Lexsitus Lecturer: Arne Willy Dahl (former Judge Advocate General, Norway)
Topic: ICC Statute Article 8(2)(b)(i)
Level: Introductory
Date of recording: 30 May 2017
Place of recording: Norway
Duration of recording: 10:36
PURL of film: www.cilrap.org/cilrap-film/8-2-b-i-dahl/
PURL of English transcript: www.legal-tools.org/doc/9a6702/

Now I shall say some words about article 8, paragraph 2, sub-paragraph (b) (i), which penalizes intentionally directing attacks against civilians not taking direct part in hostilities.

The crimes under article 8, paragraph 2 (b) are "serious violations of the laws and customs applicable in international armed conflict", which means that they may be derived from customary or treaty law applicable in international armed conflict.

It is a requirement that the attack took place in the *context of* and was *associated with* an international armed conflict. A terrorist attack against civilians in peacetime is a heinous crime, but it is not a war crime under the jurisdiction of the ICC.

The *chapeau* moreover adds "within the established framework of international law", which serves to underline that the offences must be interpreted in line with established law, possibly to exclude an all too progressive interpretation of certain offences. This understanding is in line with the provision in article 22, paragraph 2 of the Statute, which says:

> 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.

This war crime is based on Article 51 of the 1977 Additional Protocol I to the 1949 Geneva Conventions. The provision reflects customary international law.

The term 'attack' is defined for Law of Armed Conflict purposes as any acts of violence against the adversary, whether in offence or in defence. It makes no difference whether you are fighting an offensive or defensive war under *jus ad bellum*, or whether your unit for the moment is on the offensive or is fighting a defensive rearguard action.

'Acts of violence' normally means use of physical force, including blast and fire. It also includes the use of chemical weapons. Cyber operations can be attacks if they result in consequences in the physical world that are comparable to results of using ordinary weapons. This could, for example, be when the floodgates of a dam are opened by hacking the control system producing an inundation comparable to as if the dam had been breached by bombing. What defines an 'attack' is not the violence of the means, but the violence of the results.

CILRAP: Centre for International Law Research and Policy

Please cite this transcript by including its persistent URL or the URL of its corresponding film in Lexsitus Lectures (these PURLs do not break). All rights are reserved by the Centre for International Law Research and Policy (CILRAP), 100 Avenue des Saisons, 1050 Brussels, Belgium.

'Civilians' are all persons who are not members of the armed forces. Armed forces include not only the regular armed forces, but also certain militias and armed resistance movements. The definition is rather complicated and not all elements are universally accepted as customary law. In this context, I shall only point at the issues of wearing a distinctive sign and carrying arms openly, which for non-parties to the 1977 Additional Protocol I is a requirement for recognition as a combatant, that is a person who can lawfully participate directly in hostilities.

'Civilians' includes also the civilian population. The presence of some individual members of the armed forces within the civilian population does not deprive the civilian population of its civilian character. This could, for instance, be soldiers on leave visiting their families.

The armed forces will normally also include medical and religious personnel. These are protected persons under the First Geneva Convention. Although they are not 'civilians', it is a war crime under article 8(2)(a)(i) to kill such persons.

Civilians may be attacked if they take direct part in hostilities. The exact meaning of "taking direct part in hostilities" is disputed, but the core of the notion is universally accepted. You may, for instance, attack the person who is shooting at you with a machine gun. You may also attack the person who is carrying ammunition to the machine gunner. But you may not attack the person who participates indirectly, such as the machine gunner's wife who is cooking food for him.

The role of the cook is, however, one of the disputed issues. Some hold that the cook is a lawful target if he or she is a member of an organized armed group, while others, in particular the ICRC, hold that it is only those members of the group that have a continuous combat function that can lawfully be attacked. Another problem is the so-called "revolving door" controversy. Can you be a protected civilian farmer by day and a targetable fighter by night, or will repeated direct participation in hostilities make you a lawful target until you have clearly abandoned such activities?

The International Committee of the Red Cross issued in 2009 an interpretive guidance to the concept of direct participation in hostilities. This was made after six years of expert consultations; the problem is only that the experts were not able to agree on certain issues like those explained above. The interpretive guidance is, therefore, the position of the ICRC and does not reflect a consensus among experts. That said, one can safely assume that if a person is involved in activity that is direct participation in hostilities according to the ICRC view, it is lawful to attack that person. But it cannot be inferred that an attack of a person that does *not* fulfil the ICRC criteria for direct participation is unlawful and therefore a war crime. In such cases, the situation has to be studied carefully before any conclusion is drawn.

The penalized act is "intentionally directing attacks" against civilians. It is no requirement that any civilians are hurt or killed. The attack may fail due to malfunction of weapons or poor aiming. On the other hand, civilians can lawfully be hurt or killed as an incidental result of an attack that was aimed at someone or something else. This is what is called 'collateral damage' by the military. This situation is covered in article 8, paragraph 2, sub-paragraph (b) (iv), which makes it punishable to launch attacks that are known to cause collateral damage that is clearly excessive in relation to the concrete and direct military advantage anticipated.

An attack can be indiscriminate in the sense that the attacker does not know whether the attack will hit civilians or not. Area bombardment or 'carpet bombing' may serve as an example if a military objective located in a residential area is attacked by weapons that are not sufficiently precise to hit the military objective, but the attacker resorts to dispatching a large number of shells or bombs in the direction of the military objective hoping that some will hit. Indiscriminate attacks

count as direct attacks against civilians. Depending on the circumstances, this mode of the crime may overlap with the crime of causing excessive collateral damage, and it can be disputed how the line exactly should be drawn.

It may also be that the attacker launches an attack against somebody that he or she assumes to be a lawful target, but does not care whether the target is a civilian or a combatant. Such recklessness - *dolus eventualis* - is, according to the ICTY in the *Galic* case, sufficient to constitute the crime. Another situation is when the attacker believes that the person attacked is a lawful target, but has not taken the necessary precautions by doing everything feasible to verify that the object of attack is not a civilian. This is not necessarily a war crime, but lack of precautions can be an indication of recklessness. In any case, one must assess which information was available or could reasonably be available to the accused at the moment of attack. The assessment cannot be made with hindsight.

The 1977 Additional Protocol I prohibits attacks on civilians by way of reprisals. The United Kingdom has entered a reservation to that treaty rule. The prohibition has not achieved customary law status and it is for that reason not binding on non-parties to the Protocol 1. Thus, as a war crime it is "within the established framework of international law" only in relation to those States that have accepted the treaty prohibition.

Thank you.