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DID THE UKRAINIAN CONFLICT WITH RUSSIA, MEET THE LEGAL THRESHOLD OF ‘GRAVE BREACHES’ UNDER INDIVIDUAL CRIMINAL RESPONSIBILITY?

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ABSTRACT

Post adoption of 1949 Geneva conventions and the Additional Protocol I (1977), today's armed conflict between Russia and Ukraine has emerged as one of the most consequential contemporary tests of IHL. The conflict has generated extensive allegations concerning indiscriminate attacks, unlawful targeting of civilians, destruction of protected infrastructure, torture of prisoners, unlawful annexation of occupied territories and attacks against nuclear installations. Reports issued by various international investigative institutions have collectively indicated patterns of conduct potentially amounting to grave breaches of IHL and prosecutable for war crimes by the ICC Statute in the current Ukrainian conflict with Russia. This paper, instrumentalises a doctrinal and jurisprudential analysis supported by the UN reports and other scholarly assets for examining two questions; first, whether the pattern during the armed conflict conducted internationally meets the legal threshold of the principles of distinction, proportionality, discrimination and precautions, alongside acts forming part of 'grave breaches'? Secondly, the question arises whether the conflict demonstrates both enduring relevance and the enforcement-limitations even in light of the most emerging conflict.

Keywords: Russia-Ukraine, armed conflict, grave breach, individual criminal responsibility, IHL principles, international criminal law.

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I. ASSESSING COMPLIANCE WITH THE DISTINCTION PRINCIPLES, PROPORTIONALITY, DISCRIMINATION AND PRECAUTIONS IN THE UKRAINIAN ARMED CONFLICT.

1.1 Principle of distinction on trial

Being a customary principle of international law and recognised under Articles 48-51 of the AP I 1977², the distinction principle plays a vital role in *jus in bello* as it also binds upon those countries which have never ratified the Geneva conventions 1949. The core principle highlights that parties to the conflict must distinguish between civilian population and military targets and shall not target demilitarized zones but "shall direct their operations only against military objectives".³ In fact, what constitutes an 'attack' is defined in Article 49 as those 'acts of violence against the adversary whether in offence or in defence.'⁴ The definition covers all forms of military violence against opponents including shelling, bombarding and other hostile acts. While applying the case of *Prosecutor v. Galić*, the ICTY held that even 'sniping and shelling of civilians' can be considered an 'attack' violative of IHL.⁵ During the conflict between the Bosnian Serb forces against the civilians, they had engaged in shelling into civilian areas which constituted an 'attack' even though it was done in defensive, were considered as acts of violence against the adversary.⁶ This reinforces the fact that attack simply is not limited to offensive campaigns but also includes acts directed at the adversary even if it was framed in defence.

Even in the case of *Prosecutor v. Kupreškić*, when the Bosnian Muslim civilians were attacked, the ICTY Chamber emphasized that even retaliation against civilians were 'attacks' and the Court while applying the definition of 'attack' included unlawful acts of violence, even during times of peace, and not merely limited to what was done lawfully during military operations.⁷ While deciding the case of *Prosecutor v. Akayesu* (ICTR 1998), the ICTR reinforced that attack includes systematic and widespread violence against civilians

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48–51, June 8, 1977, 1125 U.N.T.S. 3.

³ International Committee of the Red Cross, Customary International Humanitarian Law, Rule 7: The Principle of Distinction between Civilian Objects and Military Objectives, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7> (last visited Aug. 8, 2026).

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 49(1), June 8, 1977, 1125 U.N.T.S. 3.

⁵ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber I, International Criminal Tribunal for the former Yugoslavia, Dec. 5, 2003, available at <<https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>> (last visited Aug. 8, 2026).

⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber I, International Criminal Tribunal for the former Yugoslavia, Dec. 5, 2003, paras. 16–33, available at <<https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>> (last visited Aug. 8, 2026).

⁷ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber II, International Criminal Tribunal for the former Yugoslavia, Jan. 14, 2000, paras. 520–531, available at <<https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>> (last visited Aug. 8, 2026).

made even outside traditional battlefield context,⁸ thus, bridging the gap between IHL and crimes against humanity (CAH). Since the principle of distinction requires to differentiate between civilians and combatants, the term 'civilian' has been understood as any person who does not belong to the category of combatants. The definition is exclusive in nature as it gives any person the benefit of doubt to be civilian in order to extend protection but their protection may be lost if they take direct part in hostilities as observed by ICTY in the Tadić case.⁹ Even while dealing with Akayesu case, the ICTR reinforced that the Tutsi population were not combatants and hence they were civilians within the meaning of Article 50.¹⁰ Even in 2001 while the ICTY chamber applied the presumption and stressed that when there is a doubt individuals must be treated with the protective presumption as if they are civilians as held in Kordić & Čerkez case.¹¹

For the first time the ICTY in Blaškić case, clarified that population who were not taking direct part in hostilities even if they had supported the armed groups with food and shelter, were to be treated as 'civilians.'¹² The court had drawn a distinction between direct participants, meaning the combatants and the non-combatants, who were 'civilians'. Only after distinguishing between a civilian objects and military targets, the principle of distinction requires the combatants to enlist them as 'protected groups' by prohibiting threats, acts of violence or indiscriminate attacks against civilians. Even the UN Human Rights Monitoring Mission reports showcased that there were indiscriminate attacks against civilian population including hospitals and residential blocks.¹³ The principle of distinction obliges, those taking part in the hostilities to distinguish a 'military objective' from a civilian object and a combatant or a person taking direct part in the hostilities than that of a civilian. Attacks cannot actually be directly against civilian objects unless they fall within

⁸ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, International Criminal Tribunal for Rwanda, Sept. 2, 1998, paras. 581–582, available at <<https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict9-96-4/trial-judgements/en/980902.pdf>> (last visited Aug. 8, 2026).

⁹ Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgment, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, July 15, 1999, paras. 305–307, available at <<https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>> (last visited Aug. 8, 2026).

¹⁰ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, International Criminal Tribunal for Rwanda, Sept. 2, 1998, paras. 581–582, available at <<https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict9-96-4/trial-judgements/en/980902.pdf>> (last visited Aug. 8, 2026).

¹¹ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, Trial Chamber III, International Criminal Tribunal for the former Yugoslavia, Feb. 26, 2001, paras. 325–327, available at <https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf> (last visited Aug. 8, 2026).

¹² Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, Trial Chamber I, International Criminal Tribunal for the former Yugoslavia, Mar. 3, 2000, paras. 180–183, available at <<https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>> (last visited Aug. 8, 2026).

¹³ United Nations Human Rights Monitoring Mission in Ukraine, Protection of Civilians in Armed Conflict — June 2026, UN OHCHR Report, July 14, 2026, available at <<https://www.ohchr.org/en/hr-bodies/hrmmu/all-reports>> (last visited Aug. 8, 2026).

the definition of a 'military objective' as given in Article 52 (2) of AP I¹⁴ and Rule 8 of the ICRC Study on customary IHL.¹⁵ Even several civilian objects such as hospitals, cultural property and goods indispensable for the survival of the population enjoy additional protection. When there is a doubt as to whether a particular target is a 'military objective' or is dedicated for civilian purposes, the presumption shall be supporting the civilian cause and once that is established the such objects cannot be targeted.

As on 15th February 2024 the UN Human rights council report dated 18th of March 2024 observed that 8898 civilians had been killed and 18,818 were injured in such attacks according to the OHCHR.¹⁶ The commission observed that there was a continuation of attacks leading to the incidental death, injury, destruction and the pattern in which it was designed had called for the requirement of Russia to maintain the principle of distinction between 'military objectives and civilians.'¹⁷

One of the primary examples show how the principle of distinction got violated when the attacks on the siege of Mariupol carried out by the Russian armed forces in Ukraine.¹⁸ The HRW observed in its report that a wave of missiles was struck against Okhmatdyt Children's hospital on July 8, 2024.¹⁹ While testing whether the combatants had fulfilled the primary rule of distinction, before directing military operations, it was found that the shelling of the largest children's hospital had severely damaged multiple departments including the intensive care units, surgical wings, oncology, toxicology, traumatology departments killing at least 42 civilians including 5 children and 190 people were injured as recorded by the Human Rights Watch.²⁰ Soon after that, the UNSC conducted the session immediately after the strikes where the UN officials held that this pattern of systematic attacks had harmed the healthcare and other civilian infrastructure. Even the medical

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977, 1125 U.N.T.S. 3.

¹⁵ International Committee of the Red Cross, Customary International Humanitarian Law, Rule 8: Definition of Military Objectives, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8> (last visited Aug. 8, 2026).

¹⁶ United Nations Human Rights Council, Report on the Human Rights Situation in Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/CRP.3, noting OHCHR figures as of Feb. 15, 2024 (8,898 civilians killed; 18,818 injured), available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

¹⁷ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/64, observing continuation of attacks causing incidental civilian deaths and destruction, and stressing Russia's obligation to maintain distinction between military objectives and civilians, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

¹⁸ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Sept. 2022, UN Doc. A/HRC/51/CRP.3, noting violations of the principle of distinction during the siege of Mariupol, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

¹⁹ Human Rights Watch, Russia's July 8 Attack on a Children's Hospital in Ukraine, News Release, July 11, 2024, available at <<https://www.hrw.org/news/2024/07/11/russias-july-8-attack-childrens-hospital-ukraine>> (last visited Aug. 8, 2026).

²⁰ *ibid*

director observed that "it was not only a war crime but far beyond the limits of humanity".²¹ Every state must know that the primary objective of targeting the military facilities of another state at the time of a hostility must be to weaken the military potential of the enemy. The applicability of Additional Protocol I into the current Russia-Ukraine conflict has been used to understand the principle of distinction since this current dispute is in line with an international armed conflict and not a NIAC (non-international armed conflict).

1.2 Principle of Discrimination on trial

Under the principle of discrimination, the indiscriminate attacks are said to be prohibited by Article 51(4) and (5) of the A.P I²² and Rule 11 of the ICRC Study.²³ The UN Human Rights Council in its report dated 15th of March 2023 observed while investigating that there was use of explosive weapons in the populated civilian areas of Ukraine with the view to capture such towns or cities.²⁴ So, the attacks which have been documented have shown to have drastically impacted civilian objects including the residential buildings, hospitals, schools, hotels, shops, theatre, pharmacy, rail station and such attacks which have not been directed at a specific 'military objective' are to be classified as '*indiscriminate*' attacks. There were also certain areas which the commission could not identify as a 'military objective'. The Commission observed that the Russian armed forces had used weapons which had struck both civilian objects and military objects without respecting the principle of distinction.²⁵ The commission observed that there were four different types of weapons which led to indiscriminate attacks such as the unguided bombs dropped from the aircrafts, inaccurate long range anti-ship missiles of the KH 22 and KH 32 types which had inaccurately struck land targets, the use of cluster munitions which by its design spreads small submunitions over a large area²⁶ and the multiple rocket launch systems which had

²¹ Human Rights Watch, Russia's July 8 Attack on a Children's Hospital in Ukraine, News Release, July 11, 2024, quoting the medical director's statement that "it was not only a war crime but far beyond the limits of humanity," available at <<https://www.hrw.org/news/2024/07/11/russias-july-8-attack-childrens-hospital-ukraine>> (last visited Aug. 8, 2026).

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 51(4)–(5), June 8, 1977, 1125 U.N.T.S. 3.

²³ International Committee of the Red Cross, Customary International Humanitarian Law, Rule 11: Indiscriminate Attacks, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11> (last visited Aug. 8, 2026).

²⁴ United Nations Human Rights Council, Report on the Human Rights Situation in Ukraine, Mar. 15, 2023, UN Doc. A/HRC/52/62, observing the use of explosive weapons in populated civilian areas with the objective of capturing towns and cities, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

²⁵ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/64, observing that Russian armed forces used weapons striking both civilian and military objects without respecting the principle of distinction, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

²⁶ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/64, noting the use of unguided bombs, KH-22/32 missiles,

covered a large area with inaccuracy thereby causing civilian killings. Hence the commission confirmed that the use of such systematic attacks was indiscriminate. When Kharkiv was taken over by Russian troops, even in such region it was observed that the use of cluster munitions for carrying out attacks in the Iziurm city between March to September 2023 was violative of the principle of discrimination.²⁷ As per the testimony given by the witnesses, indicated that there was use of antipersonnel high explosive landmines in the densely populated areas in July 2022. Unlike Ukraine, Russia is not a state party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel mines and their Destruction, which absolutely prohibits the use of these kinds of landmines.²⁸ The use of this technology led to *grave injuries* where the commission after inspecting the unexploded landmines, the remains of the weapons, photographs, came to a conclusion that there was the use of antipersonnel high explosive landmines which were called 'butterfly mines'.²⁹ The commission observed that the use of indiscriminate attacks was a violation of IHL principles and such reports have indicated that such attacks were repetitive³⁰ which drastically impacted the civilians.

For the purpose of understanding a 'military objective' as defined in Article 52 of the Additional Protocol I, those "objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction capture or neutralization offers a definite military advantage."³¹ This definition can be considered to be a customary IHL. The attacks conducted upon critical energy infrastructure suggest that the power stations, electric grids, dams are really a matter of concern and needs to be legally qualified to be violative of the principle of discrimination. The question here arises as to whether the destruction of such power stations can be considered as "military targets". On a prima facie note, it can be presumed that such targets might be lawful as it does not essentially involve civilian infrastructure. But going by the principle of discrimination, such attacks can be considered a valid target only if they qualify as '*military objective*'.

cluster munitions, and multiple rocket launch systems causing indiscriminate attacks against civilians, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

²⁷ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/64, noting the use of cluster munitions in Iziurm city (Kharkiv region) between Mar.–Sept. 2023 as violative of the principle of distinction, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

²⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (Ottawa Convention).

²⁹ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Sept. 2022, UN Doc. A/HRC/51/CRP.3, concluding from weapon remains and photographs that antipersonnel high explosive "butterfly mines" were used in densely populated areas in July 2022, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

³⁰ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 18, 2024, UN Doc. A/HRC/55/64, observing that the use of indiscriminate attacks violated IHL principles and that such attacks were repetitive, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977, 1125 U.N.T.S. 3.

In order to qualify as such, there are certain requirements that needs attainment. At first, for a particular object to qualify as military object there must be an effective and actual contribution to military action which is quite doubtful that such energy infrastructure was used exclusively for military purposes only. Secondly, it has to qualify that the destruction of such an infrastructure had offered a definite military advantage, which is, a direct benefit was obtained from such attack and where such a benefit is of military nature. This shows that it is almost impossible to identify the direct military advantage that had been gained by such attacks except for the only advantage, which is, to intimidate the civilians and undermine their morale and this reason cannot legally justify the 'military objective'. Even presuming that even if the attack on the energy-infrastructure would qualify as a 'military objective', such a strike would have also required the compliance with the principles of proportionality and precautions too. Hence such indiscriminate use of weapons on this energy infrastructure suggests that the strikes were unlawful.

1.3 The Principle of Proportionality on trial

From the perspective of IHL, there are different views while assessing the principle of proportionality. When an attack maybe anticipated to cause incidental loss to the civilian life, injury and damage to civilian objects which can be considered as excessive in relation to the direct military advantage anticipated, as this can be considered as disproportionate and hence it is prohibited under Article 51 (5)(b) of the 1977 Additional Protocol 1³² reinforced by Article 57(2)(a)(iii).³³ The attacks have brought detrimental effects to the health and wellbeing of the vulnerable category of population including the persons with disability, older citizens and have completely disrupted children education. Yes, it is quite doubtful to understand whether such attacks can be included within the assessment of compliance with the principle of proportionality. Such attacks can be considered as violative of the prohibitive acts or threats of violence which is primarily meant for spreading terror among the civilian population (Article 51(2) of AP I).³⁴ The principle of proportionality is also a customary principle as per Rule 2 of the ICRC Study³⁵ read with Galic case.³⁶ The hardship caused to the civilians when they were deprived of water and electricity which was vital for them to even survive, given the winter time of the year;³⁷ such scale and scope of the attack appears to be violative of the prohibition of attacks on objects indispensable to the

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3.

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3.

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), June 8, 1977, 1125 U.N.T.S. 3.

³⁵ International Committee of the Red Cross, Customary International Humanitarian Law, Rule 2: Proportionality in Attack, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2> (last visited Aug. 8, 2026).

³⁶ Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, paras. 87–90 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 54(2), June 8, 1977, 1125 U.N.T.S. 3.

civilian population as per Article 54(2) of the AP I.³⁸ The UN Human Rights Council report dated March 15, 2023 observed that the Russian forces had committed indiscriminate and disproportionate attacks which were violative of IHL.³⁹ Hence the failure on the part of Russia to analyze attacks whether it would outweigh military advantage over civilian deaths, can be considered as against the principle of proportionality. Even in the case of *Prosecutor v. Galic*, the ICTY observed that indiscriminate shelling and sniping violated the principle of proportionality as the civilian harm was clearly excessive than the anticipated military benefit.⁴⁰ Even the Appeals Chamber had reaffirmed with this principle of proportionality and called it to be a binding customary law.⁴¹ Hence the judgment directed that the commanders were required to analyze civilian harm before launching attacks. On the other hand, in the case of *Prosecutor v Kupreškić*, the ICTY emphasized that reciprocity or revenge cannot justify disproportionate attacks.⁴² It was further clarified that proportionality requires a concrete and direct military advantage and not something which is a speculative benefit and vague in nature. In fact, this judgment clearly provided that civilian production is absolute and violations can amount to war crimes. Since the principle of proportionality confirms customary principle of international law hence it is binding even outside treaty obligations. It can be construed that all the combatants including the commanders are legally obligated to evaluate proportionality before attacking the targets and hence failure of which can attract individual criminal responsibility for committing war crimes under the Rome Statute.

1.4 The Principle of Precautions on trial

The necessity for adopting the principle of precautions in an attack is to prevent the effects of the attack. This principle of precautions required the parties to the conflict to take all steps necessary to minimize civilian harm. As per article 57 such precautions in the form of verification of targets, sufficient warnings and time given to the civilians to evacuate, even protect the civilians with shelters, and to the extent of cancelling the disproportionate

³⁸ International Committee of the Red Cross, Customary International Humanitarian Law, Rule 54: Attacks against Objects Indispensable to the Survival of the Civilian Population, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule54> (last visited Aug. 8, 2026).

³⁹ United Nations Human Rights Council, Report on the Human Rights Situation in Ukraine, Mar. 15, 2023, UN Doc. A/HRC/52/62, observing that Russian forces committed indiscriminate and disproportionate attacks in violation of IHL, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

⁴⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber I, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003, paras. 87–90, available at <<https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>> (last visited Aug. 8, 2026).

⁴¹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, Int'l Crim. Trib. for the Former Yugoslavia, Nov. 30, 2006, reaffirming proportionality as binding customary law, available at <<https://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>> (last visited Aug. 8, 2026).

⁴² *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000, paras. 520–531, available at <<https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>> (last visited Aug. 8, 2026).

attacks.⁴³ This principle is customary nature as Rule 22 of the ICRC Study confirms that the principle of precautions is binding on both International armed conflicts and non-international armed conflicts. Even in the Galić case, the ICTY observed that when the commander fields to take feasible precautions to protect civilians by verifying targets, made him accountable for individual criminal responsibility.⁴⁴ For the first time the principle was enforced by the ICTY in the trial judgment of the Blaškić case. The Chamber observed that failure to take precautions in planning and execution can be considered a violation of IHL,⁴⁵ hence there is a duty to verify the military objectives and take necessary precautions to prevent civilian perils and casualties.⁴⁶ The principle of precaution is a procedural obligation and not merely an abstract principle. In the Prosecutor v. Kordic case, the Trial judgment of 2001, observed after the systematic attacks against Bosnian Muslim civilians that there was a need to issue warnings and avoid locating military objectives near civilian population.⁴⁷ As per Article 57, before launching and while engaged in an attack a party to an armed conflict must take all feasible precautions in the choice of means and methods of warfare so has to minimize the incidental harm to the civilian and civilian objects.⁴⁸ Even in several attacks the UN commission of Inquiry report dated 15th of March 2023 observed while investigating that the Russian armed forces failed to take precautions to verify whether the civilians were present.⁴⁹ Irrespective of whether there was a military objective it is always mandatory that the armed forces must assess the targets before launching an attack.⁵⁰ If the Russian armed forces had assessed the targets before launching an attack

⁴³ Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the 1977 Geneva Protocols* 323–330 (Martinus Nijhoff, 1982).

⁴⁴ Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment, Trial Chamber I, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003, paras. 87–90, available at <<https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>> (last visited Aug. 8, 2026).

⁴⁵ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, Trial Chamber I, Int'l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000, paras. 180–183, available at <<https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>> (last visited Aug. 8, 2026).

⁴⁶ Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the 1977 Geneva Protocols* 323–330 (Martinus Nijhoff, 1982).

⁴⁷ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, Trial Chamber III, Int'l Crim. Trib. for the Former Yugoslavia, Feb. 26, 2001, paras. 325–327, available at <https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf> (last visited Aug. 8, 2026).

⁴⁸ Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the 1977 Geneva Protocols* 323–330 (Martinus Nijhoff, 1982).

⁴⁹ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 15, 2023, UN Doc. A/HRC/52/62, observing that Russian armed forces failed to take precautions to verify civilian presence before attacks, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

⁵⁰ Claude Pilloud et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 2190–2209 (International Committee of the Red Cross, 1987); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, ch. 9 (Cambridge University Press, 3rd ed. 2022); Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* 280–285 (Edward Elgar, 2019).

they could have adhered to the principle of precautions.⁵¹ Even if the Russian forces had a direct military objective in carrying out the attack the special protected status of medical institutions would have made them adopt extra precautions.

The fifth interim report on reported violations of IHL in Ukraine dated 22nd of July 2024, the ODIHR observed how the Russian forces continued to use explosive weapons upon densely populated urban areas of Ukraine which led to numerous civilian casualties and breakdown of civilian infrastructure.⁵² Even while shelling the areas the attacks primarily affected the residents who were residing close to the place where such air strikes, munition and missiles were striking down civilian objects.⁵³ Such attacks show how the Russian authorities had continuously shown disregard for the IHL principles of distinction and proportionality. From late March 2024 there was a new wave of attacks against energy related infrastructure across Ukraine which had also affected the electricity substations and the power generation facilities⁵⁴. For instance, on 22nd March 2022 Russians damaged 20 substations and 8 power plants including Dnipro power plant.⁵⁵ This attack had significantly result in civilian death and had also disrupted access to electricity, gas, water, for millions of Ukrainians. The attack on Dnipro Dam had raised concerns of possible ecological and humanitarian disasters. All these aforesaid principles mandate that the parties to the conflict select tactics and deploy weapons that comply with the principles of IHL. The specific means and methods of warfare are regulated by a wide range of treaties and customary IHL.⁵⁶

⁵¹ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 15, 2023, UN Doc. A/HRC/52/62, observing that Russian armed forces failed to take precautions to verify civilian presence before attacks, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

⁵² OSCE Office for Democratic Institutions and Human Rights, Fifth Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine, July 22, 2024, observing that Russian forces continued to use explosive weapons in densely populated urban areas causing civilian casualties and infrastructure breakdown, available at <<https://www.osce.org/odihr>> (last visited Aug. 8, 2026).

⁵³ *ibid*

⁵⁴ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Mar. 15, 2023, UN Doc. A/HRC/52/62, noting that Russian forces targeted energy infrastructure including substations and power plants, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

⁵⁵ OSCE Office for Democratic Institutions and Human Rights, Fifth Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine, July 22, 2024, documenting Russian attacks on energy infrastructure including substations and power plants, available at <<https://www.osce.org/odihr>> (last visited Aug. 8, 2026).

⁵⁶ Claude Pilloud et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 2190–2209 (International Committee of the Red Cross, 1987); International Committee of the Red Cross, *Customary International Humanitarian Law*, Rules 14–17 (Cambridge University Press, 2005).

II. EXAMINING THE LEGAL THRESHOLD OF CRIMINAL LIABILITY FOR ATTRACTING *GRAVE BREACHES* WHILE EVALUATING ITS MENTAL OR MATERIAL ELEMENTS

2.1 Mental elements establishing culpability under IHL

Article 30 of the Rome statute requires that for the purpose of establishing culpability of individuals there should be the existence of *mens rea*, which means there must be intention and knowledge behind the commission of international crimes.⁵⁷ In fact, there is no customary principle of international law which may give a free-standing idea that the knowledge of the likelihood of civilian harm can establish *mens rea* for culpability. But it has been developed through judicial precedents interpreting intent and knowledge in the case laws of ICTY, ICTR and ICC. One of the general principles of law recognized by civilized nations uphold *actus non facit reum nisi mens sit rea*, which means, no person can be charged with crime unless the mental element of *mens rea* is established. On the other hand, 'knowledge' is when the perpetrators were aware that civilian harm was an outcome of their actions committed whether in offensive or defensive. The customary IHL requires the non-parties to the Geneva conventions to foster respect for the principle of distinction and that is why intentional killings or indiscriminate attacks are prohibited.⁵⁸ There is no customary rule where it can be said that mere knowledge of the likelihood of civilian harm is sufficient to attract culpability; in fact, this gap has been merged through the jurisprudence developed over the period of time by the ICTY, ICTR and the ICC. But it is needless to prove the intent (*mens rea*) behind the commission of crimes if it can be established that the perpetrators and the commanders had the knowledge of civilian harm as a consequence of their actions. Hence it has been confirmed that the awareness of the likelihood of civilian harm can meet the threshold of 'knowledge' required for culpability under Article 30 of the Rome statute (Katanga case ICC). It was the ICTY in the case of *Prosecutor v. Galic* observed that conducting discriminate attacks against civilians knowing of the likelihood of harm satisfies the mental element for war crimes.⁵⁹ This means the knowledge of the civilian presence in the civilian objects, infrastructure or locality and when the harm could be foreseeable, attract culpability if any action is targeted against them as seen in *Prosecutor v. Strugar*, and *Lubanga* case.⁶⁰ It has been clarified by the ICTR in *Akayesu* case that when there was knowledge of consequences even without direct intent

⁵⁷ Rome Statute of the International Criminal Court, Art. 30, July 17, 1998, 2187 U.N.T.S. 90.

⁵⁸ International Committee of the Red Cross, Customary International Humanitarian Law, Rules 1 & 7: The Principle of Distinction, ICRC Database (2005), available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> (last visited Aug. 8, 2026).

⁵⁹ *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber I, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003, paras. 57–60, 133–135, available at <<https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>> (last visited Aug. 8, 2026).

⁶⁰ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 31, 2005, paras. 227–230, available at <<https://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>> (last visited Aug. 8, 2026); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment, Trial Chamber I, Int'l Crim. Ct., Mar. 14, 2012, paras. 1012–1015, available at <<https://www.icc-cpi.int/cases>> (last visited Aug. 8, 2026).

can satisfy the culpability for international crimes like war crimes and crimes against humanity.⁶¹ But for attracting culpability for genocide, the requirement for *dolus specialis* (special intent) becomes obligatory to be established during trial. Hence for establishing *mens rea* it is sufficient to establish that the awareness of the substantial likelihood of civilian harm.

2.2 Material elements establishing culpability under IHL

Each of the four Geneva conventions identifies categories of conduct constituting the grave breaches. These include willful killing, torture, inhumane treatment, biological experimentation, extensive destruction of property not justified by military necessity, unlawful deportation, unlawful confinement and the taking of hostages.⁶² The *grave breaches* regime therefore criminalizes conduct directed not merely against the combatants but also against civilians, prisoners of war and protected persons within occupied territories.

This current Ukrainian conflict has generated enormous allegations within such categories. After investigations were made in Bucha, it revealed summary executions, torture, widespread civilian death and after the withdrawal of Russian forces. The investigative agencies observed that civilians' bodies displayed signs of execution-style killings with their hands tied and gunshot wounds on the forehead.⁶³ This qualifies within the ambit of "willful killings and inhumane treatment" with Geneva convention (GC) 1949.⁶⁴ There were instances where forcible transfer of population revealed a pattern in which such transfers amount to "unlawful deportation" under the 4th GC and qualifying Article 8 ICC.⁶⁵ Such forced transfers not only violate the territorial sovereignty but also tremendously impacts the familial life, cultural and social structures which are intrinsically important for civilian identity and their survival. Every such a grave breach must be integrated in light of a broader humanitarian framework based in the Geneva Conventions. Just like in Delalic case, the ICTY observed the provisions of 'grave breach' are designed to protect

⁶¹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, Int'l Crim. Trib. for Rwanda, Sept. 2, 1998, paras. 482–488, available at <<https://unictr.irmct.org/en/cases/ict9-6-4>> (last visited Aug. 8, 2026).

⁶² Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, Art. 51; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, Art. 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 147.

⁶³ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, Sept. 23, 2022, UN Doc. A/HRC/51/CRP.3, documenting summary executions, torture, and widespread civilian deaths in Bucha following the withdrawal of Russian forces, available at <<https://www.ohchr.org/en/hr-bodies/hrc/documentation>> (last visited Aug. 8, 2026).

⁶⁴ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 147 (defining grave breaches to include wilful killing and inhumane treatment).

⁶⁵ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 147 (defining grave breaches to include unlawful deportation or transfer); Rome Statute of the International Criminal Court, Art. 8(2)(a)(vii), July 17, 1998, 2187 U.N.T.S. 90.

humanitarian values even during an armed conflict;⁶⁶ also, in Kupreskic case, it emphasized the value of humanitarian law lies in the elementary considerations of humanity which are binding upon all parties to the armed conflicts.⁶⁷

III. CONCLUSIVE OBSERVATIONS ESTABLISHING CULPABILITY UNDER IHL

Individual criminal responsibility can attract only when the material element and the mental element coincide to construct the offence. For this, the crime must qualify the 'actus reus' which refers to the external physical conduct constituting acts and omissions and their contextual circumstances behind the conduct which leads to armed conflict. Criminal liability cannot directly arise merely on the ground of such accused having proximity with a certain political association or military affiliation; but rather the prosecutors must be able to establish concrete participation in the prohibited conduct. For making the accused culpable of criminal liability, it requires not only the proof showing that the accused had made civilians an object of attack but it is necessary to establish that the perpetrator intentionally directed the attack. At the time when such intention of 'direct attack' becomes difficult to establish, the prosecutors may find their way to establish that the conduct to place within the context of international armed conflict and that the perpetrator was aware of the factual circumstances revealing the existence of such conflict. It is important to establish that the 'conflict was existing' for the purpose of quantifying the magnitude and the gravity of their criminal conduct or whether reasonable force was used. There is no doubt that the prosecution must establish a direct link between the accused's conduct and the criminal acts, as the ICC held in Katanga case. Actus reus gets established where there are repeated attacks over civilian infrastructure as this provides as evidence capable of demonstrating the physical commission of prohibited acts. Hence the contextual elements linking such conduct with the armed conflict get qualified because the acts occurred at the time when there were active military operations in the instant conflict.

Material commission of the prohibited acts alone do not make the accused culpable of criminal liability unless it is accompanied with mens rea. Mens rea distinguishes deliberate criminality from accidental or unintended harm occurring during armed conflict, as Article 30 ICC mandates intent and knowledge. Such an intent must be direct, coupled with the 'awareness of harm' in the ordinary course of events. There is why knowledge requires the 'awareness of factual circumstances' behind such unlawful nature of conduct. This makes it evident that commanders and political leaders cannot escape their liability simply by claiming ignorance, especially when there was civilian harm together with an unlawful conduct which formed part of the systematic operational pattern. Blaskic case taught that the commanders incur criminal responsibility where they knew or had reasons to know that

⁶⁶ Prosecutor v. Delalić et al. (Čelebići), Case No. IT-96-21-T, Judgment, Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998, paras. 300–302, available at <<https://www.icty.org/x/cases/mucic/tjug/en/cele-tj981116e.pdf>> (last visited Aug. 8, 2026).

⁶⁷ Prosecutor v. Kupreskić et al., Case No. IT-95-16-T, Judgment, Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000, paras. 516–520, available at <<https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>> (last visited Aug. 8, 2026).

his subordinates were committing violations and yet they failed to prevent or punish such conducts. Even the awareness of such likelihood of a civilian harm can satisfy that the accused had the required 'knowledge'. That is why, even the Akayesu jurisprudence recognized the presence of 'intent' where there are systematic or repeated patterns of unlawful conduct. Obviously, the scale and gravity of the conduct would be an essential tool to determine sentences, which is why, those repeated attacks against civilian infrastructure collectively contributes towards knowledge and intent regarding civilian harms. In applying these principles within the Ukrainian conflict, it will ultimately depend upon the prosecutors to establish that there were military and political authorities who possessed significant knowledge concerning the unlawful consequences of military operations.