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Now I shall say some words about article 8, paragraph 2 sub-paragraph(b)(iv), which penalizes 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. Such incidental loss, injury, or damage is called 'collateral damage' by the military.

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

The chapeau, moreover, adds "within the established framework of international law", which serves to underline that the offenses must be interpreted in line with established law, possibly to exclude an all too progressive interpretation of certain offenses. 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 favor of the person being investigated, prosecuted or convicted.

This crime is based on article 51, paragraph 5, sub-paragraph (b) of the 1977 Additional Protocol I to the 1949 Geneva conventions with substantial modifications.

- The prohibition in the Additional Protocol I is about attacks that cause excessive collateral damage, while the present penal provision applies to collateral damage that is "clearly excessive".
- Where the Additional Protocol I speaks of military advantage, the present provision uses the terms "overall military advantage".
- Moreover, article 51 does not mention damage to the natural environment, but Protocol I has an absolute prohibition in article 35, paragraph 3 against causing widespread, long term, and severe damage to the natural environment. In the present penal provision, this prohibition is relative. The question is whether the perpetrator intentionally launches an attack in the knowledge that such attack will cause damage to the natural environment which is "clearly excessive" to the military advantage anticipated.

The term ‘attack’ is defined for Law of Armed Conflict purposes as 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 the 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. 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 and thereby 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.

This weighing of anticipated military advantage against expected civilian losses is known as the proportionality principle. The basic norm as found in Additional Protocol I could be interpreted according to utilitarian ethics, where the moral worth of an action is determined by its contribution to overall utility. In the military context, this means that the military advantage anticipated has to be weighed against the expected collateral damage on an imaginary scale and the course of action decided according to which way the scales tip. But actions can also be judged focusing on the intention of the actor, in other words, by focusing on the intended effects. Unintended side-effects will spoil the moral quality of the act only if they are excessive, which means much more than barely outweighing the intended beneficial effects as seen from the viewpoint of the attacker.

Be that as it may, when the Rome Statute uses the term ‘clearly excessive’, it means more than scales tipping in dis-favour of the attack. This does, however, not resolve the issue of how Protocol I should be interpreted, since an act can be prohibited by the Law of Armed Conflict without being criminalized.

By ratification of Additional Protocol I, several States entered understandings to the effect that the collateral damage must be seen in relation to the military attack considered as a whole and not only from isolated or particular parts of that attack. This appears to have led to the introduction of the term ‘overall military advantage’ in the ICC Statute. What this actually means is somewhat unclear.

It can hardly mean the whole war or a substantial part of it. It may, in my opinion, cover a situation like when the allies in the weeks prior to the 1944 invasion in Normandy bombed targets in the Calais area in order to induce the Germans to retain their panzer divisions in that area and not move them to Normandy before it was too late. In contrast, the allied raids on the coast of occupied Norway over several years had a similar motivation, but less direct. The idea was to make the German occupants believe that an invasion might happen some day at some place along a coast of about 2,000 kilometers, thus inducing them to spend resources on massive fortifications. This advantage is, in my opinion, too remote and speculative to factor into a proportionality analysis of civilian losses versus military advantage of one or more of the raids.

For the military commander, it can be difficult to know which collateral damage to expect from particular attacks. When the norm itself is not very precise, the commander must be left with a considerable margin of appreciation. The ICTY, in the report on NATO’s bombing of Serbia and Kosovo in 1999, observed that the ICC Statute recognizes ‘operational reality’ and that the use of the word ‘clearly’ ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious.

As for environmental damage, the Additional Protocol I has no definitions of ‘widespread’, ‘long-term’, and ‘severe’, but some guidance can be found in the ICRC commentary. This is, however, mostly interesting when the norm is to be used in the absolute form. In the ICC Statute, the environmental damage expected is to be weighed against the military ad-

vantage anticipated, which makes it less urgent to know for example, how widespread the environmental damage has to be in order to meet some definition of 'widespread'.

Last but not least, it must be underlined that one must assess the responsibility of the accused in light of which information was available or could reasonably be available to him or her at the moment of attack. The assessment cannot be made with hindsight.

Thank you.