ATTACKING THE ENEMY CIVILIAN AS A PUNISHABLE OFFENSE

WILLIAM J. FENRICK*

I. INTRODUCTION

In the bleak aftermath of World War II, a period in which many doubted that limits could be imposed on war, Sir Hersch Lauterpacht wrote:

> [I]t is in [the] prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force.[1]

Myres McDougal subsequently observed: "The essentially modest character of this 'absolute rule' needs no underlining."[2]

The modern law of war, now more frequently referred to as the law of armed conflict or as international humanitarian law, prohibits a range of activities related to attacks on civilian persons and objects.[3] In general, however, the rules of this part of international humanitarian law are articulated at a high level of abstraction and generality. Alleged violations are rarely investigated, let alone prosecuted.

It is, perhaps, for this reason that Edward Cody, deputy foreign editor of the Washington Post, criticized the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugo-

* Senior Legal Advisor, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia. These comments are made in a personal capacity and do not necessarily reflect the views of either the Office of the Prosecutor or the United Nations.

1. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 369 (1952).

2. M.S. MCDOUGAL & F.P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 80 (1994)

3. *See generally* Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 3 (Astrid Dellissen et al. eds., 1991).

slavia (ICTY) for obtaining an indictment against Djordje Djukic, a Bosnian Serb general, for the shelling of civilian targets in Sarajevo.[4] Indeed, the OTP has obtained indictments directed against several accused who are alleged to be responsible for international crimes committed during combat.[5] The charges against General Djukic, contained in an indictment of February 29, 1996, indicate the approach of the OTP to such offenses:

> COUNTS 1 - 2
>
> CRIME AGAINST HUMANITY
>
> VIOLATION OF THE LAWS AND CUSTOMS OF WAR
>
> 6. Djordje Djukic, in concert with others, planned, prepared or otherwise aided and abetted in the planning and preparation of the acts and operations of the Bosnian Serb army and its agents. These acts and operations included the following crimes:
>
> SHELLING OF CIVILIAN TARGETS
>
> 7. From about May 1992 to about December 1995, in Sarajevo, Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure, terrorise and demoralise the civilian population of Sarajevo.
>
> By these acts and omissions in relation to the shelling of civilian targets in Sarajevo, Djordje Djukic committed:
>
> COUNT 1:
>
> a CRIME AGAINST HUMANITY, punishable under Article 5(i) (inhumane acts) of the Statute of the Tribunal.
>
> COUNT 2:
>
> a VIOLATION OF THE LAWS AND CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal.[6]

It is probable that many of the cases that will be brought before the ICTY will involve charges related to unlawful attacks on civilian

4. *See* E. Cody, *Is It a War Crime or Just War?*, WASH. POST, April 7, 1996, at C5; ICTY Indictment, Prosecutor v. Djorde Djukic, Case No. IT-96-20-I (February 29, 1996).

5. *See* ICTY Indictment, Prosecutor v. Milan Martic, Case No. IT-95-11-I (July 24, 1995) (attacks on Zagreb in May 1995); ICTY Indictment, Prosecutor v. Ivica Rajic, Case No. IT-95-12-I (August 23, 1995) (attacks on the village of Stupni Do on 23 October 1993); ICTY Indictment, Prosecutor v. Radovan Karadzic & Ratko Mladic, Case No. IT-95-5-I (July 24, 1995) (attacks on civilians in Sarajevo in 1992 and 1995); ICTY Indictment, Prosecutor v. Radovan Karadzic & Ratko Mladic, Case No. IT-95-18-I (November 16, 1995) (attacks on civilians in Tuzla in 1995); ICTY Indictment, Prosecutor v. Dario Kordic and Others, Case No. IT-95-19-I (November 10, 1995) (attacks on civilians in the Lasva Valley from January to May 1993).

6. Djukic, *supra* note 4, at 2-3.

persons and objects. This Comment explores some of the legal and practical issues related to the prosecution of such cases. Parts II and III review the concept of the military objective and the principle of proportionality, and Parts IV and V examine the existing treaty law and the ICTY Statute. Part VI identifies the preliminary legal issues, and Part VII defines the elements of chargeable offenses and includes comments on how one might prove such elements. Part VIII examines a particular attack which led to civilian deaths, and Part IX concludes the Comment.

II. THE CONCEPT OF THE MILITARY OBJECTIVE

International humanitarian law, including the law of the Hague (the component of international law which regulates the conduct of hostilities), can be reduced to a certain number of essential concepts or principles. Two of these essential principles are "the principle of distinction"[7] and "the principle of proportionality."[8] Central to the principle of distinction is the concept of "the military objective," or the legitimate target. If a viable body of law purporting to regulate combat is to exist, a distinction must be drawn between persons or objects which may be attacked and those which may not be attacked.

Since the eighteenth century, the range and potential destructive power of weapons systems has increased enormously, but the capability of weapons systems to attack precise targets has varied over time. What is practicable has an impact on how military objectives are perceived and defined. For example, because aerial bombardment was a relatively inaccurate means of attacking a small target during most of World War II, air forces tended to engage in target area bombardment rather than attacking precision targets.[9] On the other hand, in the last decade or two, at least where conventional (i.e., non-nuclear) weapons are concerned, weapons systems with precision guided munitions (PGMs) have been able to attain a higher degree of accuracy.[10]

7. *See generally* Christopher Greenwood, *Customary Law Status of the Protocols, in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 108 (Astrid Delissen et al. eds., 1991).

8. *See generally* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982).

9. *See* 4 C. WEBSTER & N. FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-1945 at 205-13 (1961).

10. *See* Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 109 (1992).

A variety of attempts have been made to define the concept of the military objective.[11] The most widely accepted definition of mili-

11. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 27-46 (1996). In 1956, the International Committee of the Red Cross (ICRC) drew up the following proposed list of categories of military objectives:

> I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:
>
> (1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.
>
> (2) Positions, installations or constructions occupied by the forces indicated in sub-paragraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
>
> (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and others organs for the direction and administration of military operations.
>
> (4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicles parks.
>
> (5) Airfields, rocket launching ramps and naval base installations.
>
> (6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
>
> (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
>
> (8) Industries of fundamental importance for the conduct of the war:
>
> (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
>
> (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment of the armed forces;
>
> (c) factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;
>
> (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c);
>
> (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
>
> (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.
>
> II. The following however, are excepted from the foregoing list:
>
> (1) Persons, constructions, installations or transports which are protected under the Geneva Conventions I, II, III, of August 12, 1949;
>
> (2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities.
>
> III. The above list will be reviewed at intervals of not more than ten years by a group of Experts composed of persons with a sound grasp of military strategy and of others concerned with the protection of the civilian population.

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 632-633 (Y. Sandoz, C. Swinarski, B. Zimmerman, eds., 1987) (hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977).

tary objective today is contained in Article 52 of Additional Protocol I of 1977[12] (Protocol I), ratified by 143 states as of December 31, 1995, including all of the states emerging on the territory of the former Yugoslavia. Article 52 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.[13]

Where objects are concerned, the definition has two elements: (a) their nature, location, purpose or use must make an effective contribution to military action, and (b) their total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time. Although this definition does not refer to persons, in general, members of the armed forces are considered combatants and thus have the right to participate directly in hostilities. As a corollary, combatants may also be attacked. Using the Protocol I definition and his own review of state practice, Major General A.P.V. Rogers, the British Director of Army Legal Services has advanced a tentative list of military objectives:

> military personnel and persons who take part in the fighting without being members of the armed forces, military facilities, military equipment, including military vehicles, weapons, munitions and stores of fuel, military works, including defensive works and fortifications, military depots and establishments, including War and Supply Ministries, works producing or developing military supplies and other supplies of military value, including metallurgical, engineering and chemical industries supporting the war effort; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads as well as tunnels and canals; oil and other power installations; communications installations, including broadcasting and television stations and telephone and telegraph stations used for military communications.[14]

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

13. *Id.* art. 52, 1125 U.N.T.S. at 27, 16 I.L.M. at 1414.

14. Rogers, *supra* note 11, at 37 (citing M. BOTHE, ET AL., NEW RULES FOR THE VICTIMS OF ARMIES CONFLICT 322 (Martinus Nijhoff ed., 1982)).

The list was not intended to be exhaustive.[15] It remains a requirement that both elements of the definition must be met before a target can be properly considered an appropriate military objective.

The Protocol I definition of military objective has been criticized by W. Hays Parks, the Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General as being focused too narrowly on definite military advantage and paying too little heed to war sustaining capability, including economic targets such as export industries.[16] On the other hand, some critics of Coalition conduct in the Gulf War have suggested that the Coalition air campaign, directed admittedly against legitimate military objectives within the scope of the Protocol I definition, caused excessive long-term damage to the Iraqi economic infrastructure with a consequential adverse affect on the civilian population.[17] This criticism has not gone unchallenged. Françoise Hampson has suggested a possible refinement of the definition:

> In order to determine whether there is a real subject of concern here, it would be necessary to establish exactly what the effect has been of the damage to the civilian infrastructure brought about by the hostilities. If that points to a need further to refine the law, it is submitted that what is needed is a qualification to the definition of military objectives. Either it should require the likely cumulative effect on the civilian population of attacks against such targets to be taken into account, or the same result might be achieved by requiring that the destruction of the object offer a definite military advantage in the context of the war aim.[18]

Although the Protocol I definition of military objective is not beyond criticism, it provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks.

15. *See id.* at 37.

16. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 135-45 (1990).

17. *See generally* MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR (1991); Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 404-10 (1993).

18. Françoise Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, *in* THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 89, 100 (P. Rowe ed., 1993).

III. THE PRINCIPLE OF PROPORTIONALITY

An undue focus on the principle of the military objective might lead one to ignore civilian casualties or regard them as an unfortunate accident occurring in the course of legitimate military activities. The principle of proportionality counters this tendency by requiring a constant weighing of military and humanitarian values. There is, however, a debate concerning the very existence of the principle of proportionality in customary law.[19] It is this author's view that that debate is pointless as, whether or not proportionality is formally embedded in customary law, it is a logically necessary part of any decision-making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict. Although the term "proportionality" is not used in Protocol I, equivalent terms such as "excessive damage" or "excessive injury" are used in Article 51(5)(b),[20] Article 57(2)(b),[21] and Article 85(3).[22] The principle of proportionality clearly does bind parties to the Protocol, including the successor states on the territory of the former Yugoslavia.[23]

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that women in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the

19. *See* Parks, *supra* note 16, at 168-202; Fenrick, *supra* note 8, at 91-127.

20. Protocol I, *supra* note 12, art. 51(5)(b), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

21. *Id.* art. 57(2)(b), 1125 U.N.T.S. at 29, 16 I.L.M. at 1416.

22. *Id.* art. 85(3), 1125 U.N.T.S. at 42, 16 I.L.M. at 1428.

23. The Socialist Federal Republic of Yugoslavia (SFRY) ratified the 1949 Geneva Conventions in 1950 and the two Additional Protocols in 1979. The Federal Republic of Yugoslavia has acknowledged it is bound by these agreements as a successor state. Croatia deposited a declaration of succession to the Conventions and Protocols on May 11, 1992 and, because of previous ratification by the SFRY, these instruments came into force for Croatia retroactively on October 8, 1991, the date of Croatian independence. Bosnia-Herzegovina deposited a declaration of succession to the Conventions and Protocols on December 31, 1992 and, because of previous ratification by the SFRY, these instruments came into force retroactively on March 6, 1992, the date of Bosnian independence.

comparison is often between unlike quantities and values. How do you assess the value of innocent human lives as opposed to capturing a particular military objective?

The questions which remain unresolved once one decides to apply the principle of proportionality include the following:

> 1) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
>
> 2) What do you include or exclude in totalling your sums?
>
> 3) What is the standard of measurement in time or space? and
>
> 4) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. I suggest that the determination of relative values must be that of the "reasonable military commander." Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.

Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons. Despite an obligation to avoid locating military objectives within or near densely populated areas, to remove civilians from the vicinity of military objectives, and to protect their civilians from the dangers of military operations,[24] very little prevention may be feasible in many cases. City planners rarely pay heed to the possibility of future warfare. Military objectives are located in densely populated areas and fighting occasionally occurs in such areas. W. Hays Parks listed causes of collateral casualties during the air bombardment campaigns of World War II as fol-

24. *See* Protocol I, *supra* note 12, art. 51(7), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

lows:

> Where collateral civilian casualties occurred, they could be attributed to myriad factors, not the least of which was the intensity of enemy defenses. Other factors included weather, enemy deception, dispersal of targets, and their commingling with the civilian population as a natural consequence of industrialization and urban growth.[25]

Even with a substantial improvement in weapon accuracy since World War II, actually hitting a target remains a difficult task. In another comment, W. Hays Parks has observed:

> Despite the development of sophisticated computer systems, many variables influence the accuracy equation. With conventional . . . munitions, one combat-experienced pilot has noted that bombing remains an inherently inaccurate process . . . Aiming errors, boresight errors, system computational errors all act to degrade the system. Unknown winds at altitudes below the release point and the 'combat degradation' factor add more errors to the process. In short, it is impossible to hit a small target except by sheer luck . . . .[26]

Parks appears to be inclined to assign a degree of responsibility for collateral casualties to the state which has left its civilians near military objectives rather than to assign total responsibility to the attacking force. Some of his observations are quite incisive. For example, if civilians are killed because attacking aircraft are shot down or because antiaircraft shells or missiles hit civilians when they return to earth, why should the attacking air force be blamed? It is suggested that that the attacking force must consider all civilian casualties and damage to civilian objects caused by its forces but not the collateral casualties or damage caused by responding defense forces.

Determining the proper standard of measurement in time or space (geographic extent) for applying the proportionality equation is also difficult. As a baseline, any deliberate attack on civilian persons or objects, occurring at any time, is unlawful, even if it is perceived as

25. Parks, *supra* note 16, at 55.

26. W. Hays Parks, *Conventional Aerial Bombing and the Law of War*, United States Naval Institute Proceedings, 1983 Naval Review Issue 98, 112.

conferring a military advantage.[27] Further, the standard of measurement must be one which is practicable to use in advance of an attack to determine whether the proportionality requirement is being met at various stages in the conflict. One cannot, for example, assert that it will only be possible to determine whether or not military activity complied with the proportionality principle at the end of the war or a lengthy campaign. At the same time, one cannot always assess proportionality on a bullet by bullet basis or even on the basis of discrete military objectives. The remarks of Louise Doswald-Beck, a senior legal adviser with the International Committee of the Red Cross (ICRC), are particularly relevant:

> It should also be noted that the principle of proportionality is being interpreted by some States as applying to the effects of a particular attack as a whole, rather than solely in relation to the incidental damage around one object. Thus the United Kingdom on signing the Protocol, and Netherlands and Italy on ratification, stated that:
>
> > in relation to paragraph 5(b) of Article 51 and paragraph 2(a)(iii) of Article 57, . . . the military advantage anticipated from the attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack.
>
> This approach should be acceptable if seen within the context of a given tactical operation: such an operation may necessitate, for example, the destruction of six military objectives, one of which, being particularly difficult to get at, might involve far greater casualties than the other five. The attack of that one objective on its own might be of no great use, but within the context of the operation as a whole, absolutely essential. The yardstick, in this example, would be the number of casualties overall in relation to the value of the operation as a whole.[28]

Determining the extent to which a military commander is obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects is almost impossible. Strictly speaking, resolution of the proportionality equation requires a determination of the relative worths of military advantage gained by

27. *See* Hans-Peter Gasser, *Negotiating the Protocols: Was It a Waste of Time?*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 82 (Astrid Dellissen et al. eds., 1991).

28. L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, *reprinted in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 137, 156-7 (Michael A. Meyer ed., 1989).

one side and the civilian casualties or damage to civilian objectives incurred in areas in the hands of the other side.[29] Military casualties incurred by the attacking side are not a part of the equation. A willingness to accept some own-side casualties in order to limit civilian casualties may indicate a greater desire to ensure compliance with the principle of proportionality. Military commanders do, however, also have a duty to limit casualties to their own forces.

IV. EXISTING LEGAL FRAMEWORK

The treaties applicable in the territory of the former Yugoslavia and relevant to the issue of attacking the enemy as a punishable offense are the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[30] and the two 1977 Protocols to the Geneva Conventions of 1949.[31] Article 25 of the Rules Annexed to 1907 Hague Convention (IV) states: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

This provision has a very limited scope of applicability. In the words of the British manual *The Law of War on Land* drafted by Sir Hersch Lauterpacht:

> 290. An undefended or "open" town is a town which is so completely undefended from within or without that the enemy may enter and take possession of it without fighting or incurring casualties. It follows that no town behind the immediate front line can be open or undefended for the attacker must fight his way to it. Any town behind the enemy front line is thus a defended town and is open to ground or other bombardment, subject to the limitations imposed on all bombardments, namely, that as far as possible, the latter must be limited to military objectives.[32]

29. *See* 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 520-28 (H. Lauterpacht, LL.D ed., 7th ed. 1952) (discussing the susceptibility of non-combatants to aerial bombardment).

30. *See* Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 205 Consol. T.S. 277, *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 57-92 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981) [hereinafter Schindler & Toman].

31. *See* Protocol I, *supra* note 12; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

32. THE WAR OFFICE, THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 97 (1958).

Although there have been allegations of attacks on open towns in the past,[33] such allegations do not appear to have formed the basis for criminal charges. As an enemy by definition may take possession of an undefended town without fighting, there would seem to be no military purpose to the bombardment of such a place. In addition to the Hague Convention provisions, the Charter of the International Military Tribunal at Nuremberg listed "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a war crime.[34] The Control Council, an Allied Powers entity which "ruled" Germany after German surrender in 1945, contained a similar provision in Control Council Law No. 10 which was used as the basis for further war crimes trials.[35] Although this provision would appear to encompass offenses committed by attacking forces, it does not appear to have been used for this purpose. The leading case concerning this provision is the trial of General Rendulic, one of the co-accused in the Hostages Trial, addressing the destruction of property in areas under his control.[36] At Nuremberg in the trial of Hermann Goering, the Commander-in-Chief of the Luftwaffe, it was expected that the International Military Tribunal would make some reference to the wanton destruction of cities in the conduct of air warfare that he ordered. This reference was not made, most likely because the Allies had also engaged in such extensive destruction of German cities by air bombardment.[37] Indeed, in the words of George Brand, the editor of the *Law Reports of Trials of War Criminals*, "No records of trial concerning the illegal conduct of air warfare were ever brought to the notice of the United Nations War Crimes Commission."[38]

Protocol I is a substantial modernization of the law for international conflict, particularly of the law concerning conduct of hostilities. Article 51 contains a number of specific rules requiring protection of the civilian population, including prohibition of

33. *See, e.g.*, 1 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 417-33 (1920).

34. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, *reprinted in* Schindler & Toman, *supra* note 30, at 826.

35. *See* Control Council Law No. 10, *reprinted in* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 558-62 (1993).

36. *See* The Hostages Trial, 8 LAW REP. TRIALS WAR CRIM. 34, 69 (1948).

37. *See* THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 492 (1948).

38. G. Brand, *The War Crimes Trials and the Law of War*, 26 BRIT. Y.B. INT'L. L. 414, 419 (1949).

"indiscriminate attacks," "reprisals," and the use of civilians to "render certain points or areas immune from military operations."[39]

Article 57 establishes the procedures by which the standards set forth in Article 51 are to be accomplished, including a requirement that those who plan an attack "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding . . . incidental loss of civilian life."[40]

Article 85 addresses repression of breaches of the Protocol and states that "grave breaches" include "making the civilian population or individual civilians the object of attack," or "launching an indis-

39. Protocol I, *supra* note 12, art. 51, 1125 U.N.T.S. at 26, 16 I.L.M. at 1413. The text reads, in part:

Article 51 - Protection of the civilian population

. . .

4. Indiscriminate attacks are prohibited . . . .

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield militia objectives from attacks or to shield military operations.

40. *Id*. art. 57, 1125 U.N.T.S. at 29, 16 I.L.M. at 1416. The text reads:

Article 57 - Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

criminate attack" which is expected to cause serious injury or loss of life.[41]

Additional Protocol II of 1977 (Protocol II), which is concerned with internal conflicts, does not contain a provision related to repression of breaches, and its provision concerning protection of the civilian population is much less detailed:

> *Article 13 - Protection of the civilian population*
>
> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.[42]

Although it has not been done in the past, it is technically possible to identify some attacks on the enemy as "crimes against humanity." In the Nuremberg Charter, crimes against humanity were enumerated as follows:

> (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[43]

---

41. *Id.* art. 85, 1125 U.N.T.S. at 41, 16 I.L.M. at 1427. The text reads:

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

42. Protocol II, *supra* note 31, art. 13, 1125 U.N.T.S. at 615, 16 I.L.M. at 1447.

43. Agreement for the Prosecution and Punishment of the Major War Criminals of the

Control Council Law No. 10 contained a somewhat similar list, but one which did not link the offenses with the war:

> (c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[44]

The concept of crime against humanity emerged to criminalize the conduct of those who committed large scale atrocities directed against civilian populations, including the populations of the perpetrator.[45] For example, the German attempt to exterminate German Jews would not constitute a war crime but it was a crime against humanity. There is no treaty law definition of crimes against humanity.

V. THE ICTY STATUTE

The prohibitions listed above will serve as the basis for prosecution of cases in the ICTY. Articles 2-5 of the Statute of the International Tribunal (Tribunal Statute)[46] list crimes to be prosecuted and refer to the pre-existing legal framework. Article 3 of the Statute states:

> *Article 3*
>
> *Violations of the laws or customs of war*
>
> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions

European Axis, Aug. 8, 1945, art. 6(c), *reprinted in* Schindler & Toman, *supra* note 30, at 826.

44. Control Council Law No. 10, *reprinted in* HOWARD S. LEVIE, *supra* note 35.

45. *See* Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946).

46. *See* Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute].

> dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.[47]

In its decision on jurisdiction in the Tadic case,[48] the ICTY Appeals Chamber held as follows:

> 91. Article 3 thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[49]

At a later point in the same decision, the Appeals Chamber similarly stated:

> 143. It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law, as are most customary rules of international humanitarian law.[50]

Because both Protocol I and II were in force in the territory of the former Yugoslavia throughout the conflict and are not covered by Articles 2, 4, or 5 of the Statute, violations of the Protocols may be prosecuted under Article 3 of the Statute.

The Appeals Chamber also provided a relatively elaborate discussion of the current content of customary law for all conflicts.[51] In the course of this discussion, it concluded that the principles in U.N. General Assembly Resolution 2444 of December 19, 1968[52] and U.N.

47. *Id.* art. 3.

48. Prosecutor v. Duško Tadic, Case No. IT-94-1-AR72 (1995), *reprinted in* 35 I.L.M. 32 (1996) [hereinafter Tadic].

49. *Id.* at 51 (emphasis in original).

50. *Id.* at 74.

51. *See id.* at 55-68.

52. G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218 (1968).

General Assembly Resolution 2675 of December 9, 1970[53] applied to all conflicts.[54] By implication, violations of these principles may also be charged as offences under Article 3 of the Statute. Resolution 2675 provides in part:

> 5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations . . . .
>
> 7. Civilian populations, or individual members thereof, should not be the object of reprisals . . . .[55]

It is also possible to use Article 5 of the ICTY Statute in connection with unlawful attacks:

> *Article 5*
>
> *Crimes against humanity*
>
> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a)murder; . . .
>
> (i)other inhumane acts.[56]

VI. PRELIMINARY LEGAL ISSUES

A few preliminary legal issues must be addressed before determining when certain ways of attacking the enemy should be regarded as a punishable offense. First, the Geneva Conventions and Protocol I identify certain offenses as "grave breaches" and obligate all states party to enact legislation to provide effective penal sanctions for persons committing or ordering the commission of grave breaches, and to search for such persons and bring them before their courts for trial.[57] Further, Article 85 of Protocol I specifically indicates that all

53. G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970).

54. *See Tadic*, *supra* note 48, at 59-61.

55. G.A. Res. 2675, *supra* note 53.

56. Statute of the International Tribunal, *supra* note 46, art. 5.

57. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49-50, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50-51, 6 U.S.T., 3217, 3250, 75 U.N.T.S. 85, 116 [hereinafter Convention II]; Geneva Convention Relative to

grave breaches are war crimes.[58]

There is no grave breach provision in Protocol II, nor do the grave breach provisions of the Geneva Conventions apply to internal conflicts. For breaches of the Geneva Conventions and of Protocol I other than grave breaches, all parties are obliged to take measures necessary for their suppression,[59] but neither Common Article 3 nor Protocol II obligate parties to the treaties to suppress breaches. Treaties negotiated prior to 1945 do not address the issue of individual criminal responsibility.

The post-World War II war crimes tribunals, however, had no difficulty assigning individual criminal responsibility for breaches of such laws. In particular, the Nuremberg Tribunal held that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[60] The Appeals Chamber, in the Tadic jurisdictional decision,[61] relied on the approach adopted by the Nuremberg Tribunal and disregarded a potential argument that the Geneva Conventions of 1949, Protocols I and II, and other treaties such as the Conventional Weapons Convention of 1981,[62] clearly distinguished between activities which might result in individual criminal liability and other activities for which states but not individuals might be held responsible. In the view of the Appeals Chamber, the grave breach system was intended to identify certain particularly serious offenses for which universal mandatory jurisdiction was applicable.[63] Other violations of treaty or customary law applicable in international or internal armed conflict would also attract

---

the Treatment of Prisoners of War, Aug. 12, 1949, art. 129-30, 6 U.S.T. 3316, 3418-20, 75 U.N.T.S. 136, 236-38 [hereinafter Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146-7, 6 U.S.T. 3516, 3616-18, 75 U.N.T.S. 287, 386-88 [hereinafter Convention IV]; Protocol I, *supra* note 12, art. 11, 1125 U.N.T.S. at 11, 16 I.L.M. at 1400; Protocol I, *supra* note 12, art. 85, 1125 U.N.T.S. at 41, 16 I.L.M. at 1427.

58. *See* Protocol I, *supra* note 12, art. 85, 1125 U.N.T.S. at 41, 16 I.L.M. at 1427.

59. *See* Convention I, *supra* note 57, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Convention II, *supra* note 57, art. 50, at 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Convention III, *supra* note 57, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Convention IV, *supra* note 57, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386; Protocol I, *supra* note 12, art. 85.

60. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

61. *See Tadic*, *supra* note 48, at 32.

62. United Nations Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons: Final Act, Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), *reprinted in* 19 I.L.M. 1523 (1980).

63. *See Tadic*, *supra* note 48, at 59.

individual criminal liability on the basis of the universality principle.[64] For the exercise of jurisdiction by the ICTY, the Appeals Chamber was of the view that the violation must be "serious" and it discussed this expression as follows:

> 94 . . . (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. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory . . . .[65]

Under the law applicable in World War II and earlier, siege warfare constituted a form of lex specialis. A besieging force could lawfully cut off water and food supplies to starve a town into submission, fire on civilians attempting to leave, and bombard both private and public areas within the besieged location.[66] I suggest the lex specialis of siege warfare has been effectively abolished. Under the treaty law applicable to international conflict, (1) attacking civilians is prohibited (Arts. 51 and 85 of Protocol I), (2) attacking civilian objects is prohibited (Art. 52 of Protocol I), (3) starving civilians as a method of warfare is prohibited (Art. 54 of Protocol I); and (4) a qualified right to send relief supplies exists (Art. 70 of Protocol I).

Under the treaty law applicable to internal conflicts, (1) attacking civilians is prohibited (Art. 13 of Protocol II); (2) starving civilians as a method of warfare is prohibited (Art. 14 of Protocol II); and (3) a qualified right to send relief supplies exists (Art. 18 of Protocol II).

Further, as indicated earlier, in the view of the Appeals Chamber in the Tadic Jurisdiction motion, attacks on civilian objects are prohibited as a matter of customary law in all conflicts, and this prohibition is reflected in U.N. Resolution 2675 of December 9, 1970.[67] The viability of the starvation provisions in the Protocols in a siege

64. *See id.* at 70-71.

65. *Id.* at 62.

66. *See* 2 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 417-419 (7th ed., 1952).

67. *See* G.A. Res. 2675, *supra* note 53.

warfare context has, however, been attacked by at least one writer.[68]

A potential defense plea to a charge of conducting an unlawful attack is an argument that the accused was taking such action as a reprisal. A reprisal is a crude law enforcement device. It is an illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so.[69] The reprisal is not just a retaliatory act or a simple act of vengeance, but should be roughly proportionate to the original wrongdoing, and must be terminated once the original wrongdoer ceases his illegal actions.[70] The proportionality is not strict, for, if the reprisal is to be effective, it will often be greater than the original wrongdoing.[71] Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.[72]

In international conflicts, reprisals are prohibited against civilians and civilian objects.[73] The treaty law of internal conflicts does not address the reprisal issue. U.N. Resolution 2675 indicates reprisals against civilians are prohibited in all circumstances.[74] This issue was litigated in the Rule 61 proceeding concerning Milan Martic in an ex parte proceeding held before one of the ICTY trial chambers in February 1996.[75] The prosecution argued that the chamber should decide that reprisals against civilians were prohibited in all conflicts, including internal conflicts, because (1) an explicit prohibition already existed in treaties applicable to international conflict, (2) U.N.

68. *See, e.g.*, Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 145-52 (A.M. Delissen et al. eds., 1991).

69. The standard text on reprisals is F. KALSHOVEN, BELLIGERENT REPRISALS (1971). *See also* A.R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949* 590, 47 AM. J. INT'L L. (1950); D. Bowett, *Reprisals Involving Recourse to Armed Force* 1, 66 AM. J. INT'L L. (1972); M. Bristol, *The Laws of War and Belligerent Reprisals against Enemy Civilian Populations* 397, 21 A.F. L. REV. (1979).

70. *See* Albrecht, *supra* note 69, at 590.

71. *Id*.

72. *Id*.

73. *See* Protocol I, *supra* note 12, arts. 51(6), 52(1), 1125 U.N.T.S. at 26-27, 16 I.L.M. at 1413-14.

74. *See* G.A. Res. 2675, *supra* note 53.

75. *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.9 (1996). Rule 61 addresses the procedure to be followed in case of failure to execute a warrant, and provides for an ex parte proceeding before one of the trial chambers during which the prosecutor presents some of the evidence in the case and attempts to have the indictment reconfirmed. As there is no finding of guilt or innocence, it is not a trial in absentia.

Resolution 2675 reflects the state of customary law for all conflicts; (3) Article 4 of Protocol II requiring protection of civilians "in all circumstances" implicitly prohibits reprisals; and (4) reprisals are an ineffective means of law enforcement.[76] The trial chamber agreed:

> 17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[77]

VII. CHARGEABLE OFFENCES

The existing international legal prohibitions must be prosecuted in terms of the charges listed in Articles 2-5 of the ICTY Statute. The available charges related to attacks on civilian persons or objects under Article 3, "Violations of Laws or Customs of War", of the Statute appear to be deliberate attacks, indiscriminate attacks, spreading terror and, perhaps, wanton destruction. Potential charges under Article 5, "Crimes Against Humanity", are murder and other inhumane acts.

The relevant treaty provisions concerning deliberate attacks are the following: Article 51(2) of Protocol I prohibiting direct attacks on civilian populations and individual civilians;[78] Article 52(1) of Protocol I prohibiting direct attacks on civilian objects;[79] Article 85(3) of Protocol I holding direct attacks on the civilian population or individual civilians to constitute a grave breach when committed wilfully and causing death or serious injury to body or health;[80] and Article 13(2) of Protocol II prohibiting direct attacks on the civilian population or individual civilians in internal conflict.[81] It would appear that direct attacks on civilian objects would also constitute a violation of customary law in all conflicts.

In order to minimize the impact of the conflict classification issue—international or internal—on cases before the ICTY, it would

76. Brief on the Applicable Law for Rule 61 Hearing, Prosecutor v. Milan Martic, Case No. IT-95-11-I (1996).

77. Decision of Trial Chamber I, Prosecutor v. Milan Martic, Case No. IT-95-11-I (1996).

78. Protocol I, *supra* note 12, art. 51(2), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

79. *Id*. art. 52(1), 1125 U.N.T.S. at 27, 16 I.L.M. at 1414.

80. *Id*. art. 85(3), 1125 U.N.T.S. at 42, 16 I.L.M. at 1428.

81. Protocol II, *supra* note 31, art. 13(2), 1125 U.N.T.S. at 615, 16 I.L.M. at 1447.

be appropriate to charge for violations of the laws or customs of war (attacks on civilian persons or objects), as such an offense can be committed in both international and internal conflicts. Although a direct attack on civilians can consist of a single soldier firing a single bullet, it is probable that cases before the ICTY would involve higher level decision makers and multiple incidents, or at least multiple projectiles. Appropriate elements for a charge against one who plans or decides upon an attack might include the following: (1) the accused planned or decided upon the attack; (2) the attack was launched wilfully; and (3) the attack constituted a deliberate attack on civilians or civilian objects.

Concerning the mental element for the offenses, Protocol I imposes obligations on those who plan an attack to gather and assess intelligence concerning the location to be attacked and to verify that it is in fact a military objective, to take all feasible precautions to avoid or minimize collateral civilian casualties or damage to civilian objects, and to refrain from or cancel attacks which may be expected to cause disproportionate civilian casualties or damage to civilian objects.[82] It is reasonable to impose these same obligations on those who plan attacks in internal conflicts as well. Those who plan an attack would wilfully launch a deliberate attack on civilians or civilian objects if they were aware of the presence of civilians or civilian objects and intentionally attacked them or if they recklessly failed to have such information gathered. If good faith efforts are made to gather information but the available information is wrong, no criminal liability should be assigned. The American attack on an air raid shelter during the Gulf War would appear to have been a mistake, not a crime.[83]

Whether or not an attack would constitute a deliberate attack on civilians or civilian objects would be a question of fact. Civilian casualties, civilian property damage, and the absence of military objectives or of significant military objectives in the area attacked would be of prime importance.

Indiscriminate attacks are partially defined and absolutely prohibited in Protocol I Articles 51(4) and (5):

> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (a) those which are not directed at a specific military objective;

82. Protocol I, *supra* note 12, art. 57, 1125 U.N.T.S. at 29, 16 I.L.M. at 1416.

83. *See* Hampson, *supra* note 18, at 96-97.

> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
>
> 5. Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and
>
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[84]

There is no mention of indiscriminate attacks in Protocol II. Indiscriminate attacks which are tantamount to deliberate attacks may be charged as such. Assuming civilian casualties are caused, indiscriminate attacks within the meaning of Article 51(4) of Protocol I would probably always also constitute a deliberate attack on civilians. For example, German V1 and V2 missile attacks during the World War II and Iraqi Scud missile attacks during the Gulf War could be regarded as deliberate attacks on civilians even though a few of the missiles fell on military objectives. Whether or not an indiscriminate attack within the meaning of Article 51(5)(b) would also constitute a deliberate attack on the civilian population would depend on the results of the proportionality equation: Causing disproportionate collateral civilian casualties or damage could be regarded as equivalent to a direct attack.

Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited by both Art. 51(2) of Protocol I and Art. 13(2) of Protocol II. The dictionary defines terror as "extreme fear," but many lawful acts in armed conflict cause extreme fear. The prohibition must, therefore, refer to unlawful acts or unlawful threats of violence, the primary purpose of which is to spread extreme fear among the civilian population.

84. Protocol I, *supra* note 12, arts. 51(4)-(5), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

Threats to wipe out a city or to exterminate its population would be clear examples of prohibited threats. Whether or not unlawful acts do in fact spread terror among the civilian population can be determined by psychological evidence. Whether or not the primary purpose of unlawful acts is to spread terror can be inferred from the circumstances. For example, conducting cat-and-mouse sniping against the civilians of a besieged city whereby some civilians would be attacked on a random basis and all civilians would be in a constant state of extreme fear would appear to be an example of a deliberate attempt to spread terror.

Article 3(b) of the ICTY Statute prohibits "wanton destruction of cities, towns or villages or devastation not justified by military necessity."[85] It is derived from Article 6(b) of the Nuremberg Charter[86] and it does not appear to have been used in the past for charges involving attacks against the enemy. Bearing its origins in mind, it is debatable whether the offense is confined to international conflicts or also applies to internal conflicts. As protection of the same interests can be achieved by focusing on breaches of contemporary instruments such as the Additional Protocols, and as Protocol II does apply to internal conflicts, the utility of a charge based on this provision is debatable.

It is also practicable to prosecute certain attacks against the enemy as crimes against humanity contrary to Article 5 of the Statute. The Report of the Secretary General discussing the ICTY Statute states in part that "crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[87]

Although there is no precedent for crimes against humanity charges related to attacks against the enemy, there would not appear to be any conceptual barrier against using such charges in appropriate circumstances. The most appropriate charges would appear to be under Article 5(a) for attacks where death occurs and under Article 5(i) for other injuries including mental suffering.[88] It is essential to establish that the prohibited acts were committed as part of a widespread or systematic attack against a civilian population.

85. Tribunal Statute, *supra* note 46, at 37.

86. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *supra* note 34, at 826.

87. Tribunal Statute, *supra* note 46, at 13.

88. *See id.* at 38.

VIII. PROVING OFFENSES

The ICTY Statute adopts current customary law, particularly in Article 7 concerning individual criminal responsibility, which states in part:

> *Article 7*
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[89]

The category of "superior" includes military persons in a military chain of command; that is, military commanders. One soldier shooting with one bullet at one civilian constitutes a deliberate attack on civilians and is a punishable offense; but, if the soldier has been ordered to so act by a superior, the superior is also criminally responsible.

Although individual soldiers might be held liable for unlawful deliberate attacks, the offenses related to such attacks would appear to be oriented more towards a higher level decision. Although it is desirable to have direct evidence that an accused planned or decided upon an attack, it is possible to establish a case based on circumstantial evidence. For example, if an accused is a military commander responsible for the soldiers manning a particular part of a confrontation line and these soldiers engage in sustained and frequent unlawful attacks, it is a reasonable inference that they were ordered to do so by the commander. In the alternative, circumstantial evidence might be sufficient to establish knowledgeable acquiescence to such an extent that a commander might be held liable under the doctrine of command responsibility as set forth in Article 7(1) and Article (3) of the ICTY Statute. Bearing in mind the unprecedented number of knowledgeable intermediaries and interlopers such as peacekeepers and others present in or near the confrontation line and the extent of

89. *Id.* at 38-39.

world media coverage, it is reasonable to presume that it will be easier to establish that superiors knew of unlawful acts on the battlefield in the territory of the former Yugoslavia than elsewhere.

Except in the most simple of cases, a first step in conducting an investigation concerning unlawful attacks should be an attempt to develop a general overview of the military situation, including, if possible, an indication of the relevant information available or readily available to the potential accused. An individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question.[90] The overview should include topography, an indication of the forces and equipment available to each side, their objectives and constraints, the size of the area attacked, the number of civilians and the number and nature of civilian objects in the area. It should also include a brief review of the tactical doctrine of the opposing forces, such as whether they tended to rely on overwhelming firepower, or on mobility.

The tempo of military operations is a relevant factor in determining the legitimacy of particular attacks. If ground forces are engaged in wide ranging mobile operations in circumstances where decisions to attack must be made frequently and quickly and on the basis of very limited information, good faith errors can be made and no criminal liability should attach. Conversely, when armed forces are engaged in operations in a relatively static situation, such as a siege, or when there is relatively little fighting occurring, it is reasonable to assume that decision-makers are able to devote more time and effort to individual attack decisions. The duration and intensity of attacks is also relevant in determining culpability. Unfortunately, when attacks are massive and of substantial duration, it is often much more difficult to determine whether or not particular aspects of the attack are lawful. If a city is being assaulted, for example, so much may be happening that it is impossible to gather information concerning where projectiles are landing because of the numbers of shells and the physical danger involved in conducting an investigation. Similarly, it may be extremely difficult to conduct a useful investigation after the event because it is not practicable to determine precisely when and how particular incidents occurred. This problem is even more difficult to resolve when air operations are concerned: The bombing of Dresden in 1945 cannot be reconstructed on an air-

90. *See Hostages Trial*, *supra* note 36, at 69.

craft-by-aircraft or bomb-by-bomb basis. One must attempt to make a global assessment in such cases and focus on the total effect of an attack. An incident by incident analysis will only be practicable when there are a relatively limited number of incidents and when the necessary evidence can be gathered without placing the evidence gatherers in an excessively dangerous situation.

An assessment of the attacking force's knowledge of the area being attacked is also significant. If the attacking force has a detailed knowledge of the area because it has operated in the area for an extended period of time, or because it is located in positions which overlook the area, or because many of its soldiers come from the area, it is reasonable to presume it will have a better understanding of which objects are military objectives than an attacking force which has none of these advantages.

It is desirable to determine the weapons and tactics used by the attacking force. Every weapon system has a Circular Error Probable (or CEP). When a weapon system is targeted on a specific objective, 50 percent of the projectiles launched will land inside the CEP. Obviously, 50 percent will also land outside the CEP. If weapons systems with large CEPs are directed against military objectives in heavily populated areas, one might conclude that the real object of attack is the civilian population, not the military objective. On the other hand, if one uses weapons which can be precisely aimed, such as sniper rifles, or if the person controlling the weapon system can see the target, for example a machine gunner, it is reasonable to conclude that what is hit is what is aimed at: If snipers kill children, it is because they intend to do so. Proof that certain tactics have been used may establish or reinforce an assertion that an attack was deliberate. If, for example, mortar shells are fired from mortars in fixed emplacements aimed at certain specific areas, it is reasonable to conclude that the specific areas are intentionally hit. Proof of the use of cat-and-mouse tactics by snipers who allow some civilians to move about unmolested so that others may be caught off guard can establish that their attacks are both wilful and sadistic.

Generally speaking, before concluding that an attack at a specific location is lawful or unlawful, one should identify the legitimate military objectives in the vicinity of the attack and their importance, the numbers of civilians and the types of civilian objects in the vicinity of the attack, the ratio of military to civilian casualties, and the scale of damage to military and civilian objects. The number of projectiles used is also relevant. Mistakes do occur and, on occasion,

shells land in the wrong place. If two or more shells land in the same area, the probability of their having been aimed at the area increases substantially. In some circumstances it will be practicable to determine whether or not the attacking force incurred risks to limit the danger to civilians. Evidence of assumption of risk may mitigate or even eliminate criminal responsibility. Firing mortars or sniper rifles at civilians would not appear to involve a substantial assumption of risk.

The findings of the Trial Chamber in the Martic Rule 61 proceeding indicate how a court might assess evidence on this issue (the reader should, however, bear in mind that Rule 61 proceedings are uncontested):

> 28. As regards the attacks themselves, the testimony of Sergeant Curtis, a member of the Office of the Prosecutor, and of the two police officers from Zagreb shows that on the morning of 2 May 1995, three rockets struck the centre of the city of Zagreb while three others hit a site near the civilian airport. On 3 May 1995, during the lunch hour, two rockets again fell on the centre of the city and three others on nearby neighbourhoods. Seven people died in the two attacks, more than 100 were seriously wounded, and an equal number were slightly wounded. All the testimony corroborates the assertion that none of these people were, or could be presumed to have been, performing a military duty.
>
> 29. As the photographs and the video tape produced during the hearing show, there was significant physical damage which could have been much more serious. It appears both from the documents and the testimony heard that a high school, a children's hospital, a retirement home, and the National Academy were damaged. According to the witnesses, there were no military targets in the immediate vicinity. It is noted, however, that the administration building of the Ministry of the Interior was also allegedly hit during the attack of 2 May. In addition, the witnesses emphasised that there were no military targets near the places where the civilians were killed. All asserted that the number of deaths might have been much higher. The fact that there were few civilians in the streets of Zagreb during the second attack can be attributed to the climate of terror generated by the attack of the previous day. The frightened population chose to desert the streets during the lunch hour, which certainly reduced the number of casualties this type of shelling might have caused.
>
> 30. . . . The military expert believed that because they are inaccurate and have a low striking force, the choice of the Orkan rockets for the attack on Zagreb would not have been appropriate had the purpose been to damage military targets. In respect of this, the expert referred to a set of photographs which show minor damage to

> buildings in Zagreb during the attacks of May 1995. In this opinion, it is therefore reasonable to believe that attacking and terrorising the civilian population was the main reason for using such rockets. Finally, the expert stated that the rockets were launched from a region for using such rockets. Finally, the expert stated that the rockets were launched from a region less than 50 kilometres from Zagreb controlled by the armed forces of the self-proclaimed Republic of Serbian Krajina. The region presents the type of geophysical conditions which lend themselves to this type of operation.
>
> 31. Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that there are reasonable grounds for believing that on 2 and 3 May 1995, the civilian population of the city of Zagreb was attacked with Orkan rockets on orders from Milan Martic, the then president of the self-proclaimed Republic of Serbian Krajina.[91]

IX. A CAUTIONARY NOTE - THE BATTLE OF MANILA

The battle to recapture Manila from the Japanese in 1945 is a particularly painful example of an attempt to minimize civilian casualties that went wrong for reasons beyond the control of the attacking force. In order to recapture the Philippines, it was necessary for American forces to retake Manila. The Japanese commander ordered his troops to evacuate the city on the approach of American forces as he did not have sufficient forces to defend it nor did he have enough food to feed the civilian population. A subordinate disregarded the orders and directed his troops to fight to the death to defend the city. In the course of the battle, American forces surrounded the city and closed in towards its center. The Japanese would not surrender. Initially, American commanders imposed severe restrictions on the use of artillery but, as American casualties mounted, the restrictions were lifted. The American official history described the situation:

> The losses had manifestly been too heavy for the gains achieved. If the city were to be secured without the destruction of the 37th and the 1st Cavalry Divisions, no further effort could be made to save the buildings; everything holding up progress would be pounded, although artillery fire would not be directed against the structures such as churches and hospitals that were known to contain civilians.

91. *Martic, supra* note 74.

> Even this last restriction would not always be effective for often it could not be learned until too late that a specific building held civilians. The lifting of the restrictions on support fires would result in turning much of southern Manila into a shambles; but there was no help for that if the city were to be secured in a reasonable length of time and with reasonable losses.[92]

At one stage in the battle, concerned about mounting casualties, American commanders once again requested permission to use dive-bombing and napalm strikes against Japanese trapped in the Intramuros area of Manila. General MacArthur, the American commander, refused to lift the ban:

> The use of air attacks on a part of a city occupied by a friendly and allied population is unthinkable. The inaccuracy of this type of bombardment would result beyond question in the death of thousands of innocent civilians. It is not believed moreover that this would appreciably lower our own casualty rate although it would unquestionably hasten the conclusion of the operations. For this reason I do not approve the use of air bombardment on the Intramuros District.[93]

On some few occasions, the Japanese did release civilians who were welcomed into American lines.[94] Generally, the Japanese had ignored the presence of the civilians or used them as hostages. As the Japanese situation became more hopeless, they began to commit atrocities against the civilians. An estimated 16,000 Japanese soldiers died in the battle.[95] One thousand Americans were killed and another 5,000 were wounded.[96] Manila was devastated and the bodies of 100,000 Filipino civilians were found in the rubble, most of them killed in the exchange of fire between American and Japanese forces.[97] Six Filipino civilians were dead for every soldier who had been killed.

A review of the facts clearly indicates that American forces and their commanders did not conduct an indiscriminate attack causing excessive civilian casualties within the meaning of Protocol I. It was

92. R. SMITH, TRIUMPH IN THE PHILIPPINES 264 (1963).

93. *Id*. at 294.

94. *See id*. at 299.

95. *See id.* at 306-307.

96. *See id.*

97. *See id*. at 237-308.

impossible to predict the horrifying toll of civilian lives before the attack began. Indeed, the Japanese had been ordered to withdraw from the city, but the orders had been disregarded. Serious efforts were made to minimize civilian casualties and American lives were lost because of targeting restrictions. It is always possible to argue after the event that if American commanders had been prepared to take more risks with the lives of their troops, more Filipino lives would have been saved, but this argument ignores many of the realities of combat. Objectively speaking, excessive civilian casualties occurred during the battle for Manila, but it would be unrealistic and quite unfair to impute legal or even moral responsibility for this to the American commanders who directed the recapture of the city.

X. CONCLUSION

International humanitarian law is primarily designed as a body of preventive law. As such, it is intended to be incorporated in national military training and planning to reinforce and particularize individual morality and, when hostilities occur, to reduce net human suffering. International humanitarian law is a second-level barrier, used to contain violence once hostilities commence. The legal rules related to attacks on persons and objects must be drafted and interpreted in a manner which pays due heed to the grim admonition of Henry Stimson, the United States Secretary of War during World War II, that "the face of war is the face of death: death is an inevitable part of every order that a wartime leader gives."[98] Simultaneously, however, international humanitarian law is and must be more than a set of hortatory injunctions. The fact that prosecution is difficult does not mean that prosecution is impossible. It is possible to establish that some attacks are intended to terrorize the civilian population or are deliberate attacks on civilian persons or objects. It is more difficult but it is also possible to establish that some attacks are indiscriminate. Indeed, the relatively slow pace and low intensity of the ground fighting which has occurred in the territory of the former Yugoslavia since the beginning of 1991 should make it practicable to conduct thorough investigations concerning alleged unlawful attacks. One hopes and expects that the ICTY will then contribute to the development of international humanitarian law by issuing sound decisions which add specificity to the existing general rules.

98. Henry Stimson, *The Decision to Use the Atomic Bomb*, HARPER'S MAGAZINE, Feb. 1947, at 99, 106-07.