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RIDING THE RHINO: ATTEMPTING TO DEVELOP USABLE LEGAL STANDARDS FOR COMBAT ACTIVITIES

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Abstract: The body of law regulating combat activities is, essentially, a body of preventive law which should be applied in military training, planning, and operations to minimize net human suffering and net destruction of civilian objects in armed conflict. Prosecution for violations of such law is uncommon. Such prosecutions have, however, been conducted before the International Criminal Tribunal for the former Yugoslavia (ICTY). This Article reviews the relevant jurisprudence of the ICTY and asserts that effective prosecution for combat offences, such as unlawful attacks, can be conducted before non-specialist tribunals and that these prosecutions can both strengthen the law and elaborate upon its substantive provisions.

INTRODUCTION

When new civilian staff members arrive in Baghdad, they land at the airport and then travel to the well-protected Green Zone in a heavily armored bus, which is in convoy with helicopter gunships flying overhead and armored vehicles as ground escorts. The bus is known colloquially as the Rhino. Riding the Rhino gives the passengers an acute sense of the dangers of the combat environment and of both the fragility and the importance of the body of law that purports to govern combat. Regrettably, but inevitably, combat is about killing people and breaking things.

The body of law regulating combat activities is International Humanitarian Law (IHL). The fundamental objective of IHL is to reduce net human suffering and net destruction of civilian objects in armed conflict. It is, essentially, a body of preventive law that, to be effective, must be incorporated into the training and doctrine of armed forces

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before armed conflict occurs, and then applied by armed forces, and others engaged in the conduct of armed conflict, once a conflict occurs. Generally speaking, its practitioners are lawyers affiliated with the Red Cross or lawyers advising armed forces. IHL practitioners practice preventive law, the avoidance of violations, not litigation. IHL is a field of public international law and its sources are the accepted sources of public international law, primarily treaties and custom. The treaties have been developed in international negotiating forums by delegations from foreign ministries and defense departments. The treaties have been applied, and customary law has been developed by states, primarily foreign ministries and defense departments. Traditionally, IHL expertise has reposed in a relatively small group of lawyers in government or in the academic community.

More recently, lawyers from human rights-oriented nongovernmental organizations (NGOs), such as Human Rights Watch and Amnesty International, have had an increasing impact on the development of IHL treaties, such as the Ottawa Convention on Anti-Personnel Land Mines. In addition, NGOs have become much more vigorous critics of ongoing military combat activity.¹ Somewhat similarly, developments in international criminal law, specifically the establishment of ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and their consequential jurisprudence have had an impact on the content of IHL. The International Criminal Court (ICC) is expected to have a similar impact in future.

IHL can no longer be regarded as the exclusive professional preserve of a relatively small group of law professors or of a slightly larger group of practitioners engaged in the practice of preventive law. It is entering the legal mainstream and, as a result, one can expect IHL issues to be addressed by non-traditional groups and, on occasion, by legal generalists. Although the benefits of ignorance as a spur to creativity or outside the box thinking can easily be exaggerated, this is not necessarily an entirely negative development. IHL must be, or become, healthy enough to withstand an assault by legal generalists. At the same time, one must ensure that the tail does not wag the dog and that due regard continues to be paid to the primarily preventive role of IHL. In

¹ *E.g.*, HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (2003); Amnesty International, NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force (2000), available at http://www.amnesty.org/ailib/intcam/kosovo/docs/nato_all.pdf.

particular, one must not develop perfect standards in the courtroom or in academic literature which are simply impossible for the soldiers to obey while still surviving.

The principle of distinction is the fundamental principle of IHL. Essentially, military forces are obligated to distinguish between military objectives, such as combatants and civilians taking a direct part in hostilities, on the one hand, and civilian objects and civilians not taking a direct part in hostilities on the other hand. If this principle is not accepted, there is no body of law regulating combat activities. The application of this principle implicitly contains a prohibition of (1) attacks directed against civilians or civilian objects; (2) indiscriminate attacks that fail to distinguish between those people and objects who may be attacked and those who may not be attacked; and (3) attacks directed against legitimate targets that are expected to inflict disproportionate death, injury, or damage to people or objects who should not be attacked. As an unavoidable statement of fact, there is such a thing as lawful collateral injury that may be inflicted during the course of a lawful attack. Prior to the establishment of the ICTY, there was no significant body of case law purporting to address combat activities, particularly the unlawful attack issue, or the related issues of what constitutes a military objective: when is a civilian taking a direct part in hostilities, how does one measure (dis)proportionality, and when is an attack indiscriminate? The purpose of this Article is to address how the tribunals, particularly the ICTY, have addressed the application of the principle of distinction, and whether they may be expected to contribute to the development of common standards which legal advisers (involved in advising military commanders) and those who may be perceived by the military community as officious bystanders (such as lawyers and judges involved in administering justice in related cases and NGOs engaged in critiquing military conduct) may use.

Assuming a judicial hierarchy and an elaborated rule of precedent is necessary for the existence of a body of common law, it is unlikely there will be a common law for the various international or mixed tribunals addressing IHL issues.² Tribunal jurisprudence, however, may contribute to a common discourse, which may become customary law if decisions are well reasoned and deal with common problems. This contribution may, of course, be attenuated if the vari-

² See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgement, ¶¶ 80–171 (July 15, 1999) (ICTY Appeals Chamber discussing and discarding the approach taken by the International Court of Justice in the Nicaragua case in determining whether or not a conflict should be regarded as international).

ous tribunals are rooted in statutes or treaties which use different words to address similar problems.

The common discourse concerning the principle of distinction involves a variety of participants in a variety of forums, not all of which are essentially “legal,” including both military/legal training, planning and operations forums, and officious bystanders/external reviewers such as those involved in the judicial process or NGOs. There is a high risk of a two-track approach to the development of this body of law because military participants in the discourse are, perhaps excessively, security conscious. We may see one version of the law developed by military participants, with an in-depth understanding of relevant facts and relevant technology (i.e., hothouse law) and another version developed by external reviewers denied access to such information. The two-track approach can result in distortions on each track. The military participants may develop a version that is too pro-military and does not benefit from informed external criticism, while the external reviewers may develop a version that is simply unrealistic. There will always be a degree of tension between military participants, who wish to preserve the maximum degree of discretion for their clients, and external reviewers, with the desire to develop the law in a progressive direction. Increased interaction between the groups is desirable, however, to improve the quality of analysis and perhaps encourage the emergence of an informed progressive view.

This Article will first provide an overview of ICTY unlawful attack decisions as they involve the application of the principle of distinction. It will then address the concept of military objectives, the concept of proportionality, the legal basis for unlawful attack charges, and the elements of unlawful attack charges. This Article will then address two issues specifically related to criminal prosecution: the relationship between unlawful attack charges and other charges, and how to establish a broad picture from a limited number of instances.

I. OVERVIEW OF ICTY UNLAWFUL ATTACK DECISIONS

There is a dearth of war crimes cases focusing on unlawful attacks, perhaps because such cases have been regarded as simply too difficult to prosecute.³ Recently, the Office of the Prosecutor (OTP) of the

³ In the only marginally relevant World War II war crimes decision, it was considered lawful to direct fire at civilians attempting to flee a besieged area in order to keep them within the besieged area where they might drain the resources available to the besieged

ICTY has conducted such prosecutions.⁴ Unlawful attack charges have been or are being considered by the ICTY in four cases to date.

In *Prosecutor v. Tihomir Blaskic*⁵ and in *Prosecutor v. Dario Kordic and Mario Cerkez*,⁶ the accused were Bosnian-Croat leaders and the cases revolved around several incidents in the Lasva River Valley in Bosnia, in particular the Ahmici massacre in which many of the inhabitants of a small Bosnian Muslim village were killed when it was overrun by Bosnian-Croat forces. *Blaskic* was the first case before the ICTY to address unlawful attack charges. At trial, Blaskic was found guilty of the crime against humanity of persecution and of the war crime of unlawful attacks on civilians, among other charges, and sentenced to forty-five years' imprisonment.⁷

The *Blaskic* Trial Chamber decision contained very little legal analysis and what there was focused primarily on the crime against humanity of persecution.⁸ A substantial amount of new evidence was considered in the *Blaskic* Appeal Decision and the findings were reversed on several counts and the accused's sentence reduced to nine years' imprisonment, the time he had served at the date of judgment.⁹ Both Kordic and Cerkez were convicted at trial of a number of counts related to persecutions, unlawful attacks, and other crimes and sentenced to twenty-five years' imprisonment and fifteen years' imprisonment respectively, although Cerkez was acquitted with respect

forces. U.N. War Crimes Commission, *The German High Command Trial*, 12 L. REP. TRIALS WAR CRIMINALS I, 84 (1949).

⁴ Unlawful attack charges have been considered in the following ICTY cases: *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement (Jan. 31, 2005); *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion (Dec. 5, 2003); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Judgement (Feb. 26, 2001); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Judgement (Dec. 17, 2004); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Judgement (Mar. 3, 2000); *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Judgement (July 29, 2004). They were also considered in *Prosecutor v. Milosevic*, Case No. IT-02-54-T, but this case was terminated by the death in custody of the accused. This Article will focus primarily on the *Galic* and *Strugar* cases as these are the two in which, to date, issues related to unlawful attack have been addressed and discussed in the most elaborate fashion.

⁵ *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Judgement (Mar. 3, 2000).

⁶ *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Judgement (Feb. 26, 2001).

⁷ *Blaskic*, Case No. IT-95-14-T, Trial Judgement, pt. VI.

⁸ William J. Fenrick, *A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v. Tihomir Blaskic*, 13 LEIDEN J. INT'L L. 931, 946-47 (2000).

⁹ *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Judgement, pt. XIII (July 29, 2004).

to the charges related to the Ahmici massacre.¹⁰ As with *Blaskic*, the *Kordic and Cerkez* Trial Chamber decision contained very little legal analysis related to unlawful attacks.¹¹ Kordic's sentence was affirmed on appeal and that of Cerkez was reduced to six years' imprisonment.

General Galic was the commander of the Bosnian Serb Army (RSK) Sarajevo Rumania Corps, the force surrounding Sarajevo, from September 10, 1992 to August 10, 1994. He was charged with individual criminal responsibility for inflicting terror on the civilian population of Sarajevo, for attacking civilians, and for the crimes against humanity of murder and causing inhumane acts.¹² The underlying basis for the charges were alleged protracted sniping and shelling campaigns upon the civilian population during which large numbers of civilians were killed or wounded. General Galic was convicted of ordering the infliction of terror and crimes against humanity and given a sentence of twenty years' imprisonment.¹³ The Court dismissed the unlawful attack counts because they were regarded as being assimilated into the infliction of terror count.¹⁴ Judge Nieto-Navia filed a strong dissenting opinion.¹⁵ The decision, which is currently under appeal,¹⁶ contains a thorough analysis of the law relating to unlawful attacks and to the infliction of terrorism and also addresses how one must prove the existence of a sustained campaign.¹⁷

The *Strugar* case¹⁸ revolves primarily around the events of a single day, although evidence of what happened before and after is essential to appraising culpability for these events. General Strugar, Commander of the Jugoslovenska Narodna Armija (JNA) (the Yugoslav People's Army) 2nd Operational Group (2 OG), which surrounded the Croatian city of Dubrovnik, was charged with responsibility for the unlawful attacks on civilian and civilian objects in the Old Town of Dubrovnik on December 6, 1991. In the early morning of December 6, a small unit of the JNA attempted to capture a strong point at Srd, a hill above Du-

¹⁰ Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2, Judgement, pt. V (Feb. 26, 2001).

¹¹ *Id.* ¶¶ 321-328.

¹² Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion (Dec. 5, 2003).

¹³ *Id.* pt. VI.

¹⁴ *Id.* ¶ 752.

¹⁵ Prosecutor v. Galic, Case No. IT-98-29-T, Separate and Partially Dissenting Opinion of Judge Nieto-Navia (Dec. 5, 2003).

¹⁶ Prosecutor v. Galic, Case No. IT-98-29-A, Judgement (Nov. 30, 2006).

¹⁷ See Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 13-138, 582-94 (Dec. 5, 2003). See generally Daniela Kravetz, *The Protection of Civilians in War: The ICTY's Galic Case*, 17 LEIDEN J. INT'L L. 521-36 (2004).

¹⁸ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement (Jan. 31, 2005).

brovnik. Croatian forces in and around Dubrovnik responded and the attacking JNA unit became bogged down and began taking casualties. JNA mortars, recoilless guns, and wire-guided rockets were fired at Dubrovnik. A large number of these munitions landed in the Old Town of Dubrovnik, a distinct area adjacent to the rest of Dubrovnik which contained nothing but specially protected civilian objects and civilians, causing death or injury to civilians and substantial damage to several specially protected civilian structures.

Initially, four persons were indicted in connection with the incident: Army Captain Kovacevic, who commanded the Third Battalion of the 472nd Motorized Brigade, the unit principally responsible for the unlawful attack; Admiral Jokic, Captain Kovacevic's superior and commander of the Ninth Military Naval Sector; Naval Captain Zec, Admiral Jokic's Chief of Staff; and General Strugar, commander the 2 OG and Admiral Jokic's superior. Charges were withdrawn without prejudice against Naval Captain Zec. Army Captain Kovacevic was the subject of the Prosecutor's Rule 11 *bis* motion for referral of the indictment to another court. Admiral Jokic submitted a guilty plea and was sentenced to seven years' imprisonment,¹⁹ and the trial of General Strugar proceeded with Admiral Jokic as one of the main witnesses against him. General Strugar was found guilty, based on command responsibility, of attacks on civilians and of destruction or willful damage to protected buildings and sentenced to eight years' imprisonment.²⁰ Although the court found that all of the elements of the other counts, including attacks on civilian objects, had been established, it considered the offenses for which it did make a guilty finding to most accurately encapsulate the criminal conduct.²¹

I. MILITARY OBJECTIVES

Military objectives, that is, persons and objects subject to attack, are:

- (i) combatants;²²

¹⁹ Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgement, ¶¶ 9–11, 116 (Mar. 18, 2004), *aff'd*, Case No. 1-A (Aug. 30, 2005).

²⁰ *Strugar*, Case No. IT-01-42-T, ¶¶ 477–83.

²¹ *Id.* ¶¶ 447–55. See generally F.L. Pola & E.C. Rojo, *The Strugar Case Before the International Criminal Tribunal for the Former Yugoslavia*, 18 J. INT'L L. PEACE & ARMED CONFLICT 139–45 (2005).

²² Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 43, 48 (Protocol I) Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

- (ii) civilians taking a direct part in hostilities;²³ and
- (iii) in so far as objects are concerned, those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.²⁴

The major IHL treaty instruments at present are the two Additional Protocols of 1977 to the Geneva Conventions of 1949. Protocol I (AP I) addresses international armed conflict and Protocol II (AP II) refers to internal armed conflict.²⁵ The United States has not ratified either treaty, although the countries of the former Yugoslavia have done so. For the most part, however, the provisions of AP I and AP II referred to in this article would be regarded as binding all states because they reflect current customary law.

A. *Definition of Combatants*

Military objectives, in terms of people, are combatants and civilians directly participating in hostilities. Combatants are members of the armed forces of a party to a conflict, other than medical personnel and chaplains.²⁶ Combatants have the right to participate directly in hostilities (i.e., shoot at the enemy) at any time and, for that reason, they may also be attacked at any time—sleeping, eating, and marching to the rear, unless they have surrendered or are injured and have ceased to take part in hostilities. Wounded combatants who continue to fight may be lawfully attacked. Although, strictly speaking, the concept of combatant status is legally relevant only during international armed conflicts, as is the related concept of prisoner of war status, the concept is applicable by analogy to internal conflict. As a result, the members of the armed forces of all parties to an internal conflict (other than medical personnel and chaplains) would also be subject to lawful attack at all times unless they have surrendered or are injured and have ceased to take part in hostilities. The ICTY Appeals Chamber has explicitly addressed the situation of members of a Territorial Defense (TO) organization in the territory of the former Yugoslavia, and whether they should be con-

²³ *Id.* art. 51(3).

²⁴ *Id.* art. 52(2).

²⁵ See generally AP I, *supra* note 22; Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 1977, 26 I.L.M. 561, 1125 U.N.T.S. 609 [hereinafter AP II].

²⁶ AP I, *supra* note 22, art. 43(2).

sidered combatants at all times during a conflict or only when they directly take part in hostilities. The Chamber concluded that “members of the armed forces residing in their homes in the area of the conflict, as well as members of the TO residing in their homes, remain combatants whether or not they are in combat, or for the time being armed.”²⁷

B. Definition of Civilians Directly Participating in Hostilities

The concept of civilians directly participating in hostilities is much more contentious and much more complicated. Armed forces of many western states have begun to outsource to meet many of their requirements. As a result, private contractors may provide both specialist services (such as technical representatives for the maintenance of complicated weapons systems) and more routine services (such as logistical support and provision of food services), which had previously been provided by military personnel. This is a return to the beginning of the modern period when specialists, even artillery personnel, were civilians. Furthermore, some key civilian personnel, defense scientists for example, may be much more important to the war effort than most military personnel. In the territory of the former Yugoslavia, an additional complicating factor was the fact that, at least in the early stages, new states were emerging and were required to create new armed forces as the conflict went on. Although the matter is not beyond dispute, the concept of civilians participating directly in hostilities should be narrowly construed. “Direct participation in hostilities implies a direct causal relationship between the activity engaged in and harm done to the enemy at the time and place where the activity takes place.”²⁸ Hostile acts:

[S]hould be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. . . . There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without

²⁷ Prosecutor v. Kordic, Case No. IT-95-14/2-A, Appeals Judgement, ¶ 51 (Dec. 17, 2004).

²⁸ *Id.* ¶ 1679, at 516.

such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless.²⁹

Civilians are military objectives only while they are taking a direct part in hostilities, not before and not after. When making targeting decisions, in case of doubt whether a person is a civilian, that person shall be considered a civilian. These propositions reflect customary law and are codified in AP I.³⁰ Essentially the same standard applies to internal conflicts as a result of Article 13 of AP II and Article 3 common to the four Geneva Conventions of 1949, although the latter uses the expression “persons taking no active part in hostilities” which, it is submitted, is synonymous with taking no direct part in hostilities.³¹

The direct participation in hostilities issue was addressed, but not in depth, in the *Strugar* Judgment. Civilian Mato Valjalo, who was wounded in the shelling of the Old Town of Dubrovnik, was a driver for the Dubrovnik Municipal Crisis Staff. The Chamber concluded, without analysis, that there was nothing in the evidence to suggest that, as a driver, he was taking an active part in hostilities.³²

C. Military Objectives

Article 52(2) of AP I states in part:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.³³

²⁹ AP I, *supra* note 22, ¶¶ 1942, 1945; see also CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 618–619 (Yves Sandoz et al. eds., 1987).

³⁰ AP I, *supra* note 22, arts. 43(1), 50(1), 51(2)–(3).

³¹ AP II, *supra* note 25, art. 13; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3(1), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³² Prosecutor v. Strugar, Case No. IT-01–42-T, Judgment, ¶ 274 (Jan. 31, 2005).

³³ AP I, *supra* note 22, art. 52(2).

Paragraph 3 of the Article indicates that in case of doubt over whether an object, which is normally dedicated to civilian purposes, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The definition has two elements:

- (i) That the nature, location, purpose, or use of the object must make an effective contribution to military action; and
- (ii) That the total or partial destruction, capture, or neutralisation of the object must offer a definite military advantage in the circumstances ruling at the time.

States which have ratified AP I, and most other states, would accept the AP I definition of military objective as a reasonably accurate definition applicable as a matter of customary law to all conflicts.³⁴ The definition is supposed to provide a means whereby informed objective observers (and decision makers in a conflict) can determine whether a particular object constitutes a military objective. It accomplishes this purpose in simple cases. Everyone will agree that a munitions factory is a military objective and that an unoccupied church is a civilian object. When the definition is applied to dual-use objects, which have some civilian uses and some actual or potential military uses (such as communications systems, transportation systems, petrochemical complexes, or manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict. Although representatives of the U.S. government have at times indicated that the AP I definition of military objective does reflect customary law,³⁵ it should be noted that the United States appears to have adopted a substantially broader definition of military objective for its Military Commission Instructions:

“Military objectives” are those potential targets during an armed conflict which by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military ad-

³⁴ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES, 29–32 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter HENCKAERTS & DOSWALD-BECK, VOL. I] (Rule 8).

³⁵ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. II: PRACTICE, PT I, 187–88 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter HENCKAERTS & DOSWALD-BECK, VOL. II].

vantage to the attacker under the circumstances at the times of the attack.³⁶

Certainly the reference to “war-sustaining capability” appears to be an extension beyond the AP I definition.

A number of issues remain unresolved in connection with the scope of the military objective concept, including:

- (i) Should more or fewer things be regarded as military objectives by the intervening side during a humanitarian intervention or by the “good” side during an international armed conflict?³⁷
- (ii) Is civilian morale a military objective?³⁸
- (iii) Is the political leadership a legitimate target?³⁹

To a considerable extent, the debate concerning what should constitute a military objective has yet to be commenced and it clearly will be when, and if, a case concerning air bombardment is prosecuted. Cases brought before the ICTY to date have been concerned primarily with ground combat, and identification of military objectives has tended to be a relatively simple task since the objectives are usually troop concentrations or weapons emplacements.⁴⁰

III. PROPORTIONALITY

Where unlawful attacks are concerned, proportionality is the ratio between the concrete and direct military advantage anticipated and the

³⁶ U.S. DEP’T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, *Crimes and Elements for Trial by Military Commission* § 5D (Apr. 30, 2003), available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>.

³⁷ The author tends to be a bit reluctant to distinguish between the good and the bad side for the purposes of applying IHL. *But see* Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Non-Combatancy in the Post-Kosovo Era*, in STRATEGIC REVIEW 4 (Summer 2000).

³⁸ *See* Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 AIR FORCE L. REV. 143, 143–82 (2001) (for a vigorous statement of the view that enemy civilian moral has traditionally been a legitimate military objective and that the AP I definition of military objective should be interpreted to encompass attacks on morale targets).

³⁹ HUMAN RIGHTS WATCH, *supra* note 1, at 21–40.

⁴⁰ *See* ICTY: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 8, 2001), 39 I.L.M. 1257–1283 (2000) [hereinafter OTP Report] (discussing the one exception to this rule, and in particular, the NATO attack on the headquarters and studios of Serbian State Television and Radio in central Belgrade on April 23, 1999, which did not involve litigation).

incidental loss of civilian life, injury to civilians, and damage to civilian objects anticipated from an attack directed against a military objective.

The concept of proportionality is linked to the principle of distinction, which is the fundamental legal principle underlying combat activity. Although the concept has been a part of IHL for a long time, it did not appear in treaty texts until the development of AP I in 1974–77. The concept is important because military objectives, civilians, and civilian objectives are too frequently located in the same area. Civilians and civilian objects do not have absolute immunity from the effects of combat. Attacks directed against military objectives are lawful unless they are anticipated to cause disproportionate civilian losses. It is not practicable to determine whether civilian casualties are lawful or unlawful until there have been prior determinations of whether the attack, which caused the civilian casualties, was directed against a military objective, and if so, whether disproportionate civilian casualties were anticipated. If disproportionate civilian casualties are caused, that may provide the basis for an inference that such casualties were anticipated.

The word “proportionality” is not used in AP I, but is implicitly contained in several of its provisions,⁴¹ which refer to a prohibition on 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.”⁴² “Excessive,” considered in context, is synonymous with “disproportionate.”⁴³ In the context of the law related to unlawful attacks, proportionality is relevant simply for assessing the relative values of two essentially unlike concepts, military advantage and civilian losses. Since the relative values are essentially unlike, precise valuation is difficult. It is not a simple accounting exercise. The best one can say is that if similar things are being measured, such as human lives, usually each life must be given a similar value.

A. Application of the Proportionality Concept

Unfortunately, it is not possible to provide simple answers concerning the application of the concept of proportionality to concrete mili-

⁴¹ See AP I, *supra* note 22, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), 85(3)(c).

⁴² *Id.* art. 51(5)(b) (emphasis added).

⁴³ *Id.* The ICC Statute contains an analogous expression “clearly excessive.” See Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

tary situations, because of a lack of examples in legal decisions or legal literature. The following analysis provides a rough frame of reference.

First, who decides whether an action is disproportionate? The *Galic* Trial Chamber held that the decision maker should be regarded as “a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her.”⁴⁴ Second, what is compared? The comparison is between the *anticipated* concrete and direct military advantage and the *anticipated* incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof. The actual results of the attack may assist in inferring the intent of the attacker, but what counts is what was in the mind of the decision maker when the attack was launched. Third, what is the standard? The attack is prohibited if it is anticipated that it will result in *excessive* civilian losses.⁴⁵ Fourth, what is the scope of the “concrete and direct military advantage anticipated?” The *Galic* Trial Chamber referred to several sources in addressing this point:

The *travaux préparatoires* of Additional Protocol I indicate that the expression “concrete and direct” was intended to show 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. . . .” The [International Committee of the Red Cross] Commentary explains that “a military advantage can only consist in ground gained or in annihilating or in weakening the enemy armed forces.”⁴⁶

The military advantage gained by a successful attack on a military objective may vary depending on the circumstances. For example, a successful attack on a military objective, such as an artillery emplacement, always gives the attacker a military advantage, but the extent of the direct and concrete direct military advantage gained may vary depending on several factors, such as location of the objective and its current or potential use.

Fifth, what scale should be used in assessing proportionality? Should proportionality be assessed based on an attack on a single military objective, a battle, a campaign, or a war? Several states made statements of understanding concerning the application of “military advan-

⁴⁴ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 (Dec. 5, 2003).

⁴⁵ See AP I, *supra* note 22, art. 51 (5) (b).

⁴⁶ Galic, Case No. IT-98-29-T, ¶ 58, n. 106, (citing YVES SANDOZ ET AL., *supra* note 29, ¶¶ 2209, 2218).

tage,” considered in the context of Articles 51, 52, and 57 when ratifying or acceding to AP I.⁴⁷ The Statement by Canada is representative:

It is the understanding of the Government of Canada in relation to Articles 51(5)(b), 52(2), and 57(2)(a)(iii) that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.⁴⁸

These Statements of Understanding notwithstanding, it is suggested that proportionality can be determined using a variety of scales ranging from the tactical level (military objective by military objective), to a much bigger scale, as long as the more general context is also taken into account.⁴⁹ For example, if it is essential to block military traffic across a river and the enemy forces may use three bridges to cross the river, it may well be permissible to inflict greater collateral losses for destroying the last bridge because of the resultant greater military advantage. The military objective scale is commonly used in modern state practice, particularly in assessing the legitimacy of aerial attacks.⁵⁰ It was also used by the *Galic* Trial Chamber.⁵¹

No tribunal to date has ever explicitly determined, in a well articulated manner, that disproportionate damage was caused when assessing an incident in which the disproportionate impact of the attack was not blatant or conspicuous. The *Galic* Trial Chamber, however, was compelled to grapple with the issue in its discussion of one shelling incident, the shelling of the Dobrinje football tournament on June 1, 1993. In that incident, about 200 spectators, including women and children,

⁴⁷ See DOCUMENTS ON THE LAWS OF WAR 499–512 (Adam Roberts & Richard Guelff eds., 2000).

⁴⁸ *Id.* at 503.

⁴⁹ In an earlier article, the author expressed the view that the AP I proportionality provisions would probably not be applicable below a divisional level attack. The earlier view was premised on the assumption that there could be such a thing as an attack which was disproportionate but which was not, in substance, directed against civilians or civilian objects. Whether or not that assumption was valid, in the cases which have been prosecuted to date a de facto higher threshold has been used and the argument advanced has been that the attack was so disproportionate that it must be regarded as directed against civilians or civilian objects. See William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 112 (1982).

⁵⁰ See James E. Baker, *Judging Kosovo: The Legal Process, The Law of Armed Conflict, The Commander and Chief*, 78 INT'L. L. STUD. 7, 7–18 (2002). The various incident studies referred to in OTP Report are also informative. See generally OTP Report, *supra* note 40.

⁵¹ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 387 (Dec. 5, 2003).

were watching a football game in the corner of a parking lot, which was bound on three sides by six story apartments and on the fourth side by a hill. Two shells exploded in the parking lot killing between 12 and 16 persons and wounding between 80 and 140 persons. The players and many of the spectators were military personnel and, as such, military objectives. The Commander of the Army of Bosnia and Herzegovina (ABiH 5th Motorized Dobrinja Brigade), to which the soldiers belonged, filed a report indicating there were 11 killed and 87 wounded (6 combatants killed and 55 wounded, 5 civilians killed and 32 wounded).⁵² Although assessing proportionality is not a simple exercise in number crunching, it would be difficult to conclude that, in this incident, there were disproportionate civilian casualties, unless one makes the arbitrary determination that civilian lives count more than military lives. The majority of the chamber finessed a requirement to assess the proportionality of the result by focusing on the *mens rea* of the perpetrators and on the fact that civilian casualties were caused:

Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.⁵³

IV. LEGAL BASIS FOR UNLAWFUL ATTACK CHARGES

Unlawful attacks are not enumerated offences in the ICTY Statute. Before the ICTY unlawful attacks must be charged as unenumerated offences under Article 3 of the Statute, which is concerned with violations of the laws or customs of war. As a result of the *Tadic* Jurisdiction Appeal Decision, all unenumerated offences must meet the following four general criteria:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, [the treaty must

⁵² *Id.* ¶ 377.

⁵³ *Id.* ¶ 387.

(a) bind the parties at the time of the offence (including being applicable to the type of conflict in which the incident occurred), and

(b) not be in conflict with or derogate from a peremptory norm of international law]⁵⁴

(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁵⁵

The potential legal sources for the unlawful attack offenses were customary international law, the APs,⁵⁶ and the Statute of the International Criminal Court (ICC).⁵⁷ Since the ICC Statute was not adopted until 1998, well after most of the offences within the jurisdiction of the ICTY were committed, and since that Statute (i) applies only to crimes committed after it came into force,⁵⁸ and (ii) formulates unlawful attack offences in a way which might be more restrictive than customary law or pre-existing treaty law, the OTP relied upon customary law and the APs to provide the legal basis for its unlawful attack charges.

The OTP charged unlawful attacks in the *Strugar* case using the following representative formulations, which were upheld by the Appeals Chamber:⁵⁹

(i) “[A]ttacks on civilians, a Violation of the Laws or Customs of War, as recognized by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949”, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.

(ii) “[U]nlawful attacks on civilian objects, a violation of the laws or customs of war, as recognized by Article 52 of Additional Protocol I to the Geneva Conventions of 1949”, and

⁵⁴ See Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 143 (Oct. 2, 1995).

⁵⁵ *Id.* ¶ 94.

⁵⁶ AP I, *supra* note 22, art. 48; AP II, *supra* note 25, art. 13.

⁵⁷ ICC Statute, *supra* note 43, art. 8.

⁵⁸ *Id.* art. 11.

⁵⁹ Prosecutor v. Strugar, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶¶ 9–15 (Nov. 22, 2002).

customary law, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.⁶⁰

Bearing in mind the precise wording of the Appeals Chamber in the *Strugar* Jurisdiction Decision, in the future it might be preferable: (a) to include a reference to customary law before the reference to Article 51 in the attack on civilians charge because of the importance of customary law to underpin the offense; and (b) to delete “unlawful” from the formulation of the attack on civilian objects charge, as all attacks on civilian objects are unlawful. In accordance with the *Galic* Trial Judgment, these formulations embrace direct, indiscriminate, and disproportionate attacks.⁶¹ In its judgment, the *Blaskic* Trial Chamber considered the duration of the unlawful attack (the overrunning of small villages) to include actions that occurred while control over the villages was still in dispute. The Appeals Chamber also held in the *Strugar* Jurisdiction Decision that attacks on civilians and on civilian objects were prohibited under customary law.⁶² Although the Chamber was not extremely explicit, it would appear that the customary law prohibition applies in all conflicts.⁶³

A. Attacks on Civilian Populations

The *Tadic* Jurisdiction Appeal Decision has provided the OTP with a basis for arguing that certain offenses have a substantially similar legal content in both international and internal conflicts.⁶⁴ The OTP has, therefore, developed and defended the practice of alleging unlawful attack charges, which are common to all conflicts. In order to evade the conflict classification issue, the ICTY OTP has rooted its unlawful attack-on-civilians charges in identically worded provisions of AP I (which applies to international conflicts) and AP II (which applies to internal conflicts). Both Article 51(2) of AP I and Article 13(2) of AP II state in part: “The civilian population as such, as well as individual civilians,

⁶⁰ *Id.* ¶¶ 4, 277.

⁶¹ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 57–61 (Dec. 5, 2003).

⁶² *Strugar*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶¶ 9–10, 13. The Trial Chamber in its subsequent Judgment explicitly concluded that the general rule prohibiting attacks on civilian objects applied to internal conflicts as a matter of customary law notwithstanding the absence of an Article in AP II similar to Article 52 of AP I. See Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 224 (Jan. 31, 2005).

⁶³ See *Strugar*, Case No. IT-01-42-T, Judgement, ¶ 224.

⁶⁴ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (Oct. 2, 1995).

shall not be the object of attack.”⁶⁵ AP I, however, goes on to refer to other forms of unlawful attack. In particular, Article 51 refers to indiscriminate attacks, including disproportionate attacks, and refers to five forms of indiscriminate attack, all of which are prohibited.⁶⁶ In addition, Article 85 contains grave breach provisions relating to unlawful attacks. By contrast, AP II has no provisions related to unlawful attacks on civilians beyond the single sentence in Article 13(2) quoted earlier.⁶⁷

ICTY OTP practice has been to focus on the common sentence in Article 51(2) of AP I and Article 13(2) of AP II, and to argue that proof of the occurrence of the various types of indiscriminate attacks, including disproportionate attacks, may provide an evidentiary basis for the Trial Chamber to draw an inference that the attacks were, in substance, directed against the civilian population. In other words, the OTP has argued that the essential substance of the detailed AP I provisions, concerning unlawful attacks applicable to international conflicts, are also contained in the single relevant sentence in AP II, which is applicable to internal conflicts. This is a conscious effort on the part of the OTP, successful to date, to argue that the law concerning unlawful attacks against civilians is the same substantively in both international and internal conflicts. An essentially similar approach has been accepted in the ICRC Customary International Humanitarian Law Study.⁶⁸

B. *Attacks on Civilian Objects*

The basis for the unlawful attack against civilian objects charge is a bit different. Article 52(1) of AP I states in part: “Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives”⁶⁹ There is no similar general provision in AP II. There are, however, prohibitions on attacking specific civilian objects, including objects indispensable to the survival of the civilian population,⁷⁰ works and installations containing dangerous forces,⁷¹ and cultural objects and places of worship.⁷² In addition, the

⁶⁵ AP I, *supra* note 22, art. 51(2); AP II, *supra* note 25, art. 13(2).

⁶⁶ See AP I, *supra* note 22, art. 51.

⁶⁷ AP II, *supra* note 25, art. 13(2).

⁶⁸ HENCKAERTS & DOSWALD-BECK, VOL. I, *supra* note 34, at 3–8, 37–50 (Rules 1, 11–14).

⁶⁹ AP I, *supra* note 22, art. 52(1).

⁷⁰ AP II, *supra* note 25, art. 14.

⁷¹ *Id.* art. 15.

⁷² *Id.* art. 16.

U.N. General Assembly adopted Resolution 2675, on Basic Principles for the Protection of the Civilian Population, on Dec. 9, 1970.⁷³ These Principles include:

In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations. . . . Dwellings and other installations that are used only by civilian populations should not be the object of military operations.⁷⁴

UNGA Res 2675 applies to all armed conflicts. As indicated in the *Tadic* Jurisdiction Appeal Decision, these resolutions were “declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind”⁷⁵ The ICRC customary law study adopts a similar approach.⁷⁶

As indicated above, the OTP has rooted its unlawful attack charges in customary law and in the APs, and not in the ICC Statute where the wording is somewhat different. The APs were initially adopted in 1977 and have a firmer customary law basis than the 1998 ICC Statute. The ICC Statute contains different enumerated lists of war crimes for international conflicts⁷⁷ and for internal conflicts.⁷⁸ Unenumerated offences may not be charged under the ICC Statute. The relevant ICC offences include: (1) for international conflicts—intentional attacks on civilians,⁷⁹ intentional attacks on civilian objects,⁸⁰ intentionally launching attacks that are expected to cause disproportionate incidental civilian losses or damage;⁸¹ and (2) for internal conflicts—intentional attacks on civilians.⁸²

Reliance on the ICC Statute by the OTP, which is debatable because it was not drafted until after most of the offenses within the ICTY’s jurisdiction were committed, would be helpful because proof of the effect of the unlawful attack (death or injury to civilians, damage to

⁷³ G.A. RES. 2675 (XXV), U.N. Doc. A/8028 (Dec. 9, 1970).

⁷⁴ *Id.* § 3, 5.

⁷⁵ Prosecutor v. *Tadic*, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 112 (Oct. 2, 1995).

⁷⁶ HENCKAERTS & DOSWALD-BECK, VOL. I, *supra* note 34, at 25–36 (Rules 7–10).

⁷⁷ ICC Statute, *supra* note 43, art. 8(2)(a) and (b).

⁷⁸ *Id.* art. 8(2)(c) and (e).

⁷⁹ *Id.* art. 8(2)(b)(i).

⁸⁰ *Id.* art. 8(2)(b)(ii).

⁸¹ *Id.* art. 8(2)(b)(iv).

⁸² ICC Statute, *supra* note 43, art. 8(2)(d)(i).

civilian objects) is not an element of the offense. As a purely practical matter, however, it is unlikely that the offence would ever be charged unless the effect actually occurred, and it would usually be necessary to prove the effect as part of the circumstantial evidence for proof of the mental element. The OTP has utilized the grave breach provisions of Article 85(3) of AP I in developing its elements and AP I does require proof of effect. There are, however, aspects of the ICC unlawful attack offences that are not helpful. In particular: (1) the OTP uses the AP I mental element of “willful,” which includes a degree of recklessness, while the ICC mental element is intentional, which may not include a degree of recklessness; (2) the OTP uses the AP I formulation for proportionality which is “excessive” while the ICC formulation is “clearly excessive,” which may be higher; and (3) the ICC Statute prohibits a narrower range of attacks in internal conflicts that the OTP, relying on the *Tadic* Jurisdiction decision, has not been able to prosecute.

V. ELEMENTS OF UNLAWFUL ATTACK CHARGES

A. *The Charge of Unlawful Attacks on Civilians*

For cases before the ICTY, the elements of the unlawful attacks on civilians charge are as indicated in the *Galic* Trial Judgment (subject to the modification of the *mens rea* element required by the *Blaskic* Appeal Judgment). In *Galic*, the Trial Chamber accepted that the mental element for the offense of unlawful attack was “willful” and that the approach taken in the grave breach provisions of AP I was appropriate. Specifically, it held:

The Commentary to Article 85 of Additional Protocol I explains the term as follows:

wilfully: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this 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”.⁸³

The approach to the concept of recklessness must, however, be modified as a result of the holding of the Appeal Chamber in *Blaskic* to the effect that the knowledge of any sort of risk is not sufficient for the imposition of criminal responsibility, and that an accused must be aware of the “substantial likelihood” that the *actus reus* of the crime will occur.⁸⁴

The *Galic* Trial Chamber then went on to decide that the elements for the charge are the elements common to all unenumerated offences under Article 3 of the ICTY Statute, and the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.⁸⁵

It added, “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.”⁸⁶ Further, the Trial Chamber considered that “certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.”⁸⁷ “To establish the *mens rea* of a disproportionate attack the Prosecution must prove. . . that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.”⁸⁸ The Trial Chamber went on to observe that the failure of a party to comply with its obligation to remove civilians, to the

⁸³ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 54 (Dec. 5, 2003) (quoting ICRC COMMENTARY, *supra* note 46, ¶ 3474).

⁸⁴ Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgement, ¶¶ 41–42 (July 29, 2004).

⁸⁵ Galic, Case No. IT-98-29-T, ¶ 56.

⁸⁶ *Id.* ¶ 57.

⁸⁷ *Id.* ¶ 60.

⁸⁸ *Id.* ¶ 59; see Kravetz, *supra* note 17, at 532 (criticizing that court’s finding by arguing that disproportionate attacks should not come within the definition of the crime of attack on civilians).

maximum extent feasible, from the vicinity of military objectives did not “relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.”⁸⁹ The Trial Chamber did allude to the possibility that proof of results was not an element of the offence of unlawful attack on civilians.⁹⁰

The Appeals Chamber, in the *Kordic* Judgment, issued after the *Galic* Trial Judgment, reviewed the state of the law concerning the requirement for proof of results, and concluded that there was such a requirement under customary law at the time of the offence.⁹¹ In a corrigendum to the same judgment, the Appeals Chamber corrected an error made in earlier trial judgments, which appeared to hold that civilians or civilian objects could be attacked if justified by military necessity and held “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”⁹²

B. *The Charge of Unlawful Attacks on Civilian Objects*

The specific elements for the unlawful attacks on civilian objects charge are, *mutatis mutandis*, the same as those for unlawful attacks on civilians spelled out in the *Galic* Trial Judgment:

1. Acts of violence directed against civilian objects causing damage to civilian objects; and
2. The offender wilfully made civilian objects the object of these acts of violence.⁹³

“Wilfull” has the same meaning here as it does for attacks on civilians.

Although the elements for the analogous ICC offences do not require proof of results (with the exception of Article 8(2)(b)(iv)—war crime of excessive incidental death, injury, or damage), the ICC offences appear to be narrower than the ICTY offences prosecuted to date as the ICTY has prosecuted for unlawful attacks against civilian objects in all conflicts. In addition, the elements are more restrictive

⁸⁹ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 61 (Dec. 5, 2003).

⁹⁰ See *id.* ¶ 43.

⁹¹ Prosecutor v. Kordic, Case No. IT-95-14/2-A, Appeals Judgement, ¶¶ 55–68 (Dec. 17, 2004).

⁹² *Id.* ¶ 54; Prosecutor v. Kordic, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004 (Jan. 26, 2005).

⁹³ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 56 (Dec. 5, 2003). The *Strugar* Trial Chamber indicated that it was unclear whether the damage to civilian objects must be extensive but noted that, in any event, the damage was extensive in the particular case. Case No. IT-01-42-T, Judgement, ¶ 280 (Jan. 31, 2005).

than the offenses set forth in the APs, as they appear to have a narrower *mens rea* (“intentional” in lieu of “willfulness”).

VI. RELATIONSHIP BETWEEN UNLAWFUL ATTACK CHARGES AND OTHER CHARGES

Proof that an unlawful attack occurred is a prerequisite for determining whether other offenses also occurred in a combat situation. Where the crime base consists of shelling or sniping incidents in a combat environment, it must first be proved that death, injury, or damage was caused by an unlawful attack (that is, one directed against civilians or civilian objects, or one directed against a military objective that may be expected to cause disproportionate incidental losses), before determining whether the additional elements necessary to establish the commission of other offences have been established. If the attack was not unlawful then the resultant death, injury, or damage cannot be unlawful. If a civilian is killed or injured during an attack on a military objective, which was not reasonably expected to result in civilian casualties or damage to civilian objects disproportionate to the expected military advantage, then no crime has been committed because it is a lawful act of war. This is true even if there is an expectation that some civilians may be killed or injured during the attack.

There is no basis for a crime against humanity charge because the attack was directed against a military objective, not against civilians or civilian objects. There is no basis for a war crimes charge of murder because the *mens rea* is lacking. The intent was to perform a lawful act. The unlawful attack foundation is essential to the assessment of legality, even if there is no unlawful attack charge relating to a particular combat related incident. The issue cannot be avoided by simply avoiding the charge. There can be some incidents in which it is so clear that the attack is directed against civilians that one can proceed with a persecution count, or a war crime, or crime against humanity count of murder. Even in such circumstances, however, it is essential that the prosecutor, in making charging decisions, and the court in assessing the facts, take into account the unlawful attack elements, at least implicitly, before coming to the conclusion that counts charged have been proven.

The *Galic* Trial Chamber, seemingly without enthusiasm, accepted and applied the OTP submission that proof of an unlawful attack was a prerequisite for proof of other offences related to shelling or sniping:

The Prosecution submits that, in the context of an armed conflict, the determination that an attack is unlawful in light of treaty and customary international law with respect to the

principles of distinction and proportionality is critical in determining whether the general requirements of Article 5 have been met. Otherwise, according to the Prosecution, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible. It therefore submits that an accused may be found guilty of a crime against humanity if he launches an unlawful attack against persons taking no active part in the hostilities when the general requirements of Article 5 have been established. The Trial Chamber accepts that when considering the general requirements of Article 5, the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such.⁹⁴

VII. ESTABLISHING THE BIG PICTURE

Since unlawful attack counts will require reference to multiple incidents, and it would be impracticable to introduce detailed evidence concerning each incident, it will be necessary to develop a way for getting from the micro to the macro level in presenting the case.

In the *Galic* case, hundreds of civilians were killed or wounded in Sarajevo by shelling or sniping during the period covered by the indictment, 1992–1994. It would be impracticable to treat each incident of killing as a separate murder case. A way had to be developed to get from the specific incident at the micro level to what was alleged to be an unlawful shelling or sniping campaign at the macro level. Indeed, the link from the micro to the macro level was essential to the case. If, for example, the prosecution could prove, with a degree of precision in a manageable time, that twenty sniping incidents have occurred over a two-year period while the accused was responsible for 15,000 soldiers in the front lines, in the absence of direct evidence of relevant orders being given, would a reasonable court conclude that the commander bears command responsibility for the sniping or that he must have ordered such acts? On the other hand, if the prosecutor could establish both the occurrence of the twenty incidents and an

⁹⁴ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 144 (Dec. 5, 2003).

adequate link to what appears to be a much broader crime base, it might be much easier for the court to reach such conclusions.

Presumably, the preferred approach would be to determine in some scientifically valid fashion the entire apparent crime base. For example, if it appears from sound medical evidence that 1000 civilians have been killed by sniper fire from forces under the command of X, the prosecutor could pick a statistically valid sample on something similar to a random numbers basis for a more detailed examination. Detailed evidence concerning all cases in the sample group would then be put before the court. If that was done, or if the prosecutor made the court aware of incidents or situations in the sample group, which do not indicate unlawful acts occurred, then the court could conclude that seventy percent of the cases in the sample group constituted crimes, therefore seventy percent of the larger group also constituted crimes, and therefore a campaign of unlawful sniping occurred.

Desirable as the mathematical/scientific approach might be, it is not always practicable. The *Galic* prosecution team listed scheduled sniping and shelling incidents as “representative allegations” in annexes to the indictment. The prosecution also introduced evidence of unscheduled incidents, survey or impressionistic evidence, and solid demographic evidence, which could adequately establish cause of death or injury, but which did not, in and of itself, establish whether the death or injury was the result of unlawful acts.

The majority in the Trial Chamber held that a campaign of military actions in the area of Sarajevo, involving widespread or systematic shelling and sniping of civilians, resulting in civilian death or injury existed together with a lawful military campaign directed against military objectives.⁹⁵ Civilians were directly or indiscriminately attacked and, at a minimum, hundreds of civilians were killed, and thousands of others were injured.⁹⁶ The reasons for this finding included:

- (a) No civilian activity and no areas of Sarajevo held by the ABiH seemed to be safe from sniping or shelling attacks from SRK-held territory;⁹⁷
- (b) Indeed, specific areas of the city became notorious as sources of sniper fire directed at civilians;⁹⁸

⁹⁵ *Id.* ¶¶ 582–583.

⁹⁶ *Id.* ¶ 591.

⁹⁷ *Id.* ¶ 584.

⁹⁸ *Id.* ¶ 585.

- (c) Although civilians adapted to the environment by taking precautionary measures, they were still not safe from deliberate attack;⁹⁹
- (d) The evidence of residents of Sarajevo and of victims was supported by the evidence of international military personnel;¹⁰⁰
- (e) Although there was some evidence that ABiH forces attacked their own civilians to attract the attention of the international community, that stray bullets may have struck some civilians, and that some civilians were shot in the honest belief they were combatants, evidence in the Trial Record conclusively establishes that the pattern of fire throughout the city of Sarajevo was that of indiscriminate or direct fire at civilians in ABiH-held areas of Sarajevo from SRK-controlled territory not that of combat fire where civilians were accidentally hit;¹⁰¹ and
- (f) Fire into ABiH-held areas of Sarajevo followed a temporal pattern.¹⁰²

CONCLUSION

There are some things judicial decisions can contribute and some they are unlikely to contribute to the common discourse on the principle of distinction. In particular, it is unlikely there will be many decisions clarifying the scope of the military objective concept because, as a matter of prosecutorial discretion (and cost), it is unlikely prosecutors will submit indictments related to “gray area” targets. The most important contribution of ICTY jurisprudence is the simple demonstration that competent prosecution, defense, and adjudication of unlawful attack cases is not only possible, but that it is not beyond the practical competence of non-specialist tribunals. ICTY cases, such as *Galic* and *Strugar*, demonstrate how such cases can be prosecuted in the future. As a former military legal adviser, I would be the last to downgrade the importance of preventive law in ensuring that appropriate legal advice is injected into the operational decision making process so that breaches of the law do not occur in the first place. It is, however, extremely reassuring to know that there is now an additional arrow in the legal quiver and that effective prosecution is also practicable when necessary.

⁹⁹ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 586 (Dec. 5, 2003).

¹⁰⁰ *Id.* ¶ 587.

¹⁰¹ *Id.* ¶ 589.

¹⁰² *Id.* ¶ 590.