it is politically unacceptable’. We just — We didn’t recommend prosecuting for NATO stuff because we didn’t think there was anything there that was big enough or that had senior enough people involved for us to do the job — for us to be involved. If we compared what we were doing [in the NATO report] with potential accused from Bosnia or Croatia or Serbia, they were either people who had done much worse things or people much higher up the totem pole.<sup>659</sup>

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<sup>657</sup> Scheffer 292. See also Cryer, ‘The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and their Statutes’, 215.

<sup>658</sup> Del Ponte and Sudetic, 80-81. ‘The difficulties the Tribunal would doubtlessly have encountered had NATO States withdrawn financing and co-operation should not be underestimated. It is clear that the Prosecutor was placed in an unenviable position. Some are of the view that this justifies the Prosecutor in not taking matters further. However, there is an analogous problem at the domestic level: investigation of police brutality. In such cases, it is difficult for a Prosecutor to work as there are continuing relations between the police and prosecutors which are imperilled by prosecutions of the investigators and those who hold evidence. Problems with this are considered serious enough by some to suggest the need for an international criminal court. Despite the difficulties the Prosecutor was faced with, it appears that the ICTY (or, more accurately, the OTP) did take into account external factors in coming to its decision. There was no discriminatory motive, but the approach to investigating offences by NATO States and other parties to the Kosovo conflict was disparate, leaving it open to critiques of selective enforcement.’ Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 219-220.

<sup>659</sup> Interview with Former ICTY Official

Even if the members of the Prosecutor's NATO bombing committee felt insulated from the political posturing taking place between the Office of the Prosecutor (OTP) and NATO, it seems clear that Del Ponte believed that she would be unable to proceed with other cases if she lost NATO's support and this affected her willingness to proceed with a full investigation of the air campaign.<sup>660</sup> Despite the fact that state officials from NATO countries may have thought they were complying with the court in good faith,<sup>661</sup> and despite the fact that the committee members themselves did not believe that NATO was influencing the outcome of the OTP inquiry, once again, it is not whether NATO was actually withholding evidence that is important here, but rather whether the Prosecutor *believed* this to be the case. This is because ultimately, it is the Prosecutor's decision to push forward with an indictment or to drop the case.

Clearly court officials are politically aware and understand that state officials will likely take actions to marginalise the court (or will withhold crucial evidence) if they make decisions that are not in the state's interest.<sup>662</sup> The *Nuclear Weapons non liquet* demonstrates that despite their formal independence, international courts, like their domestic counterparts, rely upon other actors for resources and legitimacy. Court officials may be inclined to make decisions that do not reflect their ideological preferences, but instead are made to avoid the institutional costs that would come from exercising their discretion freely. The history behind Prosecutor Del Ponte's difficulties with investigating NATO's bombing campaign during Operation Allied Force further shows that court officials do not necessarily fear direct political action against the court, because states can exert pressure merely by not cooperating with the court on its investigations. Furthermore, as with the *Nuclear Weapons* case, if

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<sup>660</sup> Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 218-220.

<sup>661</sup> From Scheffer's point of view, NATO *had* acquiesced and gave the Prosecutor the evidence she wanted: 'It was left primarily to me to ensure that NATO (and the United States) sustained a cooperative relationship with the Yugoslav Tribunal in order to resolve the lingering questions about NATO actions. The effort paid off as NATO explained each bombing run in enough detail and with persuasive explanations to prevent a full-scale war crimes investigation. Shortly after the release of the prosecutor's report on June 24, 2000, concluding that no investigation of NATO's actions would be required, Del Ponte boarded a plane for Washington and another, albeit considerably delayed, round of consultations.' Scheffer, 292.

<sup>662</sup> Bosco, 20-22.

the law regarding proportionality and precautions in attack is ambiguous enough, then the prosecutor has a technical way to avoid a conflict with state officials without suffering a legitimacy cost for not issuing an indictment.

Since it seems that court officials are at least aware of the strategic environment in which they operate and there is evidence that prosecutors and judges will sometimes use their discretion to dismiss cases for extra-legal reasons, I will make the following assumptions for the purposes of this study:

- Prosecutors value successful prosecutions since it justifies their *raison d'être*.
- Prosecutors believe they will incur a legitimacy cost for bringing cases to trial that do not result in a conviction.
- Prosecutors believe that state officials will not cooperate with investigations if it is not in their interest to do so.
- Prosecutors believe they will incur a legitimacy cost for *not* bringing forth cases that ostensibly fall within their remit, if they cannot otherwise justify their decision.
- Prosecutors will incur material costs when they choose to investigate cases.

As with my assumptions regarding state officials, I suggest that these motivations are stable, holding true for both domestic<sup>663</sup> and international criminal courts and do not change when the *person* of the prosecutor changes in any particular court. Moreover, these assumptions are roughly in line with what Landes had proposed in his basic model of prosecutorial strategy.<sup>664</sup>

### *Conclusions*

Although there are many reasons for why it has been difficult to achieve accountability for the rules of proportionality and precautions in attack, the strategic choice perspective offers researchers a way to cut through some of this complexity by looking at the relationship between the motivations of court and state officials as they interact with one another in a given strategic

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<sup>663</sup> Again, this is subject to the additional assumption that the domestic court is sufficiently independent of the political branches of government.

<sup>664</sup> See Ch 4 starting at note 536.

environment. For the purpose of this study, I am defining state officials as those who come from states that use air power regularly and have the power to set state policy on LOAC. There is a great deal of evidence which reveals that state officials want to maintain their state's freedom of action to pursue mission success with minimal restrictions and are particularly sensitive to having their commanders prosecuted. In this study, I am defining court officials narrowly as prosecutors, since in this case, nearly every instance of a *prima facie* disproportionate attack that has been brought before a court has been dismissed by a prosecutor before being taken to trial. For their part, prosecutors are concerned with having enough evidence to secure a conviction, given what the law requires, because they do not wish to waste resources or to suffer the legitimacy costs associated with failure. Prosecutors are sensitive to how the public views their exercise of prosecutorial discretion to dismiss cases, but they have also found ways to use the technical problem of acquiring evidence as an excuse to minimise the legitimacy costs associated with dismissing a case for political reasons. In Chapter 6, I shall formalise these assumptions by showing how state officials and prosecutors attempt to maximise their payoffs in a game-theoretical model.

## Chapter 6

### A Model of State Official and Prosecutor Interaction

The logic of the proportionality rule arose as the result of a long history of development in LOAC and ICL, but it is nevertheless difficult to try violations of this rule, especially in criminal courts. Generally, the rule requires commanders to make sure that the expected collateral damage caused by an attack is not going to be excessive when compared with the military advantage they expect to gain from striking a military target. Furthermore, in order to make sure that commanders can properly make this decision, the rule on precautions in attack requires them to, among other things, take all feasible measures to verify the nature of targets so they have all the information they need to make a proportionality calculation in good faith. Although these rules can be effective at guiding attackers' actions before launching a strike, particularly when legal advisors act as a compliance fence around the commander's decision-making process,<sup>665</sup> they are fiendishly difficult for legal professionals to apply to a case of *prima facie* disproportionate attack *ex post*.<sup>666</sup> The criminalisation of these rules theoretically includes liability for reckless attacks,<sup>667</sup> but there have not been any successful prosecutions of the proportionality, either for direct intent to cause a disproportionate outcome or for recklessness in targeting or performing the proportionality calculation. Neither national nor international jurisdictions have managed to effectively deal with alleged violations of these rules in a robust way.<sup>668</sup>

There are several legal and practical reasons for this, but after considering the literature, there seem to be two main reasons that explain why the rules have proved to be so elusive. Firstly, those countries that rely heavily on air power have lobbied for the ICL definition of proportionality to require the commander to have direct knowledge of the disproportionate nature of the attack<sup>669</sup> and they have used the vagueness of the rule's provisions to take

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<sup>665</sup> See Ch 1 at starting at note 39.

<sup>666</sup> See generally, Ch 2.

<sup>667</sup> See Ch 2 at note 211-214.

<sup>668</sup> See Ch 2 starting at note 223.

<sup>669</sup> See Ch 5 at notes 619.

advantage of other criminal law norms which give discretion to the commander, such as the Rule of Lenity.<sup>670</sup> Secondly, any prosecutor wishing to try an alleged case of disproportionate attack must find evidence, not only of the effects of the attack, but also the commander's mental state when they launched the attack and this often requires investigators to seek information from state officials who may not be forthcoming with such evidence. The combined effect of these difficulties has been to substantially limit the implementation of the criminal version of the rule.

If the ICL version of proportionality rule represents a case of dead-letter law, is this the necessary consequence of trying to criminalise a provision that is just too difficult to pin down in a fair way, or are there strategic conditions which make it unlikely that a case of disproportionate attack would be taken to trial? In Chapter 4, I introduced the strategic-choice perspective and reviewed the literature that described how court actors might interact with other strategic actors, such as lawmakers, in order to achieve their personal or institutional goals. I suggest that this same approach can simplify the problem of achieving accountability for the rules on proportionality and precautions in attack. To that end, in Chapter 5, I identified the relevant actors for this problem as state officials who can influence LOAC and prosecutors from either domestic or international jurisdictions who have the authority to prosecute war crimes. In this Chapter, I will detail a model of their interaction and will explore what conditions must change in order to produce a different equilibrium state from the one that case law suggests is currently the case.

### *The Model*

To model the strategic interaction between state officials and prosecutors, I have chosen to use a three-level game of perfect information. There are six paths through the game and it covers:

- the state official's decision to lobby for a particular interpretation of proportionality and precautions at an international law conference;

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<sup>670</sup> Or, in the case of the Rome Statute, the commander must intentionally launch a 'clearly' disproportionate attack.

- the prosecutor’s decision to pursue a case of disproportionate attack; and
- the state official’s subsequent decision either to cooperate with the prosecutor or not.<sup>671</sup>

In Chapter 5, I identified the motivations of both state officials and prosecutors. To formalise these motivations for the purposes of this model,  $L$  will represent the anticipated legitimacy payoffs for either the state ( $L_s$ ), or the prosecutor ( $L_p$ );  $m$  will represent the anticipated payoffs to states from future military action, and  $c$  will represent the fixed costs associated with running an investigation into an alleged incident of disproportionate attack. Each path through the game also has a unique value for  $p$ , which will represent the probability that a commander will be convicted of planning or launching an unlawful attack. Clearly, if a commander is not indicted, this value will be zero, but for all other paths through the game, the value of  $p$  will be affected by the decisions made earlier in the game. Figure 3 below lists each of these variables along with their definitions:

$p_{s,i,c}$	Probability of conviction after indictment, given a strong liability regime and state cooperation with the prosecutor
$p_{s,i,-c}$	Probability of conviction after indictment, given a strong liability regime and no state cooperation with the prosecutor
$p_{w,i,c}$	Probability of conviction after indictment, given a weak liability regime and state cooperation with the prosecutor
$p_{w,i,-c}$	Probability of conviction after indictment, given a weak liability regime and no state cooperation with the prosecutor
$m$	Anticipated value of future military action
$L_s$	Anticipated state legitimacy
$L_p$	Anticipated prosecutor legitimacy
$c$	Anticipated costs associated with running an investigation/prosecution

Figure 3: Notations table

The relationship between these variables is based on the motivations I discussed in Chapter 5. Beginning with the relationship between the different values of  $p$  associated with the commander’s probability of conviction, I suggest that  $p$  is higher on any path under the strong liability<sup>672</sup> condition than on any path under the weak liability condition ( $p_s > p_w$ ) simply because it will be easier to convince a panel of judges or a jury that the commander clearly violated the law

<sup>671</sup> In the definition of cooperation, I include providing insider evidence and assistance with rendering suspects into custody.

<sup>672</sup> To avoid any confusion caused by using terms of art, like ‘strict liability’, I use the terms ‘strong liability’ and ‘weak liability’ to indicate broad classes of liability, rather than particular types of liability.

under a strong liability condition than under a weak liability condition. Then, for each subgame that occurs after a prosecutor's indictment, the commander's probability of conviction is higher under the cooperate condition than the do-not-cooperate condition ( $p_c > p_{-c}$ ), because the prosecutor will have better access to the evidence needed to prove the commander's criminal mental state. I posit that these two assumptions can be combined to form the following inequality:  $p_{s,i,c} > p_{s,i,-c} > p_{w,i,c} > p_{w,i,-c}$ . Although it is possible that  $p_{w,i,c} > p_{s,i,-c}$ , I am going to assume for this model that the liability condition has a greater impact on the value of  $p$  than whether the state decides to cooperate with the court.

Next, I turn to the relationship between the different variables used in the players' payoffs. The legitimacy terms,  $L_s$ , for the state official, and  $L_p$ , for the prosecutor,<sup>673</sup> can be either negative or positive, depending on whether the particular outcome bolsters or undermines the legitimacy of either actor. The term,  $m$ , only applies to the state, since an independent prosecutor should not be concerned with the outcome of a future military action. The value of  $m$  can also be positive or negative, depending on whether the outcome represents military success or failure. Finally, the term,  $c$ , only applies to the prosecutor, as the state should not be concerned about the costs of prosecuting a suspect commander.<sup>674</sup> Since the statements and actions of state officials in the literature and in my interviews indicate a preference for military success over state legitimacy for countries that use air power frequently, I will initially assume that  $m > L_s$ . Furthermore, for the prosecutor, the legitimacy value of pursuing a successful prosecution must be higher than the prosecution costs; otherwise, the prosecutor would have more incentive to do nothing, thereby earning a

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<sup>673</sup> Breaking from Landes' basic model, I've decided to model the prosecutor's motivation in terms of legitimacy, rather than the length of a suspect's sentence. Though there is clearly a relationship between these two ideas (the prosecutor justifies their position in society by securing as many tough sentences as they can), particularly in the context of international justice, legitimacy for the Office of the Prosecutor more accurately reflects the prosecutor's motivation. Furthermore, it allows me to have this term change valance according to whether the prosecutor wins or loses a case. When the prosecutor is only motivated by sentence length, the worst they can do is obtain a payoff of 0. However, if the prosecutor incurs a legitimacy cost for losing a case, then it adds an extra element of risk to a prosecutor's decision to issue an indictment which would be present in high-profile war crimes cases. See Ch 4 at notes 536-541.

<sup>674</sup> Because I am more interested in how the liability regime and state cooperation affect the value of  $p$ , rather than how the prosecutor's ability to resource the investigation affects this value, unlike Landes' basic model, I envisage the prosecutor's resourcing of the investigation as a fixed cost that the prosecutor incurs for undertaking an investigation, but which does not affect the probability of conviction. See Ch 4 at note 536-541.

payoff of zero, rather than take on even an easily winnable case and be burdened with the logistical costs associated with the prosecution. Therefore, I assume that  $L_s > c$ .

Figure 4 depicts the game tree for the complete game between a state official and a prosecutor along with the payoffs associated with each path through the game. The game begins with a decision by the state official to either lobby for a version of international law that includes a strong liability for *prima facie* disproportionate attacks or to push for a version that keeps the liability for such attacks as weak as possible. This could be done any number of ways. The state official may try to influence the wording of the crime at an international law conference, they could try to coordinate with other states to include a reservation to a LOAC or ICL treaty that bolsters their preferred interpretation of the law, they could make official statements which promote a weaker liability under customary law or they could incorporate some level of vagueness into the provision in the knowledge that the Rule of Lenity will make it impossible for the commander to be convicted. The prosecutor knows under which condition they are working and they must then decide to either indict a suspect commander or to drop the case. To simplify the model, the decision to indict a commander includes preliminary processes, such as an investigation of the incident; moreover, I assume that if a commander is indicted, the court will have a way to bring them into custody. If the prosecutor drops the case, the game ends. However, if the prosecutor issues an indictment, then the state official must decide if they should cooperate or refuse to cooperate with the court. This subgame models the real-life problem that courts have had with obtaining evidence of the disproportionate nature of an attack from less-than-forthcoming state officials. In the next section, I shall first examine each of the two subgames to show the logic behind them and then I shall substitute in some numeric values for each variable so the equilibria states become more apparent.

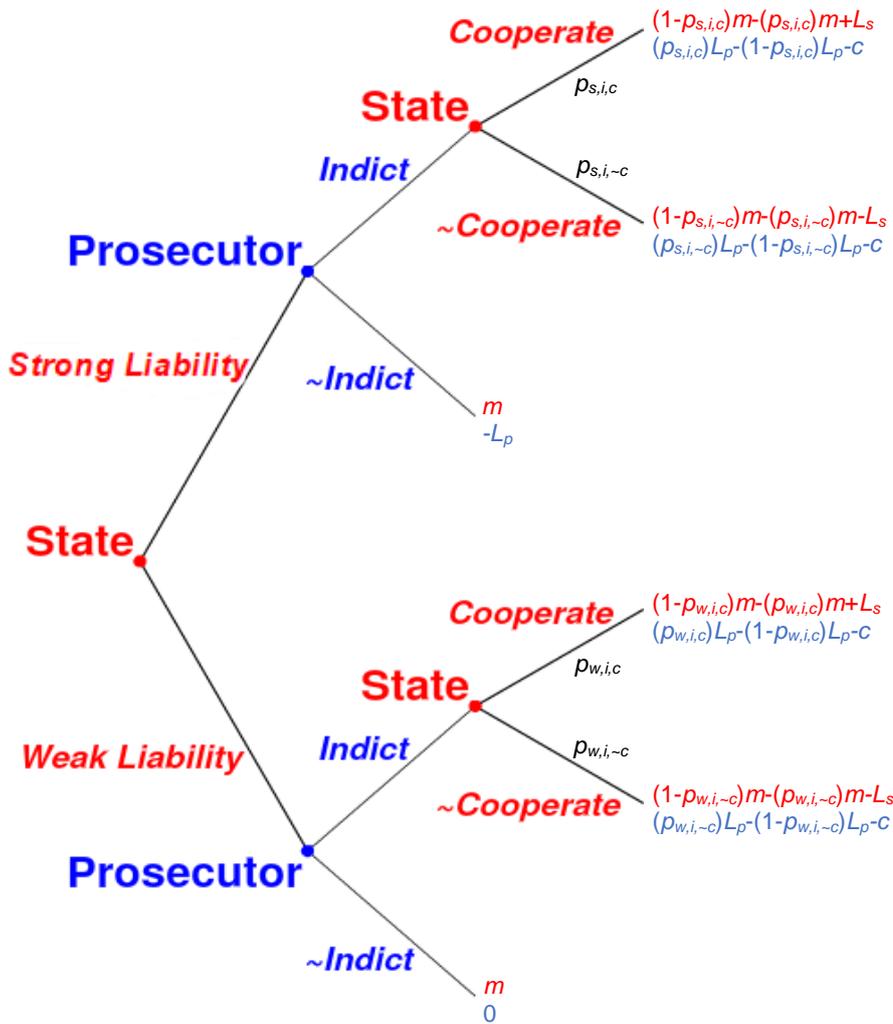


Figure 4: Game tree of an interaction between a state official and a prosecutor with player payoffs<sup>675</sup>

Just as important as what is included in the model, I should also describe some of the details of this strategic interaction that have either been left out or collapsed into a single term for the sake of parsimony. For instance, one could have included a cost associated with the state relinquishing its intelligence to the court that was separate from the ‘future military value’ term. This would have represented the fear, described by Charles Garraway, that the court might mishandle sensitive intelligence, thereby compromising their sources or

<sup>675</sup> The state official payoffs are depicted above prosecutor payoffs. This model was designed using the Game Theory Explorer online modelling tool. See Rahul Savani and Bernhard von Stengel, ‘Game Theory Explorer -- Software for the Applied Game Theorist’ (2015) 12 Computational Management Science 5.

methods of intelligence-gathering.<sup>676</sup> The cost could be added to the state official's utility function under the 'cooperate with the court' condition and then left absent in the 'do-not-cooperate' condition. I chose not to model the interaction this way because it seems possible for the state to work with the court in question to review and clear intelligence in such a manner as to not jeopardise national security or the state's sources.<sup>677</sup> Furthermore, in the case of an international prosecution by the ICC, Article 72 of the Rome Statute specifically addresses the national security concerns of the states by allowing the court to negotiate an: 'Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.'<sup>678</sup> Therefore, it ought to be possible for the state to offer meaningful assistance to either a domestic or an international court without compromising national security.

Moreover, regardless of whether a case of *prima facie* disproportionate attack were to be taken up in an international or a domestic jurisdiction, the prosecutor would likely have more than one chance to decide whether to pursue the case. For example, at the ICC, the prosecutor can first choose to open a preliminary examination,<sup>679</sup> then if they believe there is sufficient cause to proceed, they can petition the Pre-Trial Chamber to open a formal investigation.<sup>680</sup> Afterwards, if they believe there is still a reasonable basis to prosecute a case, they can choose to issue an indictment for the accused to

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<sup>676</sup> See Ch 3 at note 452.

<sup>677</sup> See Ch 3 at notes 453 & 454. Furthermore, Richard Goldstone was still able to secure state cooperation with the court, despite the ICTY's policy of liberally sharing evidence with the defence: 'Arrangements to receive police information, and, even more so, intelligence information, required lengthy, complex and detailed negotiations. Again, there was no substitute for personal visits. Trust and confidence had to be built between the institution and the government concerned. This could not be achieved without direct contact with the relevant officials. The necessary agreements required special procedures, including the building of secure premises to house such confidential documents. The rules of procedure had to be amended to enable the Prosecutor to accept information in confidence. More particularly, the Prosecutor had to be allowed to receive 'lead' evidence without the obligation to disclose it to defendants and their legal representatives.' Richard Goldstone, 'A View from the Prosecution' (2004) 2 *Journal of International Criminal Justice* 380, 381.

<sup>678</sup> Article 72(5)(d), Rome Statute of the International Criminal Court of 1998.

<sup>679</sup> Article 15(2), *ibid.*

<sup>680</sup> Articles 15(3) and 53, *ibid.*

appear before the Court.<sup>681</sup> The model simplifies the decisions taken at each of these stages by collapsing them into one decision to indict or not indict the accused. In reality, the interaction between state officials and prosecutors is more iterative, with the prosecutor choosing to proceed with different stages of an investigation and the state officials re-evaluating their decision to cooperate at each new stage. The iterative nature of the actual strategic interaction also increases the likelihood that exogenous factors will affect the outcome of the game. For example, if after cooperating with the court during a preliminary examination, public opinion within the state turned against the Court, the state official, fearing a legitimacy cost for continuing to cooperate with the court, may decide not to cooperate after the prosecutor launches a formal investigation. Nevertheless, the value of simplifying the interaction for this model outweighs its lack of resolution in this case.

Another way in which the model represents a simplified version of reality is the assumption that the same state official who chooses to lobby for a particular type of liability for unlawful attacks will also be the official who chooses whether the state should cooperate with the prosecutor. Given the stability of preferences held by different US delegates to the CDDH and to the Rome Conference,<sup>682</sup> I believe it is appropriate to assume that even if a different individual argues for the state's position on the content of the law from the one who must decide whether to cooperate with the prosecutor, both state officials share a common understanding of what is in the state's interest. Therefore, they can be treated functionally as the same official for the purposes of the model.

Finally, I assume for the purposes of this model that the path players take through the game is the only factor that influences the probability of conviction for a suspect commander,  $p$ . In reality, there could be any number of exogenous factors that might affect this probability which are independent of the liability condition or whether the state official decides to cooperate with the court. For example, an insider witness could agree to testify against a suspect commander without prior approval from the state or the evidence against the

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<sup>681</sup> Article 58, *ibid.*

<sup>682</sup> See Ch 5 at note 613.

commander could be so overwhelming that the court does not require any state cooperation to secure a conviction. Nevertheless, such events will occur with a frequency that is difficult for the state official or the prosecutor to predict, so I have decided not to include their effects in the original model. However, when I discuss how *changing* the values of the different variables affects the Nash equilibrium of this model, I will mention how exogeneous effects on the value of  $p$  might change the path that the different players follow through the game.

### *The Indictment Subgames*

Beginning at the node where the Prosecutor makes their decision, the game between the prosecutor and the state official proceeds with the same strategies, regardless of whether the players find themselves in either the strong liability condition or the weak liability condition. There are, however, two main differences between these two conditions. Firstly, if the prosecutor chooses not to indict a suspect commander under the strong liability condition, then they will suffer a legitimacy cost associated with not pursuing a case that had a reasonable chance of conviction, but if they choose not to indict under the weak liability condition, then they will be able to, in Del Ponte's words, 'discount the political considerations, because of the technical impediment'<sup>683</sup> and use the weak liability as an excuse for not pursuing the case. Secondly, the liability condition also affects the probability of conviction, so the values of  $p$  under the strong liability condition will always be higher than those under the weak liability condition. Other than these differences, the functions which describe the expected utility of each player follow a similar logic in each subgame.

In both conditions, if the prosecutor chooses to indict a suspect commander, the state official expects that the value of any future military action will be dependent on whether the commander is convicted. If the state official agrees to cooperate with the court, the first part of the state official's expected utility,  $(1 - p)m$ , will represent the gains made from an acquittal and the next

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<sup>683</sup> Del Ponte and Sudetio, 80-81. See Ch 5 at note 656.

part,  $-(p)m$ , will represent the losses incurred by a conviction.<sup>684</sup> The last part of the function,  $+L_s$ , represents the legitimacy the state receives for cooperating with the court. If the state official does not agree to cooperate with the court, then their expected utility will again feature the value of future military success, moderated by the probability of the suspect commander's conviction,  $(1 - p)m - (p)m$ . However, rather than receiving a legitimacy bonus, the state will suffer a legitimacy cost,  $-L_s$ , for seemingly defying justice.

Regardless of whether the state official chooses to cooperate with the court or not, the prosecutor's utility function remains the same whenever they choose to issue an indictment. As with the state official, the prosecutor's expected utility is dependent upon the likelihood of securing a conviction of a suspect commander, should the case go to trial. Therefore, the first term in the function,  $(p)L_p$ , represents the legitimacy that will be gained from a successful conviction and the next term,  $-(1 - p)L_p$ , represents the legitimacy that will be lost from failing to make a successful conviction. As stated above, the final term,  $-c$ , accounts for the fixed resource costs associated with running the investigation. Although scholars such as Bosco<sup>685</sup> suggested that court officials might be intimidated by state retribution against the court, none of the court officials I spoke with endorsed this idea wholeheartedly and they more often insisted that legal and logistical issues were more pressing than direct threats from the state.<sup>686</sup> However, states do not need to directly threaten the court to have an impact on prosecutorial decision-making. By merely making it more difficult for them to secure a conviction, states can change the prosecutor's payoffs, consistent with Landes' basic model.<sup>687</sup> Therefore, for the sake of parsimony, I am not including a separate 'state intimidation' term into the prosecutor's utility function and I will assume that indirect influence over the outcome of a potential verdict (e.g. either by structuring the law a certain way or

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<sup>684</sup> Taken together, these two terms form a simple von Neumann-Morgenstern expected utility function. See John Von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (3rd edn, Princeton UP 1953), 17-20.

<sup>685</sup> See Ch 5 at notes 634 & 640.

<sup>686</sup> See, for instance, Ch 5 at 630.

<sup>687</sup> See Ch 4 at notes 536-541.

by refusing to hand over evidence to the court) will be enough to change the prosecutor's behaviour.

By substituting numeric values for each of the variables in this game, it becomes possible to explore it in a more concrete way. Figure 5 lists all of the variables used in the model and their corresponding numeric values for this exercise. Importantly, these values satisfy the assumptions made earlier in this Chapter. Notionally, I have set  $L_s$  and  $L_p$  as equal to each other, but this is not imperative as these are theoretically two separate variables. Furthermore, unless a variable is used in the utility function of both players, it is the relationship between the variables *within* a player's own utility functions that is important, rather than the relationship between variables used across the different players' utility functions. This is because ultimately the point of the game is to maximise one's own absolute payoff, rather than to maximise the relative payoff vis-à-vis the other player.

$p_{s,i,c}$	0.8	$m$	3
$p_{s,i,-c}$	0.6	$L_s$	2
$p_{w,i,c}$	0.4	$L_p$	2
$p_{w,i,-c}$	0.2	$c$	1

Figure 5: Substitute values

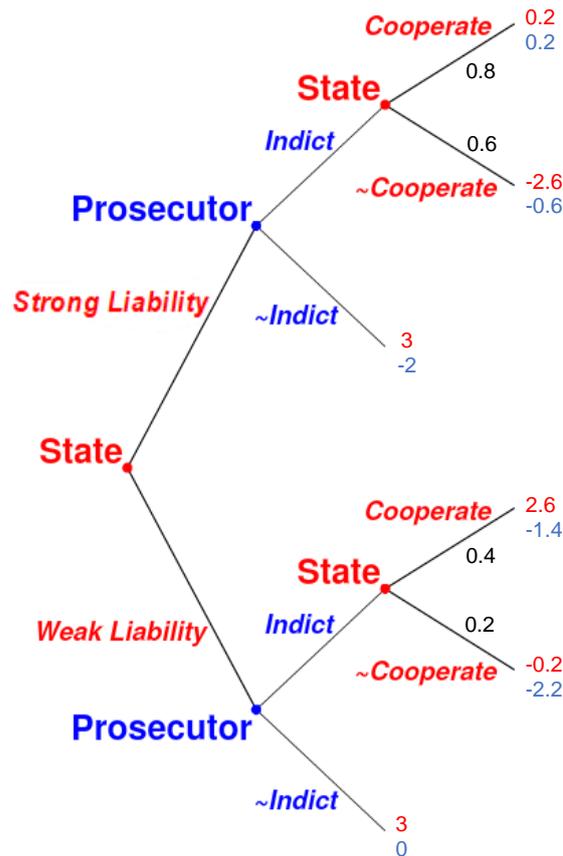


Figure 6: Game tree showing numeric payoffs based on the substituted values

The resulting game, depicted in Figure 6, can be solved through backwards induction, so I shall consider the results of the two 'indictment' subgames first, before turning to the results of the complete game. Since the state official has the last move, their payoffs will be analysed first. For the subgame that occurs under the strong liability condition, the state official has the choice to either cooperate with the court and receive a payoff of 0.2, or to not cooperate with the court and receive a payoff of -2.6. Therefore, the court official has a dominant strategy to cooperate with the court in this particular subgame. The prosecutor, believing that the state official will choose to cooperate, must decide if they should indict the suspect commander and receive a payoff of 0.2, or to not indict the suspect commander and receive a payoff of -2. In this case, the decision to indict strictly dominates the decision to drop the case. The Nash equilibrium for the strong liability condition is therefore: (indict  $\rightarrow$  cooperate). For the subgame that occurs under the weak liability condition, the state official can either cooperate with the court and receive a payoff of 2.6, or not cooperate and

receive a payoff of -0.2. As with the strong liability subgame, the decision to cooperate strictly dominates the decision to not cooperate. However, the prosecutor's decision changes. Believing that the state official will cooperate, the prosecutor anticipates receiving a payoff of -1.4 for issuing an indictment to the suspect commander<sup>688</sup> and they will expect a payoff of 0 for not issuing the indictment. In this case, not issuing an indictment is the dominant strategy for the prosecutor and the Nash equilibrium for this subgame becomes: (do not indict).

### *Solving the Complete Game*

Combining the results of the two subgames, it becomes possible to develop a rational-choice explanation for why it is difficult to achieve accountability for apparent violations of the rules on proportionality and precautions in attack. At the first node in the game, the state official will anticipate all the subsequent moves in the game and will therefore believe that their payoffs will be 2.6 under the strong liability condition and 3 under the weak liability condition. Since the state official anticipates a higher payoff under the weak liability condition, they will decide to lobby for a version of the law which will achieve that effect. This comports somewhat with what Lietzau told me about his thinking during the negotiation of the Rome Statute:

Well, I showed up to the treaty negotiation on the US delegation, to negotiate the crimes definitions and the list of war crimes — the definition of crimes against humanity, war crimes — Articles 6, 7, and 8... Now, admittedly, I'm thinking like a defence counsel at that point time, not because, as some would say, the United States just wants to avoid liability. No. Because we intended to prosecute our own people and the assumption is: if an American is ever brought before the International Criminal Court, it's not a legitimate trial. It's some politically motivated thing, because if it was an actual crime, we would have been prosecuting that ourselves.<sup>689</sup>

Anticipating how the court might use the law against the US, Lietzau (and presumably other state representatives) were concerned about what the political fallout might be if they pursued one definition of the law over another. As Lietzau stated, it may be the case that the US, at the time of the Rome Conference, was prepared to accept liability for sloppy or disproportionate attacks in its domestic jurisdiction — just not in an international forum.

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<sup>688</sup> This is because the lower value for  $p$  vis-à-vis the strong liability condition makes it difficult to secure a conviction, even with the state official's help.

<sup>689</sup> Interview with Lietzau.

Nevertheless, the interaction, as he described it, still follows the logic of the model: In anticipating the international prosecutor's motivation to indict under a strong liability regime, the state official decides to lobby for a weaker liability, which, in turn, changes the prosecutor's incentives. Indeed, the model predicts that the prosecutor will choose not to indict the commander and will receive a payoff of 0. Therefore, the Nash equilibrium of the complete game is: (lobby for a weak liability → do not indict).

This describes what has occurred in the case law history for the crime of disproportionate attack. Thanks to the weak liability regime, endorsed by those states which use air power frequently, prosecutors have chosen to drop cases, rather than press forward with an indictment and a formal investigation of an alleged case of disproportionate attack. It is important to note that this decision takes place in the absence of any direct intimidation of the court by state officials. It is merely an extension of the usual prosecutorial motivation to pursue only those cases which will likely end with a conviction.

One of the surprising conclusions predicted by the model, given these notional values, is that if an indictment were made, it would be in the state official's interest to cooperate with the court, rather than suffer the legitimacy cost associated with appearing to obstruct justice, even if it increases the chances of conviction for their commander. This stands in contrast to my findings in Chapter 3, where it seemed as though state officials would go to great lengths to preserve their state secrets.<sup>690</sup> Although the point is mooted by the fact that the state official's endorsement of a weak liability condition guarantees that the prosecutor will choose not to indict a suspect commander, it does show that as long as the state sufficiently values the legitimacy associated with following the rules-based order, the state official will have an incentive to cooperate with the court, rather than play hardball.

### *Changing the Equilibrium*

By designing a game which accurately models the interaction between state officials and prosecutors, one can make explicit the logic behind why the crime

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<sup>690</sup> See Ch 3 at notes 451 & 452. See also Ch 5 at note 584. n.b. It is important to mention that the Goldstone Report was not a *criminal* investigation.

of disproportionate attack has been such a difficult one to prosecute. However, this formalisation also allows researchers to examine which conditions might be expected to produce a different equilibrium state from the one which has occurred in history.

Beginning with the prosecutor's payoffs, when would the prosecutor be more likely to issue an indictment under the weak liability condition? In order to change the prosecutor's choice, the payoffs for the path (lobby for weak liability → indict → cooperate) must be greater than those for the path (lobby for weak liability → do not indict). Expressed formally, this becomes:

$$(p_{w,i,c})L_p - (1 - p_{w,i,c})L_p - c > 0 .$$

Solving for  $p$  and  $c$ , reveals the following relationships between the variables:

1.  $p_{w,i,c} > \frac{c+L_p}{2L_p}$
2.  $c < 2(p_{w,i,c})L_p - L_p$

The first inequality suggests that the value of  $p$  must be high enough to overcome a ratio defined by the costs of running the prosecution plus the legitimacy term divided by two times the legitimacy term. This is quite a high bar to surmount and would likely require an exogenous influence on the value of  $p_{w,i,c}$ . For instance, assuming that  $L_p=2$  and  $c=1$  (as described in Figure 5), it would mean that the resulting value of  $p_{w,i,c}$  would need to be: 0.75 in order to change the prosecutor's mind about pursuing a case under the weak liability condition. That would not leave much room to differentiate the weak liability condition from the strong liability condition and still preserve the assumption that  $p_{s,i,c} > p_{s,i,-c} > p_{w,i,c} > p_{w,i,-c}$ . However, it is possible. Practically, this could equate to having a case where the available evidence were so damning that even under a weak liability regime, the case would be easy to prosecute. As one official from the ICTY put it when speaking about the NATO Bombing Report: 'I think if we had big clear-cut cases, you know: NATO carpet bombing Belgrade or something like that with hundreds or thousands of people killed... I think we just would've had a duty to go ahead with a prosecution, come hell or high water.'

But I don't think that was the situation.<sup>691</sup> Legally, this example blurs the line between distinction and proportionality, but the comment does exemplify that when the likelihood of conviction is high for reasons that are not necessarily connected to the liability regime, it is still possible that the prosecutor will press forward with an indictment.

The second inequality shows the relationship between the logistical costs associated with running a prosecution and the values of  $p_{w,i,c}$  and  $L_p$ . Assuming  $p_{w,i,c} = 0.4$  and  $L_p = 2$ , that would mean that  $c$  must be less than  $-0.4$ , meaning that the court would have to have its budget supplemented above and beyond the fixed costs of running the investigation in order to be motivated enough to indict a suspect commander. However, when combined with the effect of raising the 'probability of conviction' term, it may be possible to cajole the prosecutor to issue an indictment under the weak liability condition if  $p_{w,i,c} > 0.5$  and  $c = 0$ .

Another way to induce the prosecutor to issue an indictment under the weak liability condition would be to add the same  $-L_p$  term for failing to make an indictment as is the case in the strong liability condition. Practically, this would mean that there would need to be a similar amount of pressure from human rights organisations, states and other public interest groups for failing to issue an indictment under the weak liability condition as under strong liability. In this case, these various audiences would not accept the excuse that prosecutor cannot make an indictment because the state of the law makes the probability of conviction unlikely. That is, the relevant audiences would not find this to be a credible reason for not pushing forward with an indictment. Importantly though, if the prosecutor did receive a legitimacy cost for failing to indict a suspect commander under the weak liability regime, and was therefore more likely to issue indictments, there would be more trials, but not a great deal of convictions, because the value of  $p$  for a given path through the game would remain unchanged.

Under the strong liability condition, it is clearly possible to motivate the prosecutor to issue an indictment; however, it is still helpful to explore precisely

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<sup>691</sup> Interview with Former ICTY Official.

which conditions lead to their decision. For the prosecutor to decide to issue an indictment rather than dropping the case, the payoffs for the path (lobby for a strong liability → indict → cooperate) must be higher than the path (lobby for a strong liability → do not indict). This can be formalised as:

$$(p_{s,i,c})L_p - (1 - p_{s,i,c})L_p - c > -L_p .$$

Again, solving for  $p$  and  $c$  reveals the following:

1.  $p_{s,i,c} > \frac{c}{2L_p}$
2.  $c < 2(p_{s,i,c})L_p$

For the first inequality, the value of  $p_{s,i,c}$  must be higher than the ratio of the logistical costs of the prosecution over two times the value of the legitimacy term. Using the substituted values for  $L_p$  and  $c$  from Figure 5, this would mean that  $p_{s,i,c}$  would need to be at least 0.25, a value that should be easily reached if the prosecutor were operating under a strong liability condition. Similarly, in the second inequality, the value of  $c$  could be quite high and the prosecutor would still be motivated to proceed with an indictment — it would be 3.2, assuming the values of  $p_{s,i,c}$  and  $L_p$  from Figure 5. Combining these two observations, the prosecutor will choose to issue an indictment under conditions of strong liability, as long as  $p_{s,i,c}$  and  $L_p$  are both positive numbers and  $c$  is less than two times the product of both. Realistically, this means that under conditions of strong liability, the prosecutor may have an incentive to indict suspect commanders even if there is not much of a chance that they will be convicted, provided the legitimacy they hope to gain (or fear losing) is sufficiently greater than the costs of running the prosecution.

Recalling that one of the more counterintuitive conclusions the model suggests is that it should be in the state official's interest to cooperate with the prosecutor,<sup>692</sup> what would need to change to induce the state official to not cooperate with the prosecutor? For this to occur, the payoffs to the state official from making a decision to not cooperate with the prosecutor must be greater than the payoffs that come from a decision to cooperate. This can be expressed as:

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<sup>692</sup> This assumes the values for the variables listed in Figure 5.

$$(1 - p_{\sim c})m - (p_{\sim c})m - L_s > (1 - p_c)m - (p_c)m + L_s.$$

Solving for each variable reveals:

1.  $m > \frac{L_s}{p_c - p_{\sim c}}$
2.  $(p_c - p_{\sim c}) > \frac{L_s}{m}$
3.  $L_s < m(p_c - p_{\sim c})$

The first inequality suggests that the value for future military success must be higher than the state's value for legitimacy divided by the difference between the value for  $p$  if the state official cooperates with the prosecutor versus the value of  $p$  when the state refuses to cooperate. Assuming the state leader finds themselves in the weak liability condition and assuming the substitute values for  $L_s$ ,  $p_{w,i,c}$ , and  $p_{w,i,\sim c}$  from Figure 5, this means that the value of future military success would need to be greater than 10 to prompt the state official to change their strategy. The second inequality shows that the difference between the two values for  $p$  must be greater than the ratio of the values for legitimacy and future military success. Using the substitute values for  $L_s$  and  $m$ , the difference between  $p_c$  and  $p_{\sim c}$  must be greater than 0.667 in order to make the state official decide to not cooperate with the prosecutor. Finally, using the substitute values for  $m$ ,  $p_{w,i,c}$ , and  $p_{w,i,\sim c}$ , the value of  $L_s$  must be less than 0.6 to effect a change in the state official's strategy. How might these conditions come to pass in the real world? For one, the difference between the two values for  $p$  may widen based on what sort of support the state official could provide to the prosecutor. Perhaps the state official anticipates that the inside intelligence they are able to give the prosecutor is so damning that it will substantially affect the likelihood of conviction compared with the do-not-cooperate condition. Furthermore, it is also possible that certain exogenous factors may influence the values of these variables in such a way as to prompt a shift in strategy. For example, the state official may believe that the relative value of future military action would be substantially greater than the value of legitimacy if the state were to find itself fighting an existential threat as opposed to a war of choice.

One of the most important insights that can be gleaned from this sort of analysis is to figure out if the state would ever choose to lobby for a strong liability regime. For this to be the case, the anticipated payoffs on the path

(lobby for strong liability → indict → cooperate) must be higher than the anticipated payoffs on the path (lobby for weak liability → do not indict). Expressed formally, the resultant inequality is:

$$(1 - p_{s,i,c})m - (p_{s,i,c})m + L_s > m.$$

Which, in turn, produces the following relationships between the variables:

1.  $L_s > 2(p_{s,i,c})m$
2.  $p_{s,i,c} < \frac{L_s}{2m}$

In this case, the first inequality shows that the anticipated value for legitimacy must be at least twice as large as the anticipated value for military success times  $p_{s,i,c}$ . Using the substitute values for  $m$  and  $p_{s,i,c}$ , this means that the value of  $L_s$  must be higher than 4.8 to effect a change in the state official's strategy. Alternatively, if one were to take the converse of this relationship, the value of future military success must be sufficiently lower than the value of legitimacy to incentivise a change in strategy. Translating this into a practical example, there are several conditions which might lower the relative value of future military success for the state:

- the state does not anticipate that it will be fighting an existential threat in the future;
- the state could be powerful enough that the value of future success for any particular military operation is not very high;
- the state has protection from another actor which causes its value of future military success to not be very high; or
- the state does not believe it will be involved in future conflicts at all.

If one or more of these conditions exist and the state official believes that the state could benefit from appearing to be following a rules-based order to either appease domestic audiences or to gain diplomatic benefits internationally, then the state official might be inclined to lobby for a strong liability regime. This comports somewhat with the reservations that my interviewees and Hays Parks had articulated in Chapter 5 regarding those states that seem most committed

to pursuing a strong liability for civilian casualties.<sup>693</sup> At the time of negotiating the Rome Statute, some of the states in the 'like-minded' group, such as Switzerland, saw no immediate military threats on the horizon. Indeed, the head of the Swiss Delegation to the Rome Conference, Dider Pfirter, recognised that his country was not likely to be involved in the sort of conflicts that would give other states pause about restrictions on the use of force: 'Switzerland is a small, wealthy, and internally stable country, which at least for the last fifty years has been surrounded by peaceful neighbors and whose army in the last 500 years has engaged in combat activity only once, when Napoleon attacked and occupied Switzerland some 200 years ago. As a result, Switzerland or Swiss soldiers are unlikely to be defendants before the ICC.'<sup>694</sup>

Not only did the Swiss Delegation expect that its own armed forces would remain outside the Court's gaze, but Switzerland was also under domestic pressure to develop the law in a way that provided as much protection as possible for civilians. Whether it was because Swiss citizens value their country's humanitarian legacy, or because strong civilian protection measures may prevent the sort of large-scale refugee flows that have proven politically difficult for the European governments to manage, Switzerland had more of an incentive to argue for a strong liability for civilian casualties than did the United States: 'Apart from general concern for the fate of humanity, Switzerland's involvement with the ICC is due to its disproportionate exposure to international atrocities. Switzerland has the highest number of refugees per capita of any country in Western Europe. For instance, Switzerland has the second largest number in absolute terms of Kosovo-Albanians outside of Kosovo.'<sup>695</sup>

The other way to change the state official's mind about lobbying for a strong liability regime is to exogenously change the anticipated probability,  $p_{s,i,c}$ . Assuming the substitute values for  $L_s$  and  $m$  from Figure 5 for the second inequality, the value of  $p_{s,i,c}$  would need to be less than 0.33 in order to motivate the state official to lobby for a strong liability regime. However, as noted earlier,

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<sup>693</sup> See Ch 5 at notes 594, 592 & 595.

<sup>694</sup> Pfirter, 'The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes', 499-500.

<sup>695</sup> Ibid, 500.

if one assumes that the main determinant of the value of  $p$  is the path that the players take through the game, then it becomes problematic to allow exogenous factors to substantially lower or raise the value of  $p$  for any particular path, particularly if those factors were to also change the *relationship* between the different values of  $p$ .

Exploring the problem of why disproportionate attacks are so difficult to prosecute from a strategic choice perspective yields several insights. Figure 7 presents the highlights of the findings from the model presented in this Chapter. Many of these are intuitive, but there is value in making what is implicit, explicit. Not only does this sort of analysis uncover the logic behind this strategic interaction, but it can also be used to gauge the likeliness that new measures to achieve accountability will succeed.

Outcome	Necessary Changes to the Model
The prosecutor decides to prosecute under weak liability condition.	<ul style="list-style-type: none"> <li>• The prosecutor must be completely reimbursed for the logistical costs of an investigation and the probability of conviction must be at least 50:50; and/or</li> <li>• The prosecutor must incur a legitimacy cost for failing to prosecute under the weak liability condition.</li> </ul>
The state official decides not to cooperate with the prosecutor.	<ul style="list-style-type: none"> <li>• The state official must ascribe substantially more value to the success of future military operations relative to the value of legitimacy; and/or</li> <li>• The state official must believe that their cooperation with the prosecutor will substantially raise the probability of conviction compared with the do-not-cooperate condition.</li> </ul>
The state official decides to lobby for a strong liability regime for proportionality.	<ul style="list-style-type: none"> <li>• The state official must ascribe more value to legitimacy than future military success; and/or</li> <li>• Exogeneous factors have substantially lowered the suspect commander's probability of conviction.</li> </ul>

Figure 7: Summary of findings

### Conclusions

As explored in Chapter 2, the logic of the proportionality rule arose as the result of a long history of development in LOAC. Moreover, when agreeing upon restrictions designed to hold commanders responsible for reckless or disproportionate strikes, those who negotiated the grave breaches regime in API or the ICC regime in the Rome Statute, structured the law in such a way that prosecutors could theoretically hold errant commanders to account.

However, in Chapter 3, I examined several substantive and procedural reasons for why it might be difficult to prosecute violations of the proportionality rule and its associated rule of precautions in attack, including the inherent vagueness of the rules, the requirement to prove the commander's direct intent to commit the crime, and the inability for prosecutors to obtain evidence about the commander's mental state. The combined effect of each of these difficulties is to lower the commander's liability for attacks that appear *prima facie* disproportionate. That weaker liability has made prosecutors less likely to take up cases of disproportionate attack, since it is unlikely that they will be able to secure a conviction for their troubles. The strategic choice perspective offers researchers a way to systematically analyse the historical path that the two strategic actors have followed in their interaction as well as the other counterfactual paths that may arise for different values of the relevant variables. After identifying the actors and the relevant variables in Chapter 5, I was able to reconstruct the relevant strategic interaction between the prosecutor and the state official and, in doing so, I was able to describe how conditions must change in order to make the two actors adopt a different strategy. In Chapter 7, I will revisit the problems associated with achieving accountability for violations of the rules on proportionality and precautions in attack and will consider proposed solutions to these problems considering the insights gained from my strategic choice analysis in this chapter.

## Chapter 7

### The Proportionality Rule: Effective Accountability Mechanism or Dead Letter Law?

The desired outcome of good faith compliance with the law is not just for civilian casualties to be mitigated, but for them to be limited only to what is necessary to achieve a particular military advantage. If the law is too permissive, then it will be easy for commanders and state officials to shrug off unnecessary collateral damage as an unavoidable consequence of the bloody business of war.<sup>696</sup> If it is too restrictive, some state and military officials believe that it will hinder the military's ability to conduct operations or that it will mean sacrificing more troops to achieve the same military result. Ideally, compliance mechanisms, whether they take the form of *ex ante* standard operating procedures and training or *ex post* accountability regimes, ought to align the conduct of operations in reality with this hypothetical goal. If they do not, then the notion of *jus in bello* proportionality is little more than a moral appeal to the belligerents, rather than a norm that carries with it the force of law. As the manuals of modern militaries reveal, much effort is spent developing procedures which mitigate civilian collateral damage,<sup>697</sup> and military legal advisors can help to form a 'compliance fence'<sup>698</sup> around a military commander's decision-making process. However, not much has been done to address what happens when those procedures break down. On the contrary, despite being the subject of numerous reports by human rights organisations, domestic judicial organs have often shown a reluctance to investigate and hold accountable those individuals and organisations which are responsible for planning or launching *prima facie* disproportionate attacks. Furthermore, international courts such as the ICC, despite being heralded as the guardians against impunity in the international community, have also shown little interest in pursuing unlawful attack cases

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<sup>696</sup> See Ch 1 at note 11.

<sup>697</sup> As a practical example of a manual that details how to ensure that the commander has good information regarding the expected collateral damage see, CJCSI 3160.01a: No-Strike and the Collateral Damage Estimation Methodology.

<sup>698</sup> See Ch 1 at note 40.

unless it can be shown that those involved had intended to fire indiscriminately at civilians and military objectives.<sup>699</sup>

There are good legalist reasons for why it is difficult to achieve accountability for *prima facie* disproportionate attacks. The law and its associated reasonableness tests are vague and require commanders to make judgements about values that are inherently difficult to compare.<sup>700</sup> However, this difficulty should not be used as a pretence for courts to give unlimited discretion to commanders' decisions in combat or for them to ignore the vital relationship between the rule of proportionality and the rule of taking all feasible precautions in attack. Furthermore, there is some uncertainty about whether unintentional excessive damage to civilians or civilian objects ought to be criminally prosecuted, punished with administrative disciplinary tools, or made the subject of a civil tort against the state.<sup>701</sup> This may be a barrier to achieving accountability for attacks which violate proportionality, precautions or those tricky cases that lie on the boundary between the two, but not one that is insurmountable in theory. Finally, if the organisation that is investigating the attack only has access to evidence of the *effects* of an attack, it is extraordinarily difficult for them to prove the *mens rea* of the crime without cooperation from the military or other state officials.<sup>702</sup> It is technically possible for the state to cooperate with a court, particularly a domestic court, in a way that allows fact-finders to understand the commander's decision making process without jeopardising the state's legitimate national security interests.<sup>703</sup> However, given the disparity between the number of attacks in modern armed conflicts that observers have flagged as possibly unlawful and the number for which there has been any manner of formal accountability,<sup>704</sup> I suggest that these primarily legalist problems must be viewed through a strategic choice lens in order to understand why, despite their seeming tractability, they remain unresolved.

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<sup>699</sup> See, for instance, Ch 2 at note 246.

<sup>700</sup> See Ch 3 at note 365.

<sup>701</sup> See generally, Ch 3, starting at note 374.

<sup>702</sup> See Ch 3 at note 445.

<sup>703</sup> See Ch 3 at note 454.

<sup>704</sup> See Ch 2, starting at note 224.

The strategic choice perspective has helped researchers to analyse other questions relating to the process by which court and state actors interact, given the institutional interests of each set of actor and the moves afforded to them by the legal or structural environment. The idea that the implementation of the law is affected by extra-legal factors is well understood in the legal literature. As Andrew Ashworth cautioned, it is not enough to merely accept the provisions of the law at face value: 'we must [also] consider the interaction between the law itself and the discretion in the criminal process if we are to understand the social reality of the criminal law.'<sup>705</sup> However, the strategic choice perspective offers a way to explicitly model such interactions to show how the law as it is written or as it was envisaged by its drafters might differ from the law as it is practiced 'on the ground'.

For this project, I found that the interaction that was of most interest to understanding why it is difficult to achieve accountability for violations of the proportionality rule (and its associated attack precautions) was a hypothetical game between an official who can set state policy on LOAC and a prosecutor. One can roughly categorise the reasons for why violations of proportionality rarely make it to court into two overarching themes: firstly, there has been a concerted effort on the part of certain states to raise the liability needed to convict a commander of a violation of the criminal norm vis-à-vis the regulatory norm; secondly, prosecutors are wary of pursuing cases where they are unlikely to obtain the evidence needed to secure a conviction. Building on these themes, I constructed a game of perfect information where the prosecutor's motivation was to maximize their institution's legitimacy while keeping resource and legitimacy costs low and the state official's motivation was to maximize the state's legitimacy and the value of military success, while keeping legitimacy costs to a minimum. The state official could choose how to set the liability regime — either strong or weak. The prosecutor could, in turn, choose to either indict or not indict a suspect commander and then the state official could choose to cooperate with the prosecutor or to not cooperate. This game is

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<sup>705</sup> Ashworth in Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 195.

merely illustrative of a generalised scenario involving prosecutors and state officials and it could prove useful at describing a number of similar interactions. For example, the state official could be lobbying for a particular interpretation of the law at either an international conference, or before a domestic legislative committee and the prosecutor could represent an international prosecutor or a domestic prosecutor (although the model does assume the judiciary is independent from other branches of government). In the historical path through the game, the state official chooses to lobby for a weak liability regime for the rules pertaining to proportionality and precautions in attack. The prosecutor, realising that it will be too difficult to convict a suspect commander and that failing to secure a conviction will come with a legitimacy cost, chooses to not issue an indictment.

From this model, I found several ways to induce the actors to follow a different path through the game, by either changing the actors' payoffs or certain elements of the strategic environment. Firstly, in order to incentivise the prosecutor to make more indictments, a third party, such as a donor state, could reimburse the prosecutor for the material resources needed to launch an investigation into an alleged incident involving disproportionate attack, but even then, the prosecutor must already believe the odds of securing a conviction are greater than 50:50. Furthermore, a third party, such as a human rights organisation, could drum up popular resentment against the court for not issuing an indictment, thereby raising the costs for that course of action. Although these changes in the prosecutor's incentives would result in more cases of disproportionate attack making it to trial, this does not mean that the conviction rate would necessarily change. In fact, it may produce popular resentment against the court for appearing to be harassing innocent service members. The second way to change the path would be for outside forces to lower the likelihood that a commander would be convicted such that the state would feel comfortable with a strong liability regime. For example, the regime could be tailored to only apply to *other* states or armed groups. Thirdly, the environment might be such that the state official is less concerned with the value of military success compared with the value of legitimacy. This is the only condition that is

likely to produce both more indictments and more convictions. However, such a state is not likely to be involved in military action in the first place (though a decision to lobby for a strong liability in peacetime could commit the state to such a regime during a future conflict). Finally, although the model suggests that state officials have an incentive to work with prosecutors should one of their commanders be indicted, they might choose to withhold information from the prosecutor if they believe that handing over evidence to the prosecutor will not just increase the likelihood of conviction, but substantially so (e.g. they have the 'smoking gun') or if the state official's value of military success is much greater than that of legitimacy. Taken together, these findings can help to predict what sort of intervention is likely to improve accountability for the rules on proportionality and precautions in attack and which are likely to be ineffective or counterproductive.

#### *Putting Pressure on the Courts*

As it approached its first decade in existence, the ICC began to be accused of having an anti-African bias, most notably by the African Union and African heads of state.<sup>706</sup> It has not escaped the attention of commentators that there was a large degree of selectivity, not only in which sorts of crimes were included in the Rome Statute,<sup>707</sup> but also in the prosecutor's ability to use their discretion to avoid confrontation with major powers:

Evidence that the court prefers to avoid situations involving major powers has continued to mount. The clearest example of this tendency is Afghanistan. The court has broad jurisdiction there but has decided not to open a formal investigation despite high levels of violence, often involving civilians. Other exercises of the court's prosecutorial discretion also evidence this pattern. The prosecutor declined to conduct a full investigation in Iraq. The court has not opened a full investigation in Colombia, a close US ally that has hosted US troops and advisers. Even as he opened an investigation in Kenya, the prosecutor opted not to pursue a full investigation of the Russia–Georgia conflict. The prosecutor temporized on Palestine's referral and ultimately decided that he did not have the authority to accept the referral. There is no 'smoking gun' evidence that the prosecutor has made these choices because of perceived major-power preferences or out of a desire to avoid entanglement with them. There are plausible nonpolitical arguments against investigations in each of these cases... But the overall

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<sup>706</sup> Scott Stearns, 'African Union Says ICC Prosecutions Are Discriminatory' *Voice of America* (4 July 2011).

<sup>707</sup> See generally, Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Ch 5.

pattern strongly suggests that the prosecutor's office has, to this point, used its discretion on where to open investigations strategically.<sup>708</sup>

As the model predicts, one of the ways to encourage more prosecutions for violations of the provisions on proportionality would be for IGOs, HROs and other state leaders to exact a legitimacy cost from the prosecutor for failing to issue an indictment when a credible allegation is raised with them. Although the criticism from African leaders is not so targeted that they remark on every airstrike that goes awry, a number of African countries have threatened to quit the court because of a perception that the prosecutor unfairly targets their leaders while ignoring the crimes of leaders from the other parts of the world.<sup>709</sup> In the face of such sustained criticism on this topic, it is somewhat telling that Afghanistan has recently been added to the Prosecutor's docket.<sup>710</sup> In an effort to show that it is not afraid to prosecute leaders from states that employ air power regularly, the prosecutor may even attempt to indict a leader for the crime of disproportionate attack. However, this would be a mistake.

Just because the prosecutor were to indict more leaders from the Global North for allegations of indiscriminate or disproportionate attack, it does not necessarily mean that there would be a corresponding increase in the number of convictions for this offense. Since the overall strategic environment has remained unchanged, the weak liability regime will ensure that prosecutors will have great difficulty proving their cases, even if they receive evidentiary support from the states under investigation. Without a solid track record of convictions, the ICC will likely be perceived as illegitimate by the citizens of the states whose commanders have seemingly ended up on trial for no good reason. Moreover, the Court will continue to be seen as illegitimate by its critics in the Global South, who will see the same pro-Global North bias shift from the Prosecutor's office to the bench.

Similarly, the model predicts that completely removing the prosecutor's resource costs will cause them to indict more suspect commanders as a matter

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<sup>708</sup> Bosco, 186.

<sup>709</sup> Robyn Dixon, 'African Leaders Amp up Pressure on the International Criminal Court, with a Plan for Mass Exit' *Los Angeles Times* (1 February 2017).

<sup>710</sup> *Ibid.*

of course. At the domestic level, one could draw an analogy between reimbursing prosecutors in the model and the provision of legal aid for public interest lawyers working on cases of LOAC violations. For example, the disbarred UK solicitor, Phil Shiner, used contracts provided by the UK Legal Aid Agency to fund litigation into over 1,100 allegations of torture and murder of Iraqis by UK forces, many of which were later found to be groundless.<sup>711</sup> Again, more indictments (or in this case, bringing more allegations forward) will not necessarily result in more rulings against suspect commanders or the state, since the underlying strategic dynamic has not changed. It is vital for those who could not normally afford recourse to the law to have access to legal aid. However, without some incentive for public interest lawyers to screen out those cases that are unlikely to succeed in court, the docket will quickly fill with cases that have little chance of ending in a conviction or civil remedy. This will merely sour public opinion toward the concept of seeking accountability for genuine cases of wrongdoing in combat,<sup>712</sup> thereby causing governments to reconsider whether the benefits of being seen to uphold rule of law outweigh the costs of allowing spurious cases to proceed to court.

#### *Weighing Incommensurables versus Assessing Attack Precautions*

One way to improve accountability for unlawful attacks would be to add more specificity to the law governing the grey area of proportionality. On its face, a more detailed law should help fact finders establish when a critical threshold has been breached and the work of LOAC experts has already laid the groundwork for what a more detailed interpretation of existing law could look like in the HPCR Manual.<sup>713</sup> However, as Fellmeth has noted, while it is understandable for those looking for greater accountability to demand better definition in the law, any change which fundamentally alters the balance between humanitarian concerns and military flexibility will not be accepted by the states:

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<sup>711</sup> *Public Interest Lawyers' Legal Aid Contract Scrapped* (Solicitors Journal, 2016)

<sup>712</sup> Robert Mendick and Ben Farmer, "Ambulance Chasing' Law Firm That Hounded British Troops over False Claims of Iraq Abuse Banned from Public Funding" *The Telegraph* (2 August 2016).

<sup>713</sup> See Ch 3 at note 366.

Without prejudging the effectiveness of the proportionality principle, one might hypothesise that the perceived failure of a generally phrased legal principle to achieve its policy objective should prompt proposals for the adoption of treaties, regulations, or other guidance with clearer or stricter obligations. The intuitive cure for vague law is more precise or detailed law. There are, no doubt, improvements to the phrasing of the proportionality principle that could render it more effective in protecting civilians, or at least make it easier to judge compliance with the principle. In general, however, stricter rules are a double-edged sword. If not sufficiently restrained, they could upset the balance between military flexibility and humanitarian concerns struck in the framing of Additional Protocol I. The proportionality principle was intended specifically to provide a certain degree of flexibility to military commanders. An interpretation of the principle that hamstring a state's ability to achieve its critical military objectives would not attract a general consensus or serve the international community's interests.<sup>714</sup>

The other side to this statement is also true: an interpretation of the rule that hamstring the ability for humanitarian and human rights organisations from putting pressure on governments will also fail to garner general consensus (albeit from different actors) or to serve the international community's interests. Nevertheless, it is states that make international law, so the states need to be convinced of the value of further clarity in the law. Some clarification of the sort proposed in the HPCR manual may be welcomed by state officials and HROs alike, but a bright-line standard could risk the interests of either camp, depending on where that line is drawn. As a hypothetical example, if commanders needed to use a table to look up acceptable civilian casualty figures for the type of military objective they wanted to target, there is no guarantee that the outcome of such an explicit version of the proportionality rule would actually succeed in bringing about the desired normative outcome — civilian casualty mitigation — compared with the rule as it currently stands, despite its vagueness. On the contrary, as the model of state-prosecutor interaction suggests, it is more likely that the states that use air power regularly will lobby for those casualty thresholds to be unacceptably high from the point of view of an HRO, leading prosecutors to ignore behaviour which might have warranted judicial scrutiny under a less well-defined accountability regime. This does not mean that the vagueness in the law as it is written is functional or pareto-optimal, just that a bright-line standard could be worse if the underlying strategic situation remains unchanged.

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<sup>714</sup> Fellmeth, 141.

In Chapter 3, I discussed how vagueness in the law can lead to arbitrary enforcement outcomes, but how does arbitrary enforcement affect the behaviour of those subjected to it? In their seminal L&E study on how vagueness in regulatory regimes affects compliance with the law, Craswell and Craffee postulated that when there is a small amount of uncertainty about a legal provision, the subjects of the regulation will actually tend to err on the side of over-compliance with the law, but when there is a large amount of uncertainty in what the law demands, there will be a tendency for them to be under-compliance (though this effect could be mitigated with high enough penalties for successful prosecutions).<sup>715</sup> Their model was recently empirically supported by Hoepfner and Lyhs who tested participants' decision-making under a variably vague standard<sup>716</sup> and they found that as uncertainty increases, there was indeed a tendency for participants to err on over-compliance at first and then settle into under-compliance as the vagueness in the standard increased.<sup>717</sup> Similarly, because the law does not spell out how to weigh military advantage against civilian collateral damage, it could be argued that the proportionality rule is an example of a highly vague regulatory provision and therefore its provisions will tend to encourage under-compliance on the part of states and their commanders.<sup>718</sup> It must be noted, however, that there are some differences between the application of a vague rule in Hoepfner and Lyhs's model and the application of proportionality. In their model of vagueness, the subject of the

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<sup>715</sup> Richard Craswell and John Calfee, 'Deterrence and Uncertain Legal Standards' (1986) 2 J Law, Econ, & Org 279, 280.

<sup>716</sup> Participants had to choose a number between 1 and 1000; the higher the number, the greater the payoff for the participant. The participant was also advised about the probability that the computer would judge a particular number as 'compliant'. The computer would then choose a number and if the participant's number was higher than the computer's number, they would not be compliant and would be issued a fine.

<sup>717</sup> 'Our main results support the standard economic model of Craswell and Calfee (1986): a sufficiently low level of standard vagueness on average induces overcompliance; after a tipping point, however, a further increase of standard vagueness reduces and, eventually, eliminates overcompliant choices. Inefficiently overcompliant choices only obtain under low standard vagueness. Otherwise, activity choices under substantial standard vagueness are statistically indistinguishable from those under near absence of standard vagueness. Moreover, our data reveals important auxiliary results. First, the share of compliant (as opposed to non-compliant) choices gradually reduces with increasing standard vagueness. Second, as soon as standard vagueness exceeds the quasi-certain level, the share of socially desirable (as opposed to socially undesirable) choices sharply drops—to the extent that socially undesirable choices far outweigh socially desirable choices.' Sven Hoepfner and Laura Lyhs, 'Behavior under Vague Standards: Evidence from the Laboratory' [2016] Jena Economic Research Papers 1, 3.

<sup>718</sup> See Ch 3 at note 432.

regulatory regime is uncertain about whether they will be sanctioned for engaging in a particular behaviour. To use a concrete example, different judges or juries could choose to interpret the vague statute with varying degrees of strictness, or police and prosecutors from different jurisdictions could enforce the law differently based on such differences in interpretation. However, vagueness in the text of a legal document does not necessarily lead to arbitrary enforcement. Indeed, it is possible to have a vague provision in the text of the law, but for it to be nevertheless *applied* in a uniform manner.

Hoepfner and Lyhs concede that there might be exogenous variables which influence how regulatory vagueness affects behaviour in ways that their model does not predict: '[C]hanges in procedural or evidentiary rules may bias the [probability] distribution underlying the legal standard'.<sup>719</sup> Furthermore, they were unsure about how the subjects of a regulatory regime might behave if they knew the reasons why the law was kept vague: 'We do not yet understand, however, how legal uncertainty impacts individual behavior when persons realize that they are exposed to legal uncertainty by design.'<sup>720</sup> For instance, if the subjects of a regulatory regime discover that the vagueness of the black-letter text of a legal document was consistently interpreted in their favour (or that it was designed that way), it stands to reason that their behaviour will not be as constrained by that regime than if they were naïve to how the vagueness might be applied in practice. They might even lobby to keep the law vague if they believed it suited their purposes.

It is safe to assume that the proportionality rule represents a case where vagueness in the law has led to regulatory under-compliance, either by design or because state officials realise that pre-existing ambiguities in the law will always be resolved in their favour.<sup>721</sup> However, those who believe that greater regulatory definition will lead to more accountability for *prima facie* disproportionate strikes are likely to be disappointed. Rather, as the findings of my model would suggest, the outcome of any attempt to 'pin down' the law on

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<sup>719</sup> Hoepfner and Lyhs, 24.

<sup>720</sup> *Ibid.*, 24.

<sup>721</sup> This is because no cases have ever been successfully adjudicated.

proportionality might be welcomed if the change decreases the state or commander's liability for collateral damage, but it will likely be rebuffed if the clarification increases the liability.<sup>722</sup> That is, the level of vagueness in the proportionality rule is driven by how it impacts the commander's liability (at least for the criminal norm), not vice versa. Therefore, state officials must first assign a higher value to legitimacy than to the value of future military operations before they will lobby for a version of the law that clarifies it in a way that increases the commander's likelihood of being convicted for excessive collateral damage beyond 50:50 odds. Similarly, state officials continue to endorse the 'reasonable military commander' standard because the ambiguity of the standard has consistently been resolved in the commander's favour.

Rather than merely invoking the standard as a way to signal that the commander ought to be given a wide margin of appreciation for decisions taken during combat,<sup>723</sup> if the standard were operationalised in a robust way, it has the potential to clarify the proportionality rule for those who have to judge the commander's decision-making process *ex post facto*. For example, my participants have suggested that this could be done with a battle of experts.<sup>724</sup> Alternatively, the court could have its own in-house military experts<sup>725</sup> to consult on cases where the proportionality is an issue, but the court lacks the competence to assess whether a strike was reasonable under the circumstances the accused found themselves. In either case, there is a chance that the expert could still lead the court to an improper conclusion (as with the *Gotovina* case<sup>726</sup>). This could be because the expert is unfamiliar with the particular circumstances of the accused. For instance, the expert may have only been involved with peacekeeping, not combat; they might have been part of a military that was much better resourced; or they might conflate their own nation's standard operating procedures with international practice. All of these could affect their assessment of what is reasonable. Nevertheless, the use of

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<sup>722</sup> In addition to the model, see Ch 3 at notes 615 & 616.

<sup>723</sup> For example, See Ch 2 at notes 227, 260 & 262.

<sup>724</sup> Interview with Former US Military Judge; Interview with Former ICC Official; Interview with Garraway.

<sup>725</sup> Interview with Former ICTY Official, Interview with Former US LOAC Policy Official (1).

<sup>726</sup> See Ch 2 at note 238.

court experts has been commonplace in cases involving other high-stress professions like medicine and law enforcement,<sup>727</sup> and the use of experts had become the norm at the ICTY, so there should be a way to operationalise expert military testimony for the ICC and for future ad hoc tribunals that respects military professional judgement while also exposing glaring deviations from commonly accepted practice. The right mix of in-house and litigant-provided expertise for evaluating battlefield decision making deserves further study, particularly to determine what qualifications the court should demand of any potential expert.<sup>728</sup> Whatever solutions are proposed, however, must consider the logic behind the way that the strategic environment is currently arranged. Any use of experts that causes more commanders to be tried or convicted of unlawful attacks would represent a de facto increase in commanders' liability for collateral damage. If the assumptions of the model are true, this would mean that such measures would be a non-starter for state officials, unless the value of legitimacy were greater than that of future military success.

This dynamic also affects the way that states are prepared to accept accountability for violations of the precautions rule. In theory, it should be easier to assess violations of the precautions rule because the obligation to take all feasible precautions in attack relies upon more objective criteria than the more subjective balancing of incommensurable values of military advantage and civilian damage. Moreover, from the case law that does exist on allegations of disproportionate attack, in many instances, the case more properly hinged upon whether the commander understood what the relative values of military advantage or civilian collateral damage were before proceeding with an attack, or whether the commander chose the right weapon for the attack, rather than if the proportionality calculation had been performed faithfully.<sup>729</sup> A commander cannot be expected to exhaust all possible sources of intelligence, nor should they be expected to know how their weapons will perform in all conditions, but

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<sup>727</sup> See Ch 3 at note 411.

<sup>728</sup> This is, however, outside the scope of this study.

<sup>729</sup> For example, consider the *Kunduz Fuel Tankers* and the *Kunduz Hospital Bombing* cases. See Ch 2 at notes 273 & 347.

they and their staff should take reasonable measures to maintain situational awareness and they should be expected to learn from prior civilian casualty incidents. Assessing these concerns relating to precautionary measures *ex post* is more straightforward and involves looking at the practical steps that the commander took to ensure compliance with the law and comparing them against the tactics, techniques, and procedures of their own armed forces and international practices. Grave operational mistakes, such as the *Kunduz Hospital Bombing*, rarely involve just one marginal decision taken in the heat of the moment, but are rather the result of a constellation of errors that, when taken together, can be used to judge the reasonableness of commanders' precautionary measures. Nevertheless, only violations of the proportionality rule have been criminalised under API and the Rome statute and any change in the ICL regime to include violations of the precautions rule would be tantamount to accepting recklessness as a mode of liability for the crimes of attacking the civilian population or firing indiscriminately at them. Although this is possible, according to the model, the only way that certain states will agree to lobby for such a change is if the legitimacy they receive from appearing to follow the regime outweighs the perceived value of future military success.

Regardless of whether one aims to increase accountability for unlawful attacks by introducing measures to make it easier to assess the proportionality rule or the rule on precautions in attack, the states that use air power regularly are unlikely to adopt such measures *if they substantially increase the commander's liability for collateral damage*. If HROs or interested third countries were to lobby for a less permissive interpretation of proportionality or for a greater role for precautions violations in ICL, either way, they will meet stiff resistance. Even if they were successful, the states that use air power regularly may find another way to introduce ambiguity into the provisions to keep the liability for collateral damage as weak as possible.

### *Transparency*

If an allegedly disproportionate attack ever made it to trial, the court will likely rely on the state to provide evidence of what was going on 'behind the scenes' in an operation centre or on the battlefield to provide context for the

commander's mental state and the reasonableness of their actions. In his recommendations on improving state transparency for probable violations of the proportionality rule, Fellmeth proposed that states be required to share:

- all direct and indirect civilian and combatant casualties;
- the military's LOAC training methods;
- standard operating procedures for civilian casualty mitigation;
- the outcomes of all investigations into credible allegations of disproportionate attacks (with any necessary redactions); and
- the outcomes of any judicial or administrative proceedings taken against those involved with specific incidents.<sup>730</sup>

One way he proposes this could be accomplished is through an international treaty and associated monitoring body.<sup>731</sup> It is certainly not beyond the realm of possibility that such a specialist organisation could be developed along the same model of the Chemical Weapons Convention and its associated Organisation for the Prohibition of Chemical Weapons.<sup>732</sup> This sort of treaty and organisation for the mitigation of civilian casualties would likely result in *de facto* state cooperation with prosecutors for crimes involving allegations of disproportionate attack because states would be releasing key evidence into the public domain, where it could be scrutinised by anyone. As discussed in Chapter 3, there are good reasons for states to withhold information from investigators and the public.<sup>733</sup> Even so, Fellmeth believed that certain concessions to state interests could prompt the states to acquiesce to such an intrusive regime. Firstly, states would be allowed to redact information they believe would compromise national security. Secondly, states would not need to disclose incidents immediately and should be given time to prepare their assessments, if releasing information about an attack could jeopardise ongoing military operations.<sup>734</sup> These are entirely reasonable concessions and the detail

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<sup>730</sup> Fellmeth, 143.

<sup>731</sup> *Ibid.*, 142.

<sup>732</sup> These functions could also be delegated to an existing organisation, such as the International Humanitarian Fact Finding Commission.

<sup>733</sup> See, for instance, Garraway's comment at Ch 3 at note 452.

<sup>734</sup> Fellmeth, 145.

contained in CENTCOM's *Kunduz Hospital Bombing* report<sup>735</sup> shows that states are capable of volunteering self-critical evidence even when parts of a report are redacted. As opposed to other investigatory mechanisms, such as a UNHRC fact-finding mission, the advantage of a regime which allows states to take the lead on investigating claims of disproportionate attack is that the states could receive the legitimacy that comes with appearing to follow the rule of law while rebuffing calls for more intrusive international investigations.

The model presented in this study suggests that Fellmeth's idea is viable. When indicted by a prosecutor, it is usually in the state official's interest to cooperate with the prosecutor unless the value future military action is substantially more than the value of legitimacy or the state official believes they are handing over the 'smoking gun' that would substantially increase the commander's chances of being convicted at a trial. What Fellmeth proposes is even less invasive than cooperating with a prosecutor since the state official can more effectively control the release of information through this sort of information-sharing regime. Therefore, it should be even more accepted by the state officials than cooperation with a prosecutor.

However, as a caveat to this assessment of Fellmeth's proposal for greater accountability through transparency, the efficacy of such a regime depends to a large extent on state officials' willingness to abide by it in good faith. There will be a temptation to cheat and withhold information by overclassifying it or by selectively releasing damning evidence. Reporting by HROs and other third-party sources should help to correct the most egregious distortions and any state that repeatedly withholds information by invoking security privilege will suffer legitimacy costs as their investigations will no longer be seen as credible by other actors.<sup>736</sup> There is at least some evidence for this effect in the case of Israel's re-vamped investigatory process as a result of the government-sponsored Turkel Report. Whilst to the approval of local HROs, the Israeli Government had agreed to implement all the Report's recommendations, its investigatory record during Operation Protective Edge left much to be

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<sup>735</sup> See Ch 2 at note 347.

<sup>736</sup> Fellmeth 145.

desired. The government has yet to implement all of the recommendations and results of many of the FFA Mechanism's investigations have been lacking in specificity and were dismissed with a few stock phrases.<sup>737</sup> Because of these shortcomings, the local HROs withdrew their support for the government's own investigatory procedures, casting doubt on their credibility.<sup>738</sup> In this case, the HROs acted as Fellmeth predicted and the Israeli Government suffered a legitimacy cost for failing to live up to the standard set by the Turkel Commission.

Furthermore, it is unlikely that state officials from illiberal or autocratic regimes would abide this sort of transparency regime. As my model predicts, state officials will not cooperate with prosecutors when the value they assign to legitimacy is less than the value they ascribe to future military success times the difference in the probability of conviction between the cooperation condition and the do-not-cooperate condition. It is quite likely that an illiberal government will place a much greater emphasis on maintaining military flexibility than it would to the appearance of following the rule of law. Even if such a state did sign on to a civilian casualty mitigation treaty, it would be at a higher risk of cheating compared to a state that could be held democratically accountable for reneging on the agreement.

Finally, Fellmeth claims that states are more likely to agree to a transparency-based civilian casualty mitigation arrangement if they believe that their own troops are likely to avoid criminal prosecution:

Additional Protocol I directly binds state parties, not individuals. It does not specify that its provisions must be enforced by criminal prosecution; it simply prohibits specified acts and leaves the means of ensuring compliance to state parties. At least in its manifestation in Additional Protocol I, then, the proportionality principle imposes an obligation on states to deter and punish any kind of excessive attack, but not necessarily through criminal penalties. This approach is both appropriate and consistent with the policy goals of international humanitarian law. Criminal prosecution is a fortiori less appropriate for attacks other than those that threaten civilian lives or property in a manner clearly in excess of the direct and concrete military advantage anticipated. In such cases, the state satisfies its international legal obligation through measures sufficient to deter future disproportionate attacks accompanied by compensation to the civilian victims and their families. With criminal penalties off the table for all but the most

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<sup>737</sup> See Ch 2 at note 326

<sup>738</sup> See Ch 2 at note 333.

plainly disproportionate attacks, no serious obstacle to the adoption of a basic transparency obligation should remain.<sup>739</sup>

Whilst the model I used in this study suggests that state officials will cooperate with international prosecutors, regardless of whether there is a strong or weak liability regime in place for violations, I would agree with Fellmeth that meaningful accountability for marginal strikes (which is likely to be the bulk of the accusations of disproportionate attack) ought to be handled in a civil regime, rather than a criminal one.

### *Reconsidering Assumptions Relating to Civilian Casualty Mitigation and Military Effectiveness*

Another way to pursue a more effective accountability regime for violations of the rules on proportionality and precautions in attack is to directly confront some of the long-held shibboleths that state officials have regarding the relationship between civilian casualty mitigation measures and military effectiveness. As discussed in Chapter 5, one of the reasons that state officials have for preferring a weak liability regime for unlawful attacks is that they fear a stricter one might cause commanders to hold back when they need to fight the enemy aggressively.<sup>740</sup> Another is that it by adopting less permissive notions of proportionality and precautions in attack, military commanders will be incentivising the enemy to integrate as closely as possible with the civilian population in order to perfidiously take advantage of their non-combatant immunity. This ends up further endangering the civilian population because attackers will at some point decide that civilian casualty mitigation is not worth the effort and will end up killing more civilians than they would have under a more permissive standard for civilian casualty mitigation.<sup>741</sup>

What is missing from this discussion is a robust study of how restrictions on the use of air power have affected the civilian casualties, the attacking military's casualties and military success. This is a fiendishly difficult line of research where there is not yet a clear consensus on how these variables affect

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<sup>739</sup> Fellmeth, 146.

<sup>740</sup> See Ch 5 at note 591.

<sup>741</sup> See Ch 5 at note 567.

one another, hence it is easy to fall back on appeals to personal anecdotes,<sup>742</sup> or to focus on the best natural experiment we have to date on this topic which was McCrystal's adoption of a zero-civilian-casualty policy for Afghanistan in mid-2009. As I mentioned in Chapter 5, Dunlap cited a spike in US military casualties and civilian casualties between mid-2009 and mid-2010 as evidence that too much emphasis on civilian casualty mitigation could paradoxically end up increasing civilian casualties overall and that it puts US forces needlessly at risk.<sup>743</sup> Crawford also claimed that there was a greater number of ISAF casualties during this time, but she reported a decrease in civilian casualties<sup>744</sup> because she and Dunlap were calculating their civilian casualty figures using different months before and after the change in policy. Part of the problem with using this aggregate data to assess the relationship between civilian casualty mitigation efforts and actual casualty reduction (or 'mission success' for that matter) is that extraneous factors make it difficult to discern trends in the noise:

The question of whether there was actually a risk-transfer effect—shifting harm from civilians to soldiers—is complicated to assess for several reasons. First, at about the same time that the United States began to emphasize population protection, it also increased the number of troops in Afghanistan. So, both combat and noncombat fatalities might have increased simply because more troops were in the war zone... Second, in 2010 and 2011, both sides in Afghanistan began to increase the intensity of their operations and also promised to ignore the traditional "winter lull" in fighting that occurs because the snow makes travel and combat extremely difficult from December through March. The US operation in Marjah in February 2010 was an example of winter operations. The number of injuries and fatalities would also be expected to increase if the soldiers were engaging in more frequent and intense combat, over more months of the year. The role of changes in tactics—namely how restraint in the use of air power, for example, affects the rate of soldiers' deaths and injuries—would have to be assessed at a micro-level, in part because the "population centric" strategy was applied unevenly and the strictness of adherence to it varied over time in Afghanistan.<sup>745</sup>

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<sup>742</sup> For example, see: Harry Tunnell, IV, *Open Door Policy -- Report from a Tactical Commander* (2010). As a Colonel in charge of a Stryker Task Force in Afghanistan, Tunnell wrote a scathing open letter to the Secretary of the Army detailing what he perceived were the pitfalls of COIN doctrine generally and its particular application by British and Canadian Leadership. Chief among his concerns was that NATO's emphasis on zero civilian casualties was costing his soldiers their lives and providing the Taliban a safe haven and uninterrupted lines of communication. Tunnell's assessment relied heavily on his personal experiences in the field and documented particular instances where he believed ISAF had failed to be sufficiently aggressive in pursuing the enemy.

<sup>743</sup> See Ch 5 at note 564. Tunnell and Dunlap are certainly not the only one to have voiced this concern. For a review of others see Crawford, 55-59.

<sup>744</sup> *Ibid*, 56.

<sup>745</sup> Crawford, 60-61.

The difficulty of accounting for these other factors means that one cannot say for certain that taking extra care to spare the civilian population actually results in higher civilian or military casualties in the long run:

In sum, aggregate numbers are only a crude indicator of the effect of changing tactics on risk and actual harm. The hard questions are about the causal processes at work. Specifically, does killing fewer civilians really mean that fewer insurgents are created and that ultimately fewer US soldiers die and the war ends more quickly? Absent the tactical directives and US restraint in close air support bombings, would both more US soldiers and civilians have been killed in Afghanistan? <sup>746</sup>

The difficulty of finding an agreed upon definition of what constitutes military success further complicates this problem, particularly in long-term stabilisation missions such as the one performed by ISAF in Afghanistan. Nevertheless, access to better data about the relationship between civilian casualty mitigation efforts and how they do or do not contribute to force protection risks could guide state official's willingness to accept greater liability for *prima facie* excessive attacks, when they occur.

For my model of state official-prosecutor interaction, I assumed that in the state official's payoffs, the value of military success would be moderated by the inverse probability of a suspect commander's conviction for the crime of disproportionate attack. This is because the state official would believe that a higher conviction rate would lead to more timidity on the battlefield and therefore less chance of military success in the future —  $(1-p)(m)$ . If civilian casualty mitigation efforts do not affect military operations as much as commanders and policy makers currently believe, then a higher probability of conviction for suspect commanders should not alter the value of that term to the same degree. Therefore, one way to convince the state official to lobby for a stricter liability regime for proportionality without affecting their relative values of legitimacy and military success would be to challenge the assumption that successful prosecutions will necessarily impede the success of future military operations.

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<sup>746</sup> Crawford, 61.

### *Civil versus Criminal Accountability*

Another avenue for achieving accountability for unlawful attacks is to situate the liability for such strikes at the right level. Modern warfare is a complex endeavour and many functions of an attack are distributed across different actors. Therefore, it is necessary to distinguish intentionally disproportionate strikes from the sort of operational offenses<sup>747</sup> that arise from negligent acts or omissions from one or more actors in the kill chain.<sup>748</sup>

For a practical example, consider three hypothetical strikes that all result in extensive collateral damage. The damage in the first attack resulted from a commander ordering a strike on a low-ranking enemy leader after acknowledging that it was possible that hundreds of civilians could die in the process. In contrast, the damage in the second attack was a close call — the commander anticipated that the strike might be disproportionate, but it wasn't 'clearly excessive'. The collateral damage caused by the third strike was the result of a more complex breakdown in the targeting process. In this case, a drone sensor operator could have been using leading language such as 'a group of 10 military aged males are flanking your position' to describe a group of teenage civilians walking around an observation post and although it would have been a reasonable precaution for the ground forces commander to use binoculars to see if the boys were hostile, he may have decided to accept the drone operator's assessment that the boys were hostile and subsequently requested a strike.<sup>749</sup> The first strike would be a crime under ICL. The second is not solidly a crime under ICL, but is probably a violation of LOAC. The third was a violation of the LOAC rule on taking all feasible precautions in attack, but likewise does not have a clear basis for criminality under ICL. Ideally, there should be some sort of accountability for all of these incidents, but the mechanism for each could take different forms. The first strike ought to result in

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<sup>747</sup> See Ch 1 at note 28.

<sup>748</sup> Moreover, as targeting becomes increasingly automated, that actor may not be a human to which individual liability would even apply. See Ch 1 at note 29.

<sup>749</sup> 'Both CAS [close air support] and CCA [close combat attack] civilian casualty incidents tend to share the same common causal factors. These factors include leading language, not sharing important details, assuming there were no civilians in the area, and not establishing reliable positive identification (PID).' *Afghanistan Civilian Casualty Prevention: Observations, Insights and Lessons* (US Center for Army Lessons Learned, 2012), 30.

a court-martial or a trial at an international tribunal while the second and third might be more appropriately handled by a civil tort case against the state, rather than criminal sanctions for the individuals involved. Moreover, the lower liability threshold needed to prove wrongdoing in civil law generally will make it easier for those seeking redress for errant strikes to actually have success in court.

For nearly 200 years, civil tort courts worldwide have used some version of the ‘reasonable person’ standard to assess liability for accidents<sup>750</sup> and the concept of ordinary care as defined by the Hand Formula explicitly references how much effort a reasonable person should spend on precautions aimed at preventing harm to another.<sup>751</sup> Furthermore, except in cases of clear culpability,<sup>752</sup> accountability for professional misconduct has typically been addressed in civil rather than criminal courts for other high-stress professions like medicine<sup>753</sup> and law enforcement.<sup>754</sup> Therefore, if one accepts that *prima facie* disproportionate strikes ought to be assessed against the standard of a ‘reasonable military commander’ who had taken all feasible precautions in planning and executing the attack, then it makes sense that, in the absence of any evidence of a commander’s culpable *mens rea*, the state itself should be held civilly liable for operational errors. The state could then determine the appropriate disciplinary measures for troops who contributed to the violation in

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<sup>750</sup> Richard Posner, ‘A Theory of Negligence’ (1972) 1 J of Legal Studies 29, 29.

<sup>751</sup> ‘In a negligence case, Hand said, the judge (or jury) should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident’s occurring; and the burden of taking precautions that would avert it. If the product of the first two terms exceeds the burden of precautions, the failure to take those precautions is negligence’. Ibid, 32.

<sup>752</sup> In medicine, for example, ‘Criminal negligence requires a more serious deviation from the standard of care than ordinary civil negligence. Typically, criminal negligence requires some gross or flagrant deviation from the standard of care... The physician guilty of criminal medical negligence must not only have committed a gross deviation from the standard of care, but must have done so with a criminally culpable state of mind.’ James Filkins, ‘Criminalization of Medical Negligence’ in American College of Legal Medicine (ed), *Legal Medicine*, vol 7th ed (Mosby 2007), 508.

<sup>753</sup> For example, malpractice torts in US law seek to: ‘align the interests of patients and providers... This liability is imposed *ex post* for the harm arising out of violations of a standard of care. Standard of care refers not merely to typical examples of medical malpractice such as negligent misdiagnosis or careless errors during surgery... Moreover, private law has advantages over regulatory frameworks by providing flexibility through an organic, bottom-up approach, accounting for local variance and patient-specific factors.’ Ronen Avraham and Max Schanzenbach, ‘Medical Malpractice’ in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics*, vol 2: Private and Commercial Law (Oxford UP 2017), 122.

<sup>754</sup> Moreover, in the UK, not only are public authorities liable to ordinary wrongs-based tort suits, but they can also be held accountable in civil courts for breeches of the Human Rights Act of 1998 as well. John Cooke, *Law of Tort* (12th edn, Pearson 2015), 21-23.

order to act as a deterrent against future disproportionate or sloppy attacks and to remove certain individuals from having a chance to repeat the error.

A stronger civil liability standard for violations of proportionality and precautions in attack (and a forum in which such cases could be tried) is also important to help the state meet its obligations to pay reparations to the victims of LOAC violations. This requirement is listed as Rule 150 in the ICRC's CIHL Study which states simply that: 'A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused'.<sup>755</sup> The provision applies in both international armed conflict and NIAC.<sup>756</sup> Furthermore, treaty-based versions of this rule can be found in, *inter alia*, Article 3 of the 1907 Hague Regulation IV for Land Warfare<sup>757</sup> and API Article 91.<sup>758</sup> Although the obligation for states to pay reparations for their LOAC violations has a long history and, indeed, reparations have been made from one state to another *state* in previous conflicts, the idea that *individuals* have standing in legal fora to make claims against states is a relatively new one.<sup>759</sup> While some courts, like the European Court of Human Rights (ECtHR) have allowed individuals to bring claims against states for LOAC violations, such courts may be institutionally predisposed to viewing issues pertaining to armed conflict through the lens of human rights law. Furthermore, Christine Evans has questioned the sustainability of using regional human rights courts as a long-term solution to achieving accountability for individual LOAC violations:

While human rights mechanisms have increased their efficiency, expanded their jurisprudence in the realm of reparations and sought to undertake measures to monitor compliance by states, such mechanisms were not designed to address large numbers of victims in conflict situations. This worrisome lacuna needs to be addressed; the concept of state responsibility is maturing, alongside a customary right to receive reparations, yet it remains all too common that a national legal framework and forum to which victims can submit claims is lacking. While the provision of reparations remains primarily a state responsibility, the gap between international legal standards and their

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<sup>755</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 537.

<sup>756</sup> *Ibid*, 545-550.

<sup>757</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land.

<sup>758</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.

<sup>759</sup> Emily Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) 10 *International Journal of Transitional Justice* 126, 126-127; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Rules*, 541.

application represents a challenge to the international legal order and the international organisations entrusted with the promotion of human rights.<sup>760</sup>

This assessment was echoed in my interview with Garraway, who explained that one reason victims of LOAC violations have tried to seek redress from the ECtHR is because there simply are no other fora that have been willing or able to hear their case.<sup>761</sup> A more suitable venue for achieving accountability for violations of the LOAC provisions pertaining proportionality or precautions in attack would likely be in domestic civil courts, even if this would require relaxing the state's civil liability exemption for combat activities.<sup>762</sup>

To be sure, others have called for civil processes to have a greater role in determining claims involving collateral damage.<sup>763</sup> For example, Rebecca Crootof has suggested that once attacks become fully automated, criminal sanctions based on individual liability will lose their deterrent effect<sup>764</sup> since any collateral damage caused by autonomous targeting errors could be shrugged off by the attacking state as 'accidents'. Therefore, *states* ought to be held liable for the collateral damage caused by its autonomous weapons systems through a civil liability regime:

Not only do states have a vested interest in creating a tort liability regime, the unpredictability and inherently dangerous nature of autonomous weapon systems justify treating responsibility for this weapons technology differently. Unlike other weapons, autonomous weapon systems are capable of acting independently, breaking the causal chain between an individual's decision to deploy them and the target of these weapons' ultimate use of lethal force. And, unlike other robots, autonomous weapon systems are intended to kill people—they just are not supposed to kill the wrong people. The combination of these two factors strongly favor imposing strict liability. In contrast, when a non-autonomous or nonlethal weapon system malfunctions and causes a serious violation of international humanitarian law, a negligence standard may be more

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<sup>760</sup> Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge UP 2012), 127-128.

<sup>761</sup> 'It's not that the European Court of Human Rights is deliberately invading areas it shouldn't be in. It's because applicants are saying, "I've been involved with a violations of the laws of war – where can I enforce it?" "Ah yes, if I call it a breach of human rights, I can take it there!" Interview with Garraway.

<sup>762</sup> Indeed, as discussed in Chapter 3 at note 397, several states have combat exemption clauses in their civil liability laws.

<sup>763</sup> See generally, Bullock. Moreover, some in the human rights community, such as Scott Paul have argued that states have owe a *moral* obligation to make amends for LOAC violations: '[T]he failure of the law of armed conflict itself to require some sort of confrontation or accountability between victim and culprit further disrespects the victim's dignity and undermines their self-image as a person of worth.' Scott Paul, 'The Duty to Make Amends to Victims of Armed Conflict' (2013) 22 Tul J Int'l & Comp L 87, 115. He also thought it was right to compensate victims for the harm caused by proportionate strikes, 'The lack of moral accountability between a state that engages in a lawful act and a civilian who suffers losses as a result not only compounds the injury to the civilian, it also calls into question whether IHL is fully committed to humanitarian principles.' *ibid*, 115.

<sup>764</sup> See generally, Crootof.

appropriate. It is therefore possible to draw a line in the sand and create a limited strict liability tort regime governing the actions of autonomous weapon systems. Indeed, it may prove a useful test case: if it is a successful counterpart to international criminal law, states may consider the utility of further expanding state liability for war torts.<sup>765</sup>

Nevertheless, some scholars, such as Michael Reisman, Yaël Ronen, and Emily Camins, have argued that it may be better to issue *ex gratia* payments to all civilian victims of attacks, or to hold the state to a strict liability standard for collateral damage, regardless of whether it was caused by a careful, proportionate attack, a disproportionate attack, a negligent attack, or a genuine accident.<sup>766</sup> This allows the state to respond to the victim's need for redress without costly judicial proceedings that may or may not be decided in the victim's favour. A strict liability standard or the act of issuing *ex gratia* payments for all civilian victims of airstrikes may be a good policy; however, as a matter of accountability, such payments do little to inform military leaders about what sorts of actions 'cross the line' and they do not necessarily incentivise leaders to adopt new weaponry or TTPs which reduce the incidents of collateral damage caused by avoidable violations of the rules on proportionality or precautions in attack. In this regard, the value of civil court cases is not necessarily in the material support it awards victims, but also in the feedback that a body of case law could provide to military commanders and their legal advisors regarding the practical application of these rules *ex ante*.<sup>767</sup>

Therefore, the advantages of creating a civil mechanism for trying 'war torts' are manifold. Firstly, from the victims' perspective, if their case is successful,<sup>768</sup> they will receive public validation of their suffering and the knowledge that the case will likely prompt the state to take actions to avoid repeating the mistake in the future (and if the state was following the law, it can lift the cloud of doubt over its actions by presenting its case publicly). Secondly, the truth-telling function of the suit could also force the state to present its side

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<sup>765</sup> Ibid, 1401.

<sup>766</sup> Camins, 143-144; 'The Lessons of Qana' [1997] Yale Faculty Scholarship Series 381, 397-398; See generally, Yaël Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict' (2009) [42] Vanderbilt J of Transnational L 181.

<sup>767</sup> See Ch 1 at note 50.

<sup>768</sup> To be clear, in arguing for a civil tort regime for violations of the LOAC rules on proportionality and precautions in attack, I also envisage that the victims of lawful strikes would still receive *ex gratia* payments as a matter of policy.

of the story, so if there is evidence of *criminal* malfeasance it stands a greater chance of actually coming to light. Thirdly, opening the state to civil liability would begin to develop the hitherto anaemic case law involving alleged violations of the rules on proportionality and precautions in attack. Fourthly, by beefing up the case law, a robust civil liability regime could undergird the regulatory function of these rules by providing military leaders and legal advisors with more actionable feedback about how well their operations have lined up with the law and what needs to be done to ensure better compliance in the future. Certainly, HROs have provided detailed feedback on the effects of military missions, but through the back and forth of a court case, it should be possible to match up how particular state actions or omissions led to the damage reported by HROs. Moreover, civil sanctions could strengthen the regulatory function of the rules on proportionality and precautions in attack by demonstrating that their application is not merely a box-ticking exercise, but rather, a moral imperative in its own right.<sup>769</sup>

By opening itself to vicarious civil liability, the state could reap legitimacy benefits from appearing to be pursuing accountability for *prima facie* excessive collateral damage incidents. State officials could also maintain some flexibility to deal with those individuals responsible for the attack on the state's terms, rather than on the terms of an independent judiciary, thereby removing the chilling effect on future military operations that state officials have cited as a reason for why they oppose criminal prosecutions for alleged disproportionate attacks.<sup>770</sup> By disentangling the 'probability of conviction'<sup>771</sup> term from the 'anticipated value of future operations' term, state officials may be persuaded to adopt a stricter liability regime for cases involving proportionality or precautions in attack than the one that is currently in place for the criminal version of these rules. Moreover, there already seems to be an acceptance from state officials that the

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<sup>769</sup> See Ch 1 at note 49.

<sup>770</sup> This is not a new idea, as Kenneth Bullock proposed in 1995: 'By quickly satisfying the claims of war crimes victims in administrative proceedings, the United States might be better able to retain criminal jurisdiction over its own soldiers, rather than have them tried in international tribunals. Most importantly, providing war crimes victims access to a responsive and efficient compensation system would enhance the nation's image as a defender of human rights and the rule of law.' Bullock, 141.

<sup>771</sup> The civil law analogue for this term in the model would be 'probability of losing a civil suit'.

state can be held civilly liable for violations of proportionality or precautions in attack,<sup>772</sup> so the challenge is in translating those views into support for changing any combat exemption clauses the state might have in its tort laws, rather than encouraging officials to sign on to a radically different notion of state or individual responsibility for these sorts of violations.

To be sure, state officials may still see a robust civil liability regime as a threat, especially if policy makers start adopting zero-civilian casualty policies in response to civil suits and the inevitable media attention they would garner. As with the model of criminal liability used in this study, the state official's willingness to accept a greater degree of civil liability would be a function of how they believe successful torts affect the state's payoffs in terms of legitimacy and the value of future military operations. Since a more robust civil liability regime is likely to take pressure off the state to pursue military commanders for criminal offenses, state officials may have less to worry about from the outcome of successful civil cases than criminal ones and they might, therefore, be inclined to accept a stricter civil regime than a stricter criminal liability for allegations of disproportionate attack.

A more robust civil liability regime is not without its pitfalls from the standpoint of accountability. Since the evidentiary standards in civil suits are typically more relaxed than those in criminal trials, there is the possibility that the state will be found liable for a strike not because those involved engaged in any actual wrongdoing, but because the state did not want to share classified material to properly prove their case. Furthermore, if it became too burdensome for the state to prove its cases for other reasons (e.g. the volume of cases was more than what government lawyers could reasonably deal with), then as with other types of torts, such as medical malpractice, paying out claims for errant strikes might come to be seen by the state as the price of doing business as is currently the case with *ex gratia* payments. Similarly, merely setting aside funds as a type of military 'malpractice insurance' would not incentivise the sort of substantive change in behaviour that accountability is

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<sup>772</sup> See Ch 3 at notes 392 & 393.

meant to realise.<sup>773</sup> Therefore, if HROs were to lobby states to remove or modify combat exemption clauses from their domestic civil liability laws or to create new international fora for hearing these types of cases, they may face less resistance from states than if they were to try to shoehorn accountability for all LOAC attack violations into a criminal regime. However, such a civil liability regime must be designed in such a way as to be strong enough to provide effective sanctions<sup>774</sup> whilst also encouraging the state to participate in the regime in good faith. This can only be accomplished if ‘vexatious’<sup>775</sup> cases are properly screened out. Of course, any screening mechanism, particularly if it is run by the military, could be criticised for weeding out cases for political/strategic reasons rather than merit<sup>776</sup> so, the fact-finding/screening mechanism ought to be run by an independent entity that is disinterested in the outcome of a case, rather than the military.

#### *Contribution to the Strategic-Choice Approach Literature*

As discussed in Chapter 4, the strategic choice perspective has provided useful insights into why states follow the provisions of LOAC in the absence of a higher authority capable of punishing non-compliance. James Morrow’s seminal study on the topic suggested that the key to compliance in most cases depended on self-interested reciprocity,<sup>777</sup> rather than external actors, such as international courts. He predicted that to the extent that such courts could induce compliance, they would only be able to prosecute politically-defeated autocrats or democrats who found themselves engaged in legally-questionable

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<sup>773</sup> ‘One possible objection to an obligation to compensate for incidental injury may be that the cost of injury is so low that it would have the opposite effect. Strict liability for injury, covering also incidental injury, might remove the parties’ incentive to act legally and obviate the distinction between legal attacks (accompanied by appropriate precaution) and illegal ones (where precautions are inappropriate or absent). The entitlement to compensation might erode the distinction between wrongful injuries and non-wrongful ones, with parties contending that they can make right what they have done through compensation, buying their way out of adherence to the principle of distinction. This would not only affect the choice of tactics in individual instances but would undermine the laws of armed conflict altogether.’ Ronen, 207.

<sup>774</sup> The sanctions need to have a cost that is higher than that of an *ex gratia* payment, but that cost need not necessarily be financial: ‘[F]ortunately, parties to a conflict are motivated not only by financial considerations. Indeed, if the decision whether to uphold the principle of distinction was dependent on financial accountability alone, no state would have upheld it even to date because, barring a few exceptions, states have not been held financially accountable for armed conflict since World War II. Thus, the incentive to violate the law is countered by nonfinancial forms of enforcement.’ *ibid*, 208.

<sup>775</sup> See Ch 5 at note 590.

<sup>776</sup> Such was the case with Israel’s fact-finding assessment mechanisms during Operation Protective Edge. See Ch 2 at note 332.

<sup>777</sup> See Ch 4 at note 502.

behaviour.<sup>778</sup> The fact that Laurent Gbagbo was taken into ICC custody while Omar Al Bashir remains at large<sup>779</sup> anecdotally suggests that Morrow was correct about the fact that autocrats need to be stripped from power before the court can credibly hold them to account. However, his assertion that democrats who have committed legally-questionable acts also need to fear ICTs is less certain. Proportionality and precautions in attack are just the sort of murky rules that seem to vex state officials from democratic countries that regularly employ air power in war. Nevertheless, no leader, official, or commander has yet appeared before the ICC accused of a violation of proportionality. Neither has a leader, official, or commander been convicted<sup>780</sup> of a violation of proportionality or precautions in attack in any other ICT or domestic court,<sup>781</sup> despite the large number of questionable strikes that one could choose from to use as a test case. There is a growing body of literature that has examined how the existence of the ICC affects the behaviour of state actors from a strategic-choice perspective. However, the literature to date has focused on how the existence of Court affects compliance with ICL and on how the Court is able to enforce its arrest warrants.<sup>782</sup> Furthermore, Koremenos' study of vagueness in international agreements shows how state officials think strategically about how to achieve their preferences when drafting treaties.<sup>783</sup> This study fills a gap in the literature of international courts from a strategic-choice perspective by connecting selectivity in the ICL regime with strategic thinking on the part of state officials and prosecutors, casting doubt on Morrow's claim that ICTs are equipped to try the sorts of crimes that might land democratic leaders or commanders in the dock.

### *Limitations of the Model*

Any model of a complex social interaction will necessarily simplify the phenomenon the under investigation. The development of the proportionality

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<sup>778</sup> See Ch 4 at note 511.

<sup>779</sup> 'Situations under Investigation' (*International Criminal Court*, 12 July 2017) <<https://www.icc-cpi.int/pages/situations.aspx>> accessed 12 July 2017.

<sup>780</sup> General Gotovina was convicted for a disproportionate/indiscriminate attack in the ICTY Trial Chamber, but he was later acquitted on appeal. See Ch 2 at notes 235 & 238.

<sup>781</sup> Fellmeth, 127.

<sup>782</sup> See generally, Ch 4, starting at note 518.

<sup>783</sup> See Ch 4, 551-559.

rule and its associated rule on attack precautions involved the input of hundreds of state and non-state actors and these rules are used by even more actors working for state, judicial, and human-rights organisations, just to name a few. The sheer number of stakeholders who develop and use these rules means that although one can use the model presented in this study to draw some insights into how state officials and prosecutors might respond to changes to the strategic environment, the application of these insights will depend upon how similar the real-life actors are to the fictional 'state official' and 'prosecutor' used in the model and on how closely the real-life scenario adheres to the assumptions made in the model.

One potential pitfall of the model is that it assumes that the main determinant of a commander's probability of conviction is whether the state official lobbied for a strict or weak liability regime for the crime of disproportionate attack. In reality, there are any number of exogenous forces which could also affect that probability, particularly if the attack under investigation were so brutal that it fit one of the classic examples used by LOAC scholars (e.g. levelling an entire village to kill a single sniper). Nevertheless, as a baseline, I still believe that it is correct for the model to focus on the effects of the liability regime and the availability of evidence first, and then bring in other variables which might affect this probability, such as the egregiousness of the offense, only if the simpler model does not hold up under empirical scrutiny.

Another potential shortfall that this model shares with other economic models of behaviour is its adherence to the assumption that actors will tend act in ways that are motivated by rational self-interest. Arguments about what constitutes a war crime or how to best achieve accountability for decisions taken under stressful conditions can evoke strong emotions, which could cause state officials or prosecutors (or their analogues) to act in ways that are not predicted by the model. For example, the state official may care deeply about their state's perceived legitimacy at home and abroad and they may not be expecting to go to war soon (so their value of future military success is low), but nevertheless they could decide not to cooperate with a prosecutor out of a sense of loyalty to a suspect commander.

## *Conclusions*

Without a robust accountability mechanism, the rules on proportionality and precautions in attack merely represent a moral appeal to combatants to spare the civilian population from the harmful effects of their attacks. The model presented in Chapter 6 describes a scenario where state officials weaken the liability regime for proportionality to the point where prosecutors choose not to enforce it. Therefore, according to the model, the provisions contained in these rules have become dead-letter law. However, the value of this model is not merely descriptive. One can use its logic to assess what sort of changes would need to occur to the strategic environment for the rules to stand a chance of being enforced more vigorously.

The least effective way to seek greater accountability for violations of the rules on proportionality and precautions in attack would be to influence the prosecutor's payoffs. Either reimbursing the prosecutor's resource costs for pursuing a case or inflicting a legitimacy cost for failing to take a case will induce the prosecutor to make more indictments. However, without a corresponding change to the underlying liability regime, the result will be a string of failed prosecutions, which may, in time, erode support for the prosecutor's work.

Some may argue that the way to achieve greater accountability for the rules on proportionality and precautions in attack would be to use more precise language to describe exactly what is required of commanders. While a bright-line rule would make it easier for a fact-finder to figure out when suspect commander's behaviour has strayed into criminality, without a corresponding willingness on the part of the state to accept a stricter liability for civilian casualties, it is unlikely that the ambiguity of the text will be resolved in a way that suits the interests of those seeking greater civilian causality mitigation. On its face, it would seem that if one were seeking greater protection for civilians from the effects of attacks, then it would make sense to lobby for a stricter accountability regime to ensure that combatants take all feasible precautions in setting up and launching their attacks. However, without a change to the

underlying strategic dynamic, there will be no reason for state officials to adopt such a regime.

The implications for the model are more sanguine about the possibility that states will be willing to investigate allegations of disproportionate attacks and report the results of those attacks to the public. However, there is a danger that the state will try to cheat and reap the legitimacy benefits of appearing to be transparent, while using national security privilege to sanitise the most damning information from their reports.

Ultimately, the change to the status quo that is likely to have the best long-term chances of success would be for state officials to believe that achieving accountability for violations of proportionality and attack precautions will have little practical effect on the efficacy of their military. This would require HROs and other interested parties to adopt the state's own metrics for military success and martial empirical evidence to show that there is no discernible effect on the state's chances of success or on force protection. If the data reveal that the accountability regime is likely to negatively affect mission success or force protection, then the HRO must present an alternative that addresses the state's concerns before it is likely that the regime will work as designed. To this end, it may be more helpful to focus on civil accountability mechanisms, rather than those based on criminal law. This is because civil tort law more readily admits vicarious state liability, allowing victims to achieve a sense of justice done without state officials having to fear that the regime will have chilling effect on commanders' decision-making processes. Moreover, the lower evidentiary burden for proving civil cases means that the process is not as dependent on information provided by the state for the claimant to build a convincing case as it would be for a criminal case. A stronger civil accountability mechanism for dealing with apparent violations of the *jus in bello* rules on proportionality and precautions in attack could therefore promote civilian protection and justice in a way that incentivises state officials to buy-in to the regime. If accountability were not seen to be compromising future mission success (either by revealing critical intelligence or by sapping commanders' will to fight) then the legitimacy benefits from setting up such a mechanism may outweigh the possible costs borne by

state officials for endorsing a stronger liability regime for violations of these rules.

In the final analysis, as a regulatory prescription, the rules governing proportionality and precautions in attack do seem to provide some guidance for those planning an attack *ex ante*. However, as a way to hold cavalier commanders or states to account after an attack, they represent little more than dead-letter law. This does not necessarily have to be the case, but in order to assess if a particular intervention will be successful, one must appreciate the underlying strategic dynamic that incentivises the relevant actors to develop and apply the law in a certain way. Only with this understanding can one successfully match what is desirable from the standpoint of civilian casualty mitigation with what is feasible from a political perspective.

## Chapter 8 Conclusions

The prohibition against targeting civilians is a cornerstone of modern LOAC and ICL. However, it stands in an uneasy tension with military necessity, particularly in modern urban warfare, where the density of civilians and civilian objects makes it difficult to hit military objectives without also causing collateral damage.<sup>784</sup> Three rules flesh out this prohibition. Firstly, combatants must at all times distinguish between military objectives and civilians or civilian objects and they must only direct their attacks at the former. Secondly, attackers must take all feasible precautions to discover if civilians or civilian objects are near military targets and they must choose weapons and methods of attack which minimise the likelihood of causing collateral damage. Finally, if there are civilians or civilian objects near a military target, attackers must refrain from launching attacks that they believe will cause collateral damage which would be excessive in relation to the military advantage gained from the attack. Whilst there have been successful prosecutions of commanders who have launched direct or indiscriminate attacks against the civilian population, the *jus in bello* rules on proportionality and precautions in attack have evaded both civil adjudication and criminal prosecution in international and domestic law.

There are several reasons why accountability is important not just for direct or obviously indiscriminate attacks against civilians or civilian objects, but also for disproportionate and cavalier attacks. Firstly, without a robust accountability mechanism for these types of strikes, those who commit more serious violations, such as directly targeting civilians, can possibly shrug off the effects of their attacks by pointing to the difficulties inherent in applying the rules on precautions and proportionality as a defence.<sup>785</sup> Secondly, when commanders are held responsible for violations of proportionality or precautions

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<sup>784</sup> See Ch 1 at note 12.

<sup>785</sup> The way that attacks are framed matters. If, as Crawford argued, leaders often conflate certain proportionality choices and operational offenses with genuine mistakes (p. 22), then it stands to reason that an unscrupulous commander could attempt to re-frame a direct attack on the civilian population as a difficult proportionality decision or a precautions failure in order to escape criminal responsibility. Of course, this defence would not be credible for a pattern of attacks, but without an effective accountability mechanism in place to punish violations of proportionality or precautions in attack, it also lowers the commander's expected costs for attempting a direct attack on the civilian population.

in attack, it enhances the efficacy of their legal training<sup>786</sup> and provides a backstop against commanders or legal advisors who breach their institutional ‘compliance fences’.<sup>787</sup> Thirdly, accountability for these rules should aid peacebuilding by ensuring victims of errant attacks have a sense that justice has been served, leaving them less likely to seek vengeance through extrajudicial means.<sup>788</sup> Finally, selective enforcement of certain LOAC violations but not others undermines the rule of law.<sup>789</sup> But, if the state signals that it is willing to enforce the entire corpus of LOAC by issuing criminal or civil sanctions for violations of proportionality or precautions in attack, then it should increase faith in the rule of law, generally, and LOAC, in particular.<sup>790</sup> This has the knock-on effect of giving the state greater legitimacy for its operations.<sup>791</sup> However, even if it is desirable to have a better accountability mechanism for violations of these rules, any proposed solution for improving accountability must also take into account the strategic logic that has kept one from developing organically in the first place. By understanding this logic, one can then figure under what conditions a particular solution might be viable (if at all).

Developing from earlier prohibitions against causing wanton destruction, the modern rules on distinction, proportionality, and precautions in attack were negotiated at the 1977 CDDH after several conflicts in which the use of air power had wrought large-scale destruction of civilian life and property.<sup>792</sup> The rules, as codified in API to the Geneva Conventions of 1949, would later become part of customary LOAC, applicable in both international and non-international armed conflicts.<sup>793</sup> The grave breaches regime for API criminalised directly targeting civilians and civilian objects, as well as launching

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<sup>786</sup> See Ch 1 at note 38.

<sup>787</sup> The term ‘compliance fence’ describes the institutional framework of legal advisors who constrain commanders by reminding them of their obligations under the law. See Ch 1 at note 41

<sup>788</sup> See Ch 1 at note 54.

<sup>789</sup> See Ch 1 at note 58.

<sup>790</sup> See Ch 1 at note 56.

<sup>791</sup> ‘Counterinsurgents should inform and educate the media, local community, host nation, and public at large about applicable law of war provisions, U.S. and host-nation laws, and the obligations of those participating in hostilities. Providing this information can help build trust and legitimacy by helping locals and the media understand the rules U.S. forces follow and the safeguards they apply in operations. Legal preparation of the battlefield can also help delegitimize the insurgents, as locals and the media will better understand the insurgents’ violation of the laws.’ *Insurgencies and Countering Insurgencies*, Ch 13, 15.

<sup>792</sup> See Ch 2 at note 131.

<sup>793</sup> See Ch 2 at notes 132-189.

indiscriminate or disproportionate attacks, but the failure to take all feasible precautions in attack was not included in this regime. The 1998 Rome Statute, also criminalised direct attacks against civilians and civilian objects along with indiscriminate and disproportionate attacks. However, by insisting that an attack be intentional and clearly excessive in relation to the overall military advantage of the target for it to count as a crime, the framers of the Rome Statute effectively raised the liability for disproportionate attacks vis-à-vis the version of the proportionality rule found in API and customary ICL.<sup>794</sup> Although some would claim that it is merely a limitation on the ICC as an institution,<sup>795</sup> the increased liability has nevertheless been cited by prosecutors in other jurisdictions, such as in the ICTY's NATO Bombing Report.<sup>796</sup> Therefore, this interpretation of what counts as a criminal violation has some traction outside the jurisprudence of the ICC. There have been some successful prosecutions of commanders for directly targeting civilians or for launching clearly indiscriminate attacks, but in the sparse case law that does deal with violations of proportionality or precautions in attack, no one has ever been served a criminal conviction. Moreover, there have not been any successful civil suits and there have been only a handful of publicly-acknowledged examples<sup>797</sup> of a state taking administrative disciplinary measures in response to a specific strike where those involved failed to take all feasible precautions in setting up and launching the attack, such as the *Kunduz Hospital Bombing*.<sup>798</sup>

Even if the law theoretically allows for criminal prosecutions or civil suits based on the *jus in bello* rules on proportionality and precautions in attack, there are a number of legal and practical difficulties which have hampered its application in practice. Military advantage and civilian collateral damage are two values which are not easily compared and the only consistent objective test that has been used to determine what constitutes a disproportionate attack or a

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<sup>794</sup> See Ch 2 at note 204

<sup>795</sup> See Ch 2 at note 213

<sup>796</sup> *Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign against the Federal Republic of Yugoslavia*, para 21.

<sup>797</sup> In addition to the Kunduz Hospital Bombing case, administrative punishments were issued to those accused of attacking the Chinese Embassy in Belgrade during the Kosovo War. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, 218.

<sup>798</sup> See Ch 2 at note 347.

precautions violation is the 'reasonable military commander' test. However, this test has only been invoked by state and court officials in an exculpatory manner. Therefore, the ambiguity in both the black-letter text of the rules on proportionality or precautions in attack and their associated reasonableness tests has been exclusively resolved in favour of the state and its commanders.

Moreover, although it is theoretically possible to prosecute commanders under international criminal law for precautions violations which lead to excessive collateral damage, the result of such cases would be highly dependent on how the particular forum decided to interpret the relevant law. If the court allowed convictions for either direct attacks against the civilian population or disproportionate attacks based on a recklessness liability standard, then such a trial could occur. However, even if it is possible, for many of the same reasons that they will not convict for proportionality cases, it is not likely that judges will convict under a recklessness standard for precautions violations. Nevertheless, civil law is well-suited to tackle questions about liability for decision-making errors using a reasonable person standard or about what constitutes the appropriate degree of precaution that a reasonable person must take to guard against causing harm to others. Moreover, historically, LOAC has been considered more a body of civil law, than a criminal code.

Finally, it is difficult to achieve accountability for proportionality or precautions violations because investigators are not always able to visit the scene of an errant strike immediately after the event. Furthermore, it is nearly impossible for them to obtain access to conversations that occurred in the operations room or notes from the war logs unless the state under investigation agrees to such an examination of their classified records. When this nearly impossible evidentiary burden is combined with the weak liability regime that has historically developed for violations of proportionality or precautions in attack, the chances of a prosecutor securing a conviction in a criminal trial are absurdly low.

These problems do not exist in a strategic vacuum. State actors and court actors have a set of interests and these interests are reflected in both the substance of the law and how it is enforced. Therefore, the strategic-choice

perspective may shed light on how these problems contribute to the lack of accountability and on how it might be possible to create an effective accountability regime in the future. Although strategic-choice analyses tend to answer questions which may seem intuitively obvious to seasoned lawyers, there is value in making what is implicit, explicit. Moreover, by examining the fewest number of actors and variables necessary to tease out the logic behind a strategic interaction, researchers who design models using this perspective posit parsimonious explanations for phenomena that can be subjected to empirical testing. James Morrow has already applied this approach to the study of LOAC compliance, but his work emphasised the role that reciprocity plays in keeping combatants from violating the law. To the extent that courts would prevent violations, he surmised that only deposed autocrats and democrats who are accused of marginally unlawful behaviour who would end up in the dock. The case law suggests that deposed illiberal leaders do go to trial, but democrats do not seem to be ending up in court at all. The large body of literature which describes the way in which court and state actors make decisions in the US separation of powers system shows that, despite their formal independence, judges do consider the likely response of other actors when exercising judicial review. In the smaller number of studies which have examined how state and international court actors interact with one another, the focus has been on how the self-enforcing nature of international criminal justice. Furthermore, previous studies have tended to explain how the ICT behaviour affects state actors, rather than the other way around. In this study, I decided to examine how decisions made one step back in the chain affect the success of an accountability regime by considering how state actors are also able to influence the prosecutor's decision-making process.

To model the interaction between state officials who can set policy on LOAC matters and a prosecutor who has the power to indict commanders for a violation of proportionality and its associated attack precautions, I first needed to know what motivated each actor. Using my interviews with state and court officials along with archival material and a few secondary sources, I postulated that state officials are motivations fell into broadly two categories. Firstly, they

seemed concerned over any rule or accountability regime that would have a chilling effect on the commander's willingness to fight the state's adversaries aggressively and they were protective of their ability to keep classified information secret over fears that it could likewise compromise the success of future military operations. Secondly, they were concerned with how other audiences would perceive the state's actions, suggesting that they were also concerned with state legitimacy. One could see this dynamic playing out at the CDDH and at the Rome Conference where the UK and US delegations wanted to include the proportionality rule in these treaties, but they also fought hard to word the text in such a way as to make sure that their own commanders would not be held liable for collateral damage. Furthermore, even with 20 years separating the CDDH and the Rome Conference, the delegations to each of these conferences held similar beliefs and motivations, suggesting that their positions were not merely the transient preferences of one political party or an ideological fad. For their part, prosecutors are also keen to enhance the legitimacy of their office and the way they achieve this is by ensuring that the cases they bring to trial are solid enough to end with a conviction. Furthermore, they are wary of the logistical costs of running an investigation. Because the liability regime for cases involving *prima facie* disproportionate attack is so weak and the evidentiary burden is so high, the historical record contains several instances where prosecutors have chosen to drop such cases rather than try to fight them in court. The most famous example of this was the ICTY prosecutor's decision not to press forward with a formal investigation or trial of NATO's actions during its 1999 war with Serbia, but it is possible that the ICC OTP has also decided to forgo cases for this reason as well.

After having defined the relevant actors and their motivations, I created a three-level game of perfect information to model the possible ways that state and court actors can affect one another's decision-making process as it relates to achieving accountability for *prima facie* disproportionate attacks. The model was not meant to depict any particular judicial forum; rather, it sketched out a strategic logic that could apply to both domestic and international courts. Moreover, although the model is focused on criminal law, its broad-strokes

conclusions could also be generalised to civil law courts. In the game, the state official moves first and can decide whether to keep the liability regime for proportionality offenses strict or weak, which will respectively increase or decrease the probability that a suspect commander will be convicted, if tried. If one of the commanders from that state is accused of ordering a disproportionate attack, then the prosecutor can choose to either issue an indictment or not issue an indictment. Finally, the state official can choose to either cooperate with the court or to not cooperate, which again will influence the suspect commander's probability of conviction. Historically, state officials have chosen to keep the liability regime weak for cases of disproportionate attack and prosecutors have therefore decided not to indict commanders for charges based on violations of proportionality or precautions in attack.

In order for the game to settle into a new equilibrium path, certain conditions must be present. For example, to get the prosecutor to issue an indictment in spite of a strong liability regime being in place, an exogenous actor, such as an HRO or a group of 'like-minded' countries<sup>799</sup> could help defray the costs of running the investigation and could pressure the court into taking on a case by exacting a legitimacy cost from the prosecutor for dropping proportionality-related cases from the docket. This solution would lead to more prosecutions, but it would ultimately be a futile effort since the likelihood of conviction would remain unchanged.

Surprisingly, it appears to always be in the state official's interest to cooperate with the prosecutor by providing some access to behind-the-scenes information regarding the attack, so long as it doesn't substantially increase the likelihood of conviction for a suspect commander. This is because, in most cases, the legitimacy that the state gains for participating in a transparency regime should overcome the threat posed by sharing information about any particular attack. However, even if state officials agree to cooperate with the prosecutor, either directly or through a transparency regime, they will not likely hand over the 'smoking gun' or any information that substantially increases the

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<sup>799</sup> See Ch 4 at note 469.

commander's probability of conviction. Furthermore it is unlikely that autocrats or particularly bellicose states (i.e. those that value military success substantially more than legitimacy) will sign up to such a regime.

To get the state official to agree to a stricter liability regime for the rules on proportionality and precautions in attack, the state official must ascribe more value to state legitimacy than to future military success or they must believe that other exogeneous factors will lower the probability of a suspect commander's conviction. Practically, one way to do this is to challenge the state official's belief that limiting collateral damage necessarily puts the success of future military operations in danger. By providing the official with empirical evidence which shows that the value of future military success is not moderated by the likelihood that commanders will be convicted for proportionality offenses, the state official may be more likely to endorse a stricter liability regime for the proportionality rule. Otherwise, HROs or other parties interested in accountability for cavalier or disproportionate attack could get states to agree to a stricter liability regime by lobbying for such attacks to be tried in civil, rather than criminal courts. By treating such incidents as civil torts for which the state, not the commander, incurs liability, state officials would not have to worry about criminal prosecutions having a chilling effect on their commanders' willingness to aggressively pursue the enemy. With the value of future military action no longer moderated by the spectre of criminal prosecutions, the state official should be more inclined to support a stricter civil liability for the rules on proportionality and precautions in attack. At any rate, proportionality offenses and precautions failures are well-suited to civil adjudication since their associated reasonableness tests should be familiar to any tort lawyer. Furthermore, such a regime would incentivise military and civilian leaders to take operational offenses more seriously, which should lead to the sort of top-down structural changes in military's armoury and TTPs needed to limit collateral damage. Additionally, if one commander's decisions or actions were particularly egregious, then the tort could motivate the state to take further administrative or criminal action against them, depending on the severity of their individual offense.

Now that the contours of the model have been defined and its predictions have been explored with a few case studies, the next task will be to develop a solid empirical basis for its applicability in real-world situations. Going forward, it will be important to analyse the future behaviour of the ICC Prosecutor to see if they are willing to issue an indictment for a case of disproportionate attack and whether state officials will offer their support. Given the number of engagements currently involving the use of aerial bombardment, the number of accusations of disproportionate attacks is unlikely to fall in the near future. Since few of them are likely to fall within the ICC Prosecutor's remit, because of restrictions on its jurisdiction, there will likely be even more cases at the domestic level that will wrestle with the thorny issues of proportionality and precautions in attack in the years to come. The variation in different national systems of justice should produce a natural experiment against which the predictions of this model could be assessed empirically.

If the *jus in bello* rules on proportionality and precautions in attack are to be more than a moral appeal, then the law must not only be a guide for how combatants ought to approach their duties when planning or launching attacks, but it should also hold those who fail in this duty to account after the fact, whether they be individuals or states. With more civilians living in dense urban environments where it is difficult to escape the effects of bombardment with heavy weapons, enforcement of these rules is needed to avert humanitarian catastrophes. Nevertheless, any proposal to improve accountability for the *jus in bello* rules on proportionality or precautions in attack also must also consider how the decision-making processes of state officials and prosecutors have caused them to be so weakly enforced in the first place. With a better appreciation of this strategic reality it may yet be possible to design an accountability regime that will avoid these rules becoming dead letter law.

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