THE CUSTOMARY ORIGINS AND ELEMENTS OF SELECT CONDUCT OF HOSTILITIES CHARGES BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*: A POTENTIAL MODEL FOR USE BY MILITARY COMMISSIONS

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I. Introduction

On 13 November 2001, in response to continuing military developments regarding the war against terrorism, the President of the United States—in his capacity as Commander in Chief of the Armed Forces—issued a military order concerning the "Detention, Treatment,

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* In accordance with the International Criminal Tribunal for the Former Yugoslavia (ICTY) Administrative Instruction AI/2001/05 (2001), the authors are required to note that the views expressed in this article are those of the authors alone, and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

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and Trial of Certain Non-Citizens in the War Against Terrorism."[3] This order established the necessary findings, policy basis, and jurisdiction to constitute military commissions, with the mandate of bringing to trial members or supporters of the Al Qaeda organization for "violations of the laws of war and other applicable laws by military tribunals."[4] The President's Military Order did not define the phrase "law of war," nor did it identify such acts that might qualify as "violations."

The ensuing legislative committee hearings and associated discussion immediately following the issuing of this order focused primarily on issues concerning procedure and due process.[5] The hearings elucidated no additional information concerning specific criminal acts subject to trial by military commission. Nor did Military Commission Order Number One (DOD MCI No. 1), issued by the Secretary of Defense, address this point.[6] While the Secretary's orders addressed a number of procedural concerns, the underlying issue of what the United States considered an actual criminal offense within the context of the law of war remained an open question. Over a year later, the Department of Defense published Military Commission Instruction Number Two (MCI No. 2), listing a series of acts that constituted offenses under the law of armed conflict (LOW).[7] Included among these are the specific offenses of "attacking civilians" and "attacking civilian objects".[8]

This article argues that the historical policy and practice of the U.S. government regarding the law of war pertaining to the "conduct of hostilities"—coupled with consistent jurisprudence developed over the past eleven years by the International Criminal Tribunal for the former

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[3] Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001) [hereinafter Military Order of 13 November 2001].

[4] *Id.* § 1(e).

[5] *See generally* Open Session Testimony Before the U.S. Senate Armed Services Committee, Military Commissions (Dec. 13, 2001), *available at* http://armed – services.senate.gov/hearings.htm#dec01) and the U.S. Senate Committee on the Judiciary (*Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, Dec. 4, and Dec. 6, 2001, *available at* http:// judiciary.senate.gov/) (providing additional comments by Sen. Leahy on the Senate floor on 14 December 2001 (congressional Record 107-1 at S.13276-S.13280).

[6] U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter DOD MCI No. 1].

[7] U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2 (30 Apr. 2003), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter MCI No. 2].

[8] *Id.* para. 6A & 6B.

Yugoslavia (ICTY)—establishes a solid legal foundation in customary international law for these offenses to be tried by military commission.

II. Overview

The first part of this article will examine U.S. doctrine on the law of war, including recognition and application of customary law of war under domestic statute, policy, doctrine, and declarative statements. In their totality, these bases form a foundation for what the U.S. government historically acknowledges as customary law with respect to military attacks involving civilians and civilian objects. The second part of this article will detail the chronology of ICTY conduct-of-hostilities cases and the customary basis for such charges under the law of armed conflict. The article examines the customary foundations of ICTY charges dealing with unlawful attacks on civilians and civilian objects in order to explore how these same foundations might form the basis for the similar offenses listed in MCI No. 2.[9] The third part of this article will examine the propriety of using the principles articulated in the 1977 Protocol One Additional (Protocol I) to the 1949 Geneva Conventions as a legal basis for charges before a military commission. Ultimately, the analysis of these three areas should demonstrate that customary international law, to include ICTY jurisprudence, provides the required legal foundation to bring these charges against an accused individual before any U.S. military commission.

III. Part 1: The Law of War as Recognized by the United States

On 30 April 2003, the Department of Defense (DOD) General Counsel addressed the United States' view of the existing law of war in a series of Military Commission Instructions issued for the primary purpose of detailing many of the technical aspects of the conduct of future military commissions. Military Commission Instruction No. 2 enumerates a series of crimes and elements under the heading of "Substantive Offenses."[10] Those identified as war crimes include a number of offenses relating to the means and methods by which parties to a conflict conduct hostilities. These include the offenses of "attacking

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[9] *Id.*
[10] *Id.*

civilians" and "attacking civilian objects,"[11] both of which clearly apply to the attacks of September 11, 2001, in New York City.[12]

Less clear is the technical applicability of these offenses before a military commission. As reflected in MCI No. 2, there are limits to the offenses that may be tried before a constituted military commission:

> No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict, or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.[13]

This raises a question as to what standards, norms, principles, or instruments the international community generally recognized as declarative of existing law with respect to conduct-of-hostilities issues in general, and specifically to the above-noted offenses. A further question asks how much of this existing law the international community and the United States also recognized, either by treaty ratification or as custom, at the time of the offense. The latter answer is not immediately clear, as the United States declined to ratify a number of modern conduct-of-hostilities treaties proscribing such acts as grave breaches or criminal offenses.[14]

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[11] *Id.* para. 6(A)(2) (Attacking Civilians); para. 6(A)(3) (Attacking Civilian Objects).

[12] *See* discussion *infra* Part III (Section V B) for comments pertaining to offenses that may apply to the attack on the Pentagon.

[13] MCI No. 2, *supra* note 7, para. 3A.

[14] The United States signed Protocol Additional (Protocol I) to the 1949 Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I]. On 29 January 1987, the President of the United States notified the U.S. Senate that he would not forward Protocol I to the Senate for ratification. *See Letter of Transmittal, President Ronald W. Reagan, to the Senate of the United States*, 23 WKLY. COMP. PRES. DOC. 91 (Jan. 29, 1987) [hereinafter *Letter of Transmittal*]. President Reagan did forward Protocol Additional II to the 1949 Geneva Conventions (pertaining to internal armed conflict) to the U.S. Senate on 29 January 1987 (Treaty Action 100-2) Protocol Additional II to the 1949 Geneva Conventions of 12 Aug. 1949, and Relating to the

A. Conventional (Treaty) Law

The United States has long been a state party to the 1907 Hague Conventions in their entirety, to include Annex IV (Respecting the Laws and Customs of War on Land).[15] The international community broadly considers the Annex governing the protection of civilians from the effects of hostilities between belligerents to be customary international law with respect to land warfare.[16] The 1907 Convention, however, is largely admonitory in nature, and punitive provisions for violations of civilian protections by state belligerents during the conduct of hostilities are developments that are more recent in treaty law. While the 1949 Geneva Conventions contain some punitive terms, notably the grave-breach regime, the relevant provisions prohibiting the extensive destruction or appropriation of property not justified by military necessity, apply only to the actions of an occupying power against a civilian population.[17] The grave-breach provisions of the 1977 Protocol I to the 1949 Geneva Conventions (Protocol I) articulated the first explicitly punitive provisions potentially applicable to the offenses at issue.[18] The United States is not a party to Protocol I, having decided in

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Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3, at 609 [hereinafter Protocol II]. This Protocol II Treaty has not come to a floor vote, and presently remains in the Committee for Foreign Relations. More recently, on 31 December 2001, the United States signed the Rome Treaty establishing the International Criminal Court. Subsequently, on 6 May 2002, the United States stated its intent to withdraw its signature from the treaty. *See* Letter from Under Secretary of State for Arms Control and International Security John R. Bolton, to UN Secretary General Kofi Annan (May 6, 2002). Press Release, U.S. Dep't of State, Int'l Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm [hereinafter Press Release, International Criminal Court].

[15] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277; T.S. 539 and Annex IV, sec. II, ch. 1 (Means of Injuring the Enemy, Sieges, and Bombardments (arts. 22-28) (ratified by the United States on 27 Nov. 1909, entered into force on 26 Jan. 1910). *See* U.S. Department of State, *A List of Treaties and Other International Agreements of the United in Force on January 1, 2000*, at 455-456, *available at* http://www.state.gov/www/global/legal_affairs/.

[16] MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 545-46 (2002).

[17] *See* ICRC Commentary to Article 147 of the Fourth Geneva Convention 601; *see also* Prosecutor v. Duško Tadic, No IT-94-1, para. 81 (Oct. 2, 1995) (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction).

[18] Protocol I, *supra* note 14. Article 85 covers the grave breaches regime, to include (85)(3)(a), which prohibits making the civilian population or individual civilians the object of attack. *Id.* art. 85.

1987 to forgo ratification.[19] More recently, the United States formally withdrew its signature and support for the Rome Treaty process that established the International Criminal Court (ICC), where such punitive provisions are again organic to the treaty.[20] Thus, although the crimes and elements set forth in MCI No. 2 are virtually identical to those in Article 8 of the ICC Statute, the latter cannot be the legal basis for charges before a U.S. military commission.[21] As the United States is not party to any relevant punitive treaty, a clearly recognized basis in customary law must exist if these offenses are to be tenable before a military commission.

B. Customary Law as Recognized by the United States

1. Domestic Case Law

The courts of the United States have long recognized the binding legal authority of customary international law. In the *Paquette Habana* case, the Supreme Court held that it was bound to follow "an established rule of international law," where that rule was founded on "the general consent of the civilized nations of the world, and independently of any express treaty or other public act."[22]

Civil law contains the few substantive references to U.S. legal doctrine regarding the customary law of armed conflict in domestic jurisprudence, in cases pertaining to the application of the Alien Tort Claims Act and the Torture Victim Protection Act by victims or their representatives against former foreign military officers now residing in the United States.[23] These decisions do not address offenses related to

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[19] *See Letter of Transmittal*, *supra* note 14.

[20] *See* Press Release International Criminal Court, *supra* note 14.

[21] *Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10, Official Records* (ICC-ASP/1/3) (Sept. 2002) [hereinafter *Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10, Official Records*]. Article 8(2)(b)(i) (war crime of attacking civilians (in international armed conflict)); art. 8(2)(e)(i) (war crime of attacking civilians (in internal armed conflict)); and art. 8(2)(b)(ii) (war crime of attacking civilian objects).

[22] The Paquette Habana, 175 U.S. 677, at 708 (1900).

[23] Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), as derived from the Judiciary Act of 1789, and the associated Torture Victim Protection Act (TVPA) of 1991, Pub. L. 102-256, 106 Stat. 73 (as codified in 28 U.S.C. § 1350).

the customary law of armed conflict because the text of the statutes themselves set forth explicitly the relevant offenses.[24]

No established jurisprudence exists within the context of criminal law. Offenses enumerated under the 1997 Expanded War Crimes Act[25] apply strictly on a treaty or convention basis, and no court has ever adjudicated crimes under this provision. The handful of other references and rulings in federal case law relating to this subject pertain exclusively to jurisdiction and other procedural issues.[26] No federal court has addressed the substantive issue of which offenses might constitute customarily recognized violations of the law of armed conflict.

2. Federal Statutes

As noted previously, the 1997 Expanded War Crimes Act offers no utility in this regard, as offenses enumerated therein are restricted to violations of treaties or conventions to which the United States is a party.[27] Another potential source of federal statutory clarification, the Uniform Code of Military Justice (UCMJ),[28] is similarly unhelpful in defining applicable offenses. The UCMJ establishes jurisdiction to try violations of the law of war; however, it neither articulates a definition of the law of war nor specifies the acts or offenses that prosecutors may charge as violations under such law.[29]

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[24] 28 U.S.C. § 1350. There is no requirement under the TVPA for a legal nexus between the commission of the acts and a state of armed conflict; rather, such acts need only have been committed by "an individual under actual or apparent authority, or under the color of law or any foreign nation". *See* Pub. L. No. 102-256, § 2(a), 106 Stat. 73.

[25] 18 U.S.C. § 2441.

[26] *See, e.g.*, U.S. v. Buck, 690 F. Supp. 1291 (S.D.N.Y. 1988) (holding that the Geneva Conventions and Additional Protocol I were not applicable to the defendant's claim of Prisoner of War status).

[27] 18 U.S.C. § 2441. Under this federal statute, *Expanded War Crimes Act of 1997*, Congress enumerates specific treaty-associated violations of the law of war. There are three definitions of a war crime, which could potentially apply: (1) a grave breach of the 1949 Geneva Conventions or of any protocol thereto to which U.S. is a party; (2) a violation of Articles 23, 25, 27, or 28 of the 1907 Hague Convention IV; and (3) a violation of Geneva Convention-Common Article 3. Notably absent from this statute is any clause which at face value could imply an applicability to a broader body of the customarily recognized laws of war. *See* 18 U.S.C. § 2441, (c) (Definitions).

[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM].

[29] 10 U.S. C. § 818 (2000).

3. Federal Executive Actions

Despite the lack of relevant federal jurisprudence or statutes, several declarative statements issued by the Executive Branch provide significant guidance to what concepts the U.S. government considers customary over the past thirty years with respect to conduct-of-hostilities issues. While these statements have no technical legal significance, they are noteworthy to the extent that they represent the *opinio juris* of the Commander-in-Chief of the Armed Forces concerning customary law of armed conflict obligations. Moreover, current military doctrine and practice incorporates a number of these acts and statements, further solidifying their standing as custom recognized by the United States.[30]

C. United States Doctrine Regarding the Customary Law of War

1. Background

The law of armed conflict is generally defined as the part of international humanitarian law that exists in convention or custom to safeguard innocent life, ameliorate suffering, and preserve basic human dignity during a state of armed conflict.[31] The law of armed conflict is further divided into two complimentary sets of laws; one governing the legitimacy of the use of force (*jus ad bellum*),[32] and another intended to regulate the means and methods of warfare[33] and to protect civilians and

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[30] For example, the U.S. Army amended *Field Manual (FM) 27-10* to reflect language from Article 51 of Protocol I one year before the opening for signature of the Additional Protocols. Although the United States has not elected to ratify Protocol I, this language remains operative in *FM 27-10*. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF WAR (18 July 1956) (C1, dated 15 July 1976) [hereinafter FM 27-10].

[31] Unlike the broader protections inherent in international humanitarian law (hereinafter IHL), the safeguards inherent in the law of armed conflict apply only during a recognized state of armed conflict. The protections of most other bodies of international humanitarian law are not dependent upon this requirement—for example, the protections and prohibitions found within the United Nations Convention Against Torture and other Cruel, Degrading or Inhumane Treatment or Punishment (1469 U.N.T.S. 85) apply at all times.

[32] Robert Korb, *Origin of the twin terms jus ad bellum/jus in bello*, 320 INT'L REV. RED CROSS 553-62 (1997).

[33] This body of law is generally referred to as the "law of the Hague" or the "Hague Regulations." *International Law Concerning the Conduct of Hostilities* 8, ICRC PUB. 0467/002 (Aug. 1997).

combatants rendered *hors de combat* (out of combat) (*jus in bello*).[34] Beyond this abstract consensus concerning the existence of conventional and customary practices and prohibitions, however, there is often a significant difference of opinion or practice among states concerning the scope and range of applicability of many such provisions, particularly those associated with customary law.

In large part, this is due to the recognition that customary law is considered binding upon the actions of all states that are parties to an armed conflict, without regard to whether that state is a historical party to the specific treaty or agreement proscribing such practices or conduct.[35] Further, compliance does not hinge on the concept of *jus ad bellum* and may not be set aside by a party based on the changing fortunes of war; rather, customary law of war applies regardless of any perceived military or strategic disadvantage incurred.[36] As such, acts or practices considered contrary to custom may not be lawfully employed by belligerents, regardless of how they may favorably impact specific war aim—even by a State or government that is the victim of aggression or on the brink of military defeat.[37] More pragmatically, the law of armed

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[34] This body of law encompasses the general protections inherent in the Geneva Conventions of 1949. *See Preliminary Remarks to The Geneva Conventions of 1949* 2, ICRC PUB. 0173/002 (Mar. 1995). *Hors de combat* meaning, "out of action and often seriously wounded" (from French, literally, "out of the fight"). MSN Encara, *Dictionary*, *at* http://encarta.msn.com/dictionary_1861618777/hors_de_combat.html.

[35] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, Introduction (1986).

[36] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 615, para. 1927 (ICRC ed. 1987). The commentary states as follows:

> [I]t seems clear that the right of self-defense does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 in all circumstances; the Preamble of the Protocol reaffirms that their application must be without any adverse distinction based on the nature or origin of the armed conflict or in the causes espoused by or attributed to the Parties of the conflict.

Id.; *see also* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 15-19 (2d ed. 2000).

[37] In addressing this concept after World War II, one American military tribunal reflected the following:

conflict also reflects a post-World War II practice that achieved customary status: the international community can hold individuals, to include heads of state who commit violations of the law of war, criminally accountable for such transgressions.[38] Predictably, given the potentially grave repercussions that violations of customary law can have on a State and its leadership, declarative statements pertaining to custom are infrequent and tend to vary based upon a multitude of internal or external political, diplomatic, and security factors affecting a State at any given time.

2. Definition of the Law of War

An issue of primary significance is the definition of the law of war as recognized by the United States. The UCMJ, various DOD directives, and U.S. Army *Field Manual 27-10*, provide a framework for the current U.S. understanding of the law of war as defined in legal and military doctrine.

> It is an essence of war that one or the other side must lose and that experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The Krupp Trial, 10 LRTWC 139 (1949), *as cited in* A.R. Thomas & James C. Duncan (eds.), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 NAVAL WAR COLL. 293 (1999).

[38] The International Military Tribunal at Nürenberg concluded that the absence of treaty provisions on punishment of breaches does not bar a finding of individual criminal responsibility. *See* THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NÜRENBERG GERMANY pt. 22, at 445-47, 467 (1950). An ICTY appeals chamber's jurisdictional decision further amplifies this rationale concerning the applicability of individual criminal responsibility for violations of the law of war in internal armed conflict. *See* Prosecutor v. Duško Tadic, No IT-94-1, paras. 128-129 (Oct. 2, 1995) (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction).

a. Uniform Code of Military Justice

Article 18 of the UCMJ establishes jurisdiction for violations of the law of war to be prosecuted at general courts-martial.[39] While the UCMJ confers jurisdiction over this class of offenses, however, it neither defines the law of war nor specifically enumerates those offenses that qualify as violations.[40] The Manual for Courts-Martial is similarly devoid of any discussion on the definitional issue.[41]

b. U.S. DOD Directive 5100.77

United States DOD Directive (DOD Dir.) 5100.77 is the foundation for the DOD Law of War Program.[42] This directive outlines existing DOD policy as to the law of war obligations of the United States.[43] The directive defines the law of war as follows:

> Law of War: That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.[44]

By this definition, the DOD endorses the common view of the international community that the body of the law of armed conflict is comprised of two separate but related components: namely, treaty-based law and customary law.

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[39] 10 U.S.C. § 818 (2000) (stating that a general court-martial has the jurisdiction to "try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war").
[40] *See* 18 U.S.C. § 2441(c) (Definitions).
[41] *See* MCM, *supra* note 28, R.C.M. 201(f)(1)(B)(i)(a), 202(B), and app. 21, at 20-21 (R.C.M. 307(c)) (discussing the jurisdiction and offenses, however, the *MCM* does not provide definitions of specific offenses).
[42] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998).
[43] *Id.* para. 1.1.
[44] *Id.* para. 3.1.

c U.S. Army Field Manual 27-10*, Law of Land Warfare*

United States Army *FM 27-10* sets forth the U.S. Army's official understanding as to the customary and treaty law applicable to the conduct of warfare on land.[45] The first chapter of the manual details the sources of the law of war, explaining that the following two principle sources compose the law of war: lawmaking treaties or conventions, and custom. In affirming the legitimacy of customary law, *FM 27-10* notes:

> Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.[46]

Commenting on the broad and varied origins of customary law, *FM 27-10* reflects that such custom "arises from the general consent of States, judicial decisions, diplomatic correspondence, writings of jurists and other documentary material concerning the practice of States."[47] Significantly, the U.S. Army asserts in this publication that its provisions have "evidentiary value" in establishing the custom and practice of the United States with respect to the law of war.[48]

Field Manual 27-10 is also clear as to the binding nature of the body of the customary law of war, providing,

> The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions

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[45] FM 27-10, *supra* note 30, ch. 1, para. 1.
[46] *Id.* para. 4b.
[47] *Id.* para. 6 (Custom).
[48] *Id.* para. 1, stating,

> This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes not the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

Id.

> as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy . . . . The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country.[49]

Like *DOD Dir. 5100.77*, this Army doctrinal authority clarifies the law of armed conflict with respect to both its basis in convention and custom, and its binding nature. It does not further clarify the term "custom of nations," except to note that such unwritten law is well defined by authorities in international law.[50]

3. Ratified Treaty or Convention as a Basis for Customarily Recognized LOAC: The 1907 Hague Convention (IV) and the 1949 Geneva Conventions

It is well established that the basis for the customary law of armed conflict is in part on treaty and on convention that endures as a broader practice over time.[51] Moreover, the various state parties ultimately bound by such custom do not dispute this theoretical concept. The potential ramifications of customary law of armed conflict, however, on issues pertaining to a state's defense policy or security requirements can be quite broad. Thus, it is often difficult in the practical application sense to achieve a consensus on custom by the broader international community.

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[49] *Id.* para. 7c (Force of Customary Law).

[50] *Id.* para. 4b.

[51] *See* E. KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 29-42 (1992) (providing a functional and concise explanation of this subject), citing (among others) such noted commentators on international customary law as Theodor Meron, Professor of International Law at New York University and current President of the International Criminal Tribunal for the Former Yugoslavia and Rwanda; Antonio D'Amato, Professor of International Law at Northwestern University, and author of *International Law* (1987); and Arthur M. Weisburd, Professor of International Law at the University of North Carolina.

Such a consensus is further complicated by the existence of two different standards—one applying to international armed conflicts, and another for armed conflicts of an internal character. The separate standard for internal armed conflicts reflect customary views concerning issues of state sovereignty, non-interference in another states legitimate internal security affairs,[52] and the concern over perceptions of providing international legitimacy to purely internal violence or terrorism that would be considered criminal conduct under the domestic laws of the affected jurisdiction.[53]

Further complicating this issue is the increasingly broad challenge raised by human rights advocates and non-governmental organizations (NGOs) over the lower standard of protection available to civilians affected by non-international armed conflict. These human rights advocates and NGOs enjoy a growing role in the development of the law of armed conflict.[54] As these advocates and organizations are primarily engaged with humanitarian objectives, and operate with an agenda not influenced by traditional state-party concerns of defense, security, and legitimate war objectives, their interpretations of the customary law of armed conflict naturally tend to address the protection of non-combatants vice the rights of belligerent parties to conduct legitimate warfare.[55]

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[52] UN Charter art. 2(4), (7). *See also* Protocol II, *supra* note 14, art. 3, at 610.

[53] A number of nations who are not parties to Protocol I, including the United States, cite the provisions of Article 1, paragraph 4 as a key reason for their rejection of the treaty. *Id.* art. 1, para. 4. This paragraph, in part, extends the privileges normally afforded to state belligerents to individuals or organizations "fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." *See Letter of Transmittal*, *supra* note 14.

[54] While development of the law of armed conflict remains the province of state parties, several NGOs are exerting a growing influence in the broader realm of IHL and its impact on law of armed conflict issues. These include such organizations as Medecins Sans Frontieres, Human Rights Watch, and Amnesty International. As a reflection of this growing influence, approximately 300 NGOs had observer status at the Rome Treaty preparatory conferences, and many of these actively sought to influence the development of the ICC Statute. *See* M. CHERIF BASSIOUNI, THE STATUTE OF THE ICC, A DOCUMENTARY HISTORY 25-26, 108-109 (1998).

[55] For example, by mid-1998, a growing body of expert opinion asserted that the Fourth Geneva Convention could have a universal applicability for the protection of civilian populations in armed conflicts, to include conflicts of a non-international character and those not involving occupied territories. *See* Chairman's Report, Expert Meeting on the Fourth Geneva Convention, Oct. 27-29, 1998, *as reprinted in* MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 861-65 (ICRC 1999).

Still, in spite of often-competing interests among states, there have been occasions since the end of World War II where the international community achieved a considerable degree of consensus on core customary principles, to which nations must adhere, at least with respect to international armed conflict. One of the more significant and recent instances occurred on 22 February 1993, when the U.N. Security Council (UNSC) established the ICTY.[56] As part of the framework of the Tribunal's statute, the UN Secretary General outlined the baseline of customary law of war, recognized as of 1991, and he reaffirmed that individual criminal charges could be raised against individuals who committed serious violations of these customs.[57] As stated in his report to the Security Council:

> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodies in: the Geneva Conventions of 12 August 1949 for the protection of War Victims; . . . the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; . . . the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948; . . . and the Charter of the International Military Tribunal of 08 August 1945.[58]

Approved and adopted by the UNSC as Resolution 827 (25 May 1993), this resolution provided an authoritative definition with respect to both acknowledged custom and individual criminal liability for violations of the law of armed conflict.[59]

Given the United States' status as a permanent member of the Security Council, as well as its significant role in developing UNSC Resolutions 808 and 827, the adoption of this resolution arguably reflects the view of the United States government on the customary law of armed

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[56] U.N. SCOR 808, 3175th mtg., para. 1, S/RES/808 (1993).

[57] *See Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*, adopted on February 22, 1993 (S/25704) (May 3, 1993) [hereinafter *Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*].

[58] *Id.* para. 35.

[59] U.N. SCOR 827, 3217th mtg., S/RES/827 (1993).

conflict.[60] Beyond this declaratory basis, the United States moved to criminalize violations of certain articles of the 1907 Hague Conventions, the 1949 Geneva Conventions, and the 1949 Genocide Convention under federal statutes.[61]

4. Non-ratified Treaty or Convention as a Basis for Customarily Recognized LOAC: 1977 Protocol I to the 1949 Geneva Conventions

Beyond this baseline, the customary status of other relevant instruments is less clear. This is particularly true with respect to Protocol I, to which the United States is not a state party. Despite some of the more controversial innovations inherent in this treaty,[62] however, over 150 states have now ratified it.[63] Further, the United States and others now recognize much of Protocol I—particularly those Articles pertaining to protection of the civilian population from the conduct of hostilities—as a codification of established customary law principles pertaining to international armed conflict.[64]

Although the United States has not ratified Protocol I and thus is not a state party, it has long recognized a number of Protocol I provisions as customary.[65] A public history developed over the past twenty-five years establishes that the U.S. considers a number of specific provisions of

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[60] For instance, on 17 July 1995, the U.S. government filed a submission before the ICTY in the case of the *Prosecutor v. Duško Tadic*, offering its views on the Statute of the Tribunal on the basis of "its special interest and knowledge as a Permanent Member of the Security Council and its substantial involvement in the adoption of the Statute of the Tribunal." *See* Prosecutor v. Duško Tadic, 94-1-T, at D 4369 (17 July 1995) (containing submission of the Government of the United States of America Concerning Certain Arguments made by Counsel for the Accused in the Case of *Prosecutor v. Duško Tadic* (17 July 1995)).

[61] 18 U.S.C. § 2441 (War Crimes (as amended 1997)); *id.* §§ 1091-93 (1994) (Genocide).

[62] ROBERTS & GUELFF (EDS.), DOCUMENTS ON THE LAWS OF WAR 387-89 (2d ed. rev. 1995).

[63] At the time of writing, 156 States were parties to Protocol I. *See* International Committee for the Red Cross IHL treaties, *available at* http://www.ICRC.org/ihl.nsf (last visited Apr. 26, 2004).

[64] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42, para. 17-19 (Nov. 22, 2002) (Decision on Interlocutory Appeal, ICTY Appeals Chamber). *See* discussion *infra* Part II.

[65] Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. UNIV. J. INT'L L. & POL'Y 415 (Fall 1987).

Protocol I to reflect principles of the customary law or war, as a matter of both policy and doctrinal practice.[66] These select provisions include several specific Protocol I articles and general principles related to the protections of the civilian population from the conduct of hostilities.[67] With regard to U.S. doctrinal practice, the U.S. Army incorporated a number of provisions of Protocol I into *FM 27-10* in 1976, and they remain operative, despite U.S. non-ascension to the protocol.[68] Select DOD public reports to Congress noting the customary recognition and practice of these principles by U.S. military forces further address a number of these provisions.

This historical record, examined further below, is of significant value with respect to the referenced MCI No. 2 offenses of "attacking civilians" and "attacking civilian objects," for two reasons. The first deals with the treaty-negotiation process for the Rome Statute of the ICC. Although not a party to this treaty, the United States was significantly involved in the development of the statute.[69] As noted previously, the MCI No. 2 offenses are virtually identical to the offenses enumerated in Article 8 of the Rome Statute.

Second, ICTY jurisprudence relies heavily on these select articles of Protocol I as a "modern reference or re-formulation" to established customary law principles concerning the protection of a civilian population during the conduct of hostilities.[70] As both the ICTY and the proposed U.S. military commissions rely on the customary origins of these offenses, any acknowledgement by the United States of the customary status of the underlying Protocol I Articles is a useful predicate to applying ICTY jurisprudence before a military commission.

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[66] *Id.*

[67] Protocol I, *supra* note 14, at. 48-60.

[68] *See generally* FM 27-10, *supra* note 30.

[69] OTTO TRIFFTERER (ED.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT-OBSERVERS' NOTES, ARTICLE BY ARTICLE 186-7 (Nomos, Baden-Baden 1999) (comments by William J. Fenrick). *See also* KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY 132-3 (Cambridge Univ. Press 2002).

[70] Prosecutor v. Pavle Strugar, Miodrag Jokic No. IT-01-42-PT (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction) (discussed in detail in pt. 2).

5. Declarative Statements Concerning the Conduct-of-Hostilities Articles of Protocol

The U.S. government's recognition of customary status of relevant portions of Protocol I first manifested itself in 1976, one year before the opening of the protocols for signature. In this instance, the U.S. Army revised the text of the 1958 *FM 27-10* to incorporate language from Article 51 of Protocol I. The revised manual stated, "[c]ustomary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such."[71] This language derived directly from Article 51(2).[72] The Army also updated *FM 27-10* to reflect, in part, the principles of distinction and proportionality in the engagement of military objects, derived from Article 51(5) b.[73] United States Air Force *Pamphlet 110-31* makes similar restatements of Protocol I Article 51(2) and (5).[74]

> An internal DOD memorandum dated 9 May 1986, provides further clarification as to the official understanding of the United States regarding the customary status of various provisions of Protocols I and II during that time. In pertinent part, this memorandum—signed by several high-ranking DOD officials including W. Hays Parks[75] and then-Lieutenant Commander Michael F. Lohr[76]—affirms the view of the United States that Articles 51(2) and 52(1), (2) (except for the reference to reprisals), and (4), of Protocol I; constitute customary international law.[77]
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> Over a decade after the opening of the Additional Protocols for signature, the President of the United States definitively determined

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[71] FM 27-10, *supra* note 30 (reflecting the specific change in question related to para. 40c).

[72] *See* Protocol I, *supra* note 14, art. 51 (2).

[73] FM 27-10, *supra* note 30 (reflecting the specific change in question related to para. 41).

[74] U.S. AIR FORCE, PAM. 110-31, INTERNATIONAL LAW ch. 14 (19 Nov. 1976).

[75] W Hays Parks is currently the Associate Deputy General Counsel, International Affairs Office of the General Counsel, Department of Defense, *see* Convention on Certain Conventional Weapons, *Statement on Explosive Remnants of War* (Mar. 10, 2003), *at* http://www.ccwtreaty.com/031003Hayes.htm.

[76] Currently Rear Admiral and the Judge Advocate General of the Navy. United States Navy, *Judge Advocate General's Corps*, *at* http://www.jag.navy.mil.

[77] Memorandum, Department of Defense (unclassified), subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

> that notwithstanding the signature by the United States in 1977, ratification of Protocol I in its entirety was not in the U.S. national interest.[78] The executive branch, however, explicitly recognized that despite the decision not to forward Protocol I for Senate ratification, the international community already established a number of provisions of that protocol as principles of the customary law of armed conflict. Specifically, the December 1986 Letter of Submittal from the U.S. State Department stated, "We recognize that certain provisions of Protocol I reflect customary international law, and others appear to be positive new developments."[79] Similarly, the Letter of Transmittal from then-President Ronald W. Reagan in January of 1987, commended portions of Protocol I as "sound" and "meritorious."[80] These letters further pledged that the U.S. government would, in conjunction with its allies, develop appropriate methods to incorporate the positive provisions into the rules that govern "our military operation and as customary international law."[81]

In 1987, senior officials of the U.S. State Department addressed the Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law detailed the United States' position on the existing state of customary law.[82] With respect to Articles 51 and 52 of Protocol I, the Deputy Legal Advisor of the State Department noted:

> We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence, the primary purpose of which is to spread terror among them, and that attacks not be carried out that would result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in Article 51.
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> We also support the principle that the civilian population not be used to shield military objectives or operations

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[78] *See* Letter of Submittal, U.S. Department of State, to The President (Dec. 13, 1986) [hereinafter DOS Letter of Submittal]; *see also Letter of Transmittal*, *supra* note 14.
[79] DOS Letter of Submittal, *supra* note 78.
[80] *Letter of Transmittal*, *supra* note 14.
[81] *Id*.
[82] Matheson, *supra* note 65, at 426.

> from attack, and that immunity may not be extended to civilians who are taking part in hostilities. This corresponds to provisions in Articles 51 and 52 of Protocol I. On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles . . . and do not consider it a part of customary law.[83]

Five years later, in April 1992, the U.S. DOD reported to Congress on a number of legal issues related to the U.S.-led military operations to liberate Kuwait from Iraqi occupation. In this report, the DOD clarified the U.S. position on the customary status of select articles of Protocol I. The report noted that Articles 48 and 49 of Protocol I were "generally regarded as a customary codification of the practice of nations, and therefore binding on all".[84] It further acknowledged the obligation of coalition forces to "exercise reasonable precautions to minimize collateral injury to the civilian population or damage to civilian objects," despite actions on the part of Iraq to use civilians to shield military objects.[85] Finally, the DOD noted its view that the language of Protocol I Article 52 (3) did not constitute a codification of the customary practice of nations.[86]

In 1999, the U.S. Senate considered the status of customary law of armed conflict concerning the general protection of civilians from the conduct of hostilities, and addressed specific provisions of Article 51 of Protocol I. As part of the Senate ratification of Amended Protocol II of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons the Senate explored, which may be

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[83] *Id.*

[84] *See* U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 614 (Apr. 1992) (noting that with respect to Article 49, the DOD's use of the English word "attacks" as reflecting the obligations of both the attacker and defender, as consistent with the other official languages of the Protocol I) [hereinafter DOD REPORT, Apr. 1992].

[85] *Id.* at 614-15.

[86] *Id.* at 616. Protocol I, Art. 52(3), provides that "in case of doubt as to whether or not an object which is normally dedicated to civilian purposes . . . is being used a make an effective contribution to military action, it shall be presumed to not be so used." Additional Protocol I, *supra* note 14, art. 52(3). The DOD argued this shifted the burden from the party with possession or control of the facility, and had the ability to identify it as non-military in nature, to the non-possessing party, which may not have a detailed picture as to the use, or presumed use of the structure in question. *See* DOD REPORT, Apr. 1992, *supra* note 84, at 616.

deemed Excessively Injurious or to have Indiscriminate Effects (CCW Treaty).[87] The analysis of Amended Protocol II (which accompanies both the committee report and the ratification resolution) addresses the customary law of armed conflict governing the protection of civilians in two specific instances, both pertaining to the use of mines, booby-traps and other devices. Referencing Paragraph 7 of Article 3, the report and resolution state as follows:

> Paragraph 7 codifies within [the CCW Treaty] Protocol II a well-established customary principle of the law of war prohibiting the targeting of the civilian population as such, or individual civilians or civilian objects. It also prohibits the use of such weapons [mines, booby traps and other devices] in reprisals against civilians.[88]

Further, with respect to the principle of distinguishing between civilian persons or objects and legitimate military objectives in an attack, the report and resolution note,

> Paragraph 9 [of Article 3] provides that several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective. This provision is derived from Article 51 (5) (a) of Additional Protocol I to the 1949 Geneva Conventions. However, Article 51 (5)(a) is limited in its application to attacks by bombardment, prohibiting the indiscriminate shelling of as entire city, town or village on the basis of the presence of several distinct military objectives. It states, when so limited, a principle that the United States supports and regards as customary international law.[89]

The U.S. Senate adopted this resolution by unanimous consent, formally ratifying Protocol II of the CCW Treaty on 24 May 1999.[90]

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[87] S. EXEC. REP. NO. 106-2 (to Accompany Treaty Doc. 105-1(A) (May 13, 1999)); SENATE TREATY DOC. 105-1A (adopted on 20 May 1999) (ratified on May 24, 1999) [hereinafter SENATE TREATY DOC. 105-1A].

[88] S. EXEC. REP. NO. 106-2, at 47; SENATE TREATY DOC. 105-1A, *supra* note 87, at 28.

[89] S. EXEC. REP. NO. 106-2, at 43; SENATE TREATY DOC. 105-1A, *supra* note 87, at 29.

[90] SENATE TREATY DOC. 105-1A, *supra* note 87.

With respect to more recent U.S. military operations in the Federal Republic of Yugoslavia (*Operation Allied Force* in 1999), the public DOD after-action report to Congress did not identify any specific issues related to customary law governing conduct of hostilities.[91]

This record of acknowledgement by various agencies of the executive branch that relevant provisions of Articles 48, 49, 51, and 52 of Protocol I constitute customary law provides a framework to support the use of these principles as a customary basis for the offenses of attacking civilians and civilian objects. The Senate similarly supports acknowledging the general customary prohibition on the targeting of civilians or civilian objects as well as the specific customary status of Article 51(5)(a) of Protocol I.[92]

6. International Judicial Tribunals

Beyond the realm of domestic law, policy statements, and doctrine, a number of international courts and tribunals have a mandate to examine war crimes-related issues and offenses. The most active among these institutions is the ICTY, established under Chapter VII of the UN Charter by the UN Security Council in 1993.[93] The resolution created this institution and declared them a component body to prosecute individuals for serious violations of international humanitarian law in the territory of the former Yugoslavia, and to try a variety of criminal offenses based on violations of either conventional law or customary international law.[94]

Although the Tribunal's mandate is geographically limited, the scope of law examined during the course of proceedings is not.[95] Trial and

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[91] U.S. DEPARTMENT OF DEFENSE, REPORT TO CONGRESS, KOSOVO/OPERATION ALLIED FORCE AFTER ACTION REPORT (U) (31 Jan. 2001).

[92] The U.S. government persistently objects to the customary status of the Article 51 (6) prohibition on reprisals against civilians, *see supra* note 65, at 426, and the Article 52 (3) prohibition on attacks against normally dedicated civilian objects if their effective contribution to military action is in doubt, *see supra* note 84. Neither of these declared reservations should influence the MCI No. 2 offenses of "attacking civilians or civilian objects." MCI No. 2, *supra* note 7.

[93] U.N. SCOR 827, 327th mtg., S/RES/827 (1993).

[94] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 57, paras. 32-33.

[95] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted by the UN Security Council on 25 May 1993, 19 May 1993), *available at* http://www.un.org/icty/legaldoc/index.htm) [*Statute of the International Criminal*

appeals chambers regularly explore a variety of questions on the existing customary law of armed conflict, including offenses related to the conduct of hostilities.[96] Before judicial proceedings, the prosecutor frequently reviews customary law of armed conflict norms as a component of the investigative process. For instance, in June 2000, the Prosecutor published a review of select NATO military actions during the 1999 bombing campaign against the Socialist Federal Republic of Yugoslavia (SFRY), following a series of high-visibility incidents resulting in collateral damage to civilians or civilian objects.[97] Given the extensive scope of cases and review undertaken by the ICTY, trial and

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Tribunal for the Former Yugoslavia]. In accordance with Article 8 of the Statute of the ICTY, the ICTY has temporal and territorial jurisdiction over crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia, inclusive of land surface, airspace and territorial waters as of 01 January 1991. *Id*. art. 8. This jurisdiction encompasses offenses that occurred during periods of armed conflict with respect to the succession of the Republic of Slovenia from the Socialist Federal Republic of Yugoslavia (1991) [hereinafter SFRY]; the succession of Republic of Croatia from the SFRY (1991-92); the succession of the Republic of Bosnia and Herzegovina from the SFRY (1992); the resulting conflict in Bosnia thereafter (1992-95); and the liberation of occupied Croatian territory in 1995 (held by the self-declared Autonomous Republika Srpska Krajina). Additionally, subsequent to the Dayton Accords (Nov 1995), the ICTY has exercised jurisdiction over offenses related to armed conflict between the Federal Republic of Yugoslavia (FRY) and Kosovo Liberation Army (KLA) in the Republic of Serbia (1997-1999); the NATO intervention against the FRY (Serbia-Montenegro 1999); and the Macedonian government and Albanian separatist clashes (Macedonia 2000-2001).

[96] *See* Prosecutor v. Zoran Kupreskic, No. IT-95-16-T, paras. 537-42 (Jan. 14, 2000) (ICTY Judgment) (detailing the abstract process by which an ICTY Trial Chamber determines "existing" law).

[97] A 13 May 1999 speech by Justice Louise Arbour (then Prosecutor of the ICTY) noted that by becoming "parties to the conflict" on 24 March 1999, nineteen European and North American countries (read NATO) have "voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations." *See* Press Release, ICTY, JL/PIU/401E (May 13, 1999), *available at* http://www.un.org/icty. With respect to the issue of jurisdiction by both the ICTY and the International Court of Justice, NATO spokesperson Jamie Shea addressed the issue directly, noting, NATO "obviously recognizes the jurisdiction of these tribunals, but I can assure you, when these tribunals look at Yugoslavia I think they will find themselves fully occupied with the far more obvious breaches of international law that have been committed by Belgrade than any hypothetical breaches that may have occurred by the NATO countries." *See* Press Conference, NATO Headquarters, NATO's Role in Kosovo (May 17, 1999), *available at* http://www.nato.int/kosovo/press/p990517b.htm. *See also Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 8, 2000), *available at* http://www.un.org/icty/pressreal/nato061300.htm. It does not appear that the issue of ICTY jurisdiction over U.S. military forces was ever publicly refuted, or even addressed, by the DOD or the Department of State.

appellate decisions treating customary law issues generally reflect a broad spectrum of understanding from across the international community. As such, ICTY jurisprudence can serve as a substantial tool in defining what constitutes "existing law" with regard to the law of armed conflict.[98]

The ICTY and the U.S. military commissions are analogous in their mandates to rely, to varying degrees, on the customary origins of the law of armed conflict as a basis for the offenses they are empowered to adjudicate. The ICTY statute, enacted by the U.N. Security Council, specifically provides for the prosecution of offenses under the laws *and customs* of war. Crimes prosecuted by U.S. military commissions pursuant to the 13 November 2001 Military Order will depend almost entirely on the customary law of armed conflict.[99] Due to this similarity, relevant findings by the ICTY as to the scope of customary law will be

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[98] For example, Professor Leslie C. Green—a noted authority on the issue of command responsibility under the law of armed conflict—recently commented as follows with respect to the UN Tribunals for Yugoslavia and Rwanda:

> [I]t is necessary to bear in mind that the two Tribunals are *ad hoc*, intended to deal with specific conflicts. When they have completed the series of trials associated therewith, they become *functus officio* and, strictly speaking, their decisions will only have relevance to the conflicts and trials which they have been seized. Nevertheless, to the extent that they have analyzed general principles relating to command responsibility and have created a *jurisprudence constante*, the overall impact of the *rationes decidendi* should serve as a guide for future tribunals facing similar problems.

Leslie C. Green, Lecture, The Judge Advocate General's School, U.S. Army (6 Mar. 2002), *Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility* (6 Mar. 2002), *in* 175 MIL. L. REV. 309, 380 (Mar. 2003).

In practice, at least one federal appeals court has come to the same conclusion, again with respect to the issue of command responsibility. In ruling on "the allocation of the burden of proof in a civil action involving command responsibility doctrine" raised under the TVPA, the 11th Circuit Court of Appeals cited a number of ICTY trial and appeals judgments referencing the doctrine of command responsibility, specifically the three part test for applicability, that being: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes. *See* Ford v. Garcia, 289 F.3d 1283, 1290-91 (2002).

[99] DOD MCI No. 2, *supra* note 7.

helpful in supporting the U.S. government's assertion that MCI No. 2 offenses are "declarative of existing law."[100]

IV. Part 2: ICTY Jurisprudence on Conduct-of-Hostilities Offenses

During the past several years, the ICTY has adjudicated a number of cases charging offenses against the customary law governing conduct of hostilities; three have come to judgment, and one of those three has been completely adjudicated through the appeals process.[101] A number of other related proceedings are currently before the Tribunal.[102]. Simultaneously, the body of ICTY jurisprudence developed relevant to the customary status of portions of Protocol I.[103] This ICTY precedent on the mechanics of charging offenses related to the conduct of hostilities and the correlated jurisprudence regarding the customary status of relevant principles of Protocol I, provides an important customary foundation for related MCI No. 2 charges before a U.S. military commission.

In *Prosecutor v. Blaškic* and *Prosecutor v. Kordic and Cerkez*, the prosecutor charged the multiple accused with perpetrating "unlawful attacks against civilians, unlawful attacks against civilian objects and

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[100] *Id.*

[101] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment), (July 29, 2004) (ICTY Appeals Chamber Judgment); Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment) (appeal pending); and Prosecutor v. Stanislav Galic, No. IT-98-29-T, (Dec. 5, 2003) (ICTY Trial Judgment).

[102] With respect to the Yugoslav National Army shelling of civilians in the town of Dubrovnik in 1991, *see* the Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). In August 2003, co-indictee Miodrag Jokic agreed to plead guilty to Counts 1-6 of the second amended indictment. *See* Prosecutor v. Miodrag Jokic, No IT-01-42/1S (Oct. 17, 2003) (ICTY Second Amended Indictment). Counts Three and Five pertain to unlawful attacks on civilians. The court sentenced Jokic to seven years imprisonment. *See* Prosecutor v. Miodrag Jokic, No. IT-01-42/1S, para. 116 (Mar. 18, 2004) (Sentencing Judgment). Former FRY President Slobodan Milosevic is also charged with liability for these offenses. *See* Prosecutor v. Slobodan Milosevic, No IT-02-54, paras. 73-76 (First Amended Indictment, Croatia) (Counts 21-27 pertain to unlawful attacks on civilians).

[103] *See generally* Judicial Supplement, *The Law Review of the Tribunal*, *available at* http://www.un.org/icty/publications/index.htm (last visited 11 Aug. 2004). Specifics pertaining to Protocol I are discussed *infra* Part V.

wanton destruction not justified by military necessity."[104] These cases represent the initial efforts of the ICTY to apply the 1907 Hague Regulations and the 1949 Geneva Conventions judicially as customary law pertaining to criminal liability for making civilians the object of military attacks. Trial proceedings began in the *Blaškic* case in early 1997, with a judgment rendered in March of 2000.[105] In the cases of *Kordzic and Cerkez*, trial proceedings began in April 1999, with a judgment rendered in February 2001.[106]

As proceedings in these early cases were underway, both the defense and prosecution argued a number of issues before the respective trial chambers concerning the customary nature of various provisions of Protocols I and II.[107] These jurisdictional proceedings arose from legal challenges by a number of accused regarding the construction of charges and elements based on the language of the protocols.[108] One challenge also raised conflict-classification issues questioning the applicability of the customary provisions of 1907 Hague Conventions IV and GC IV to an armed conflict that the international community might not legally adjudicate as international in nature.[109]

These challenges before various trial and appellate chambers resulted in a body of ICTY case law pertaining to the construction of charges and elements based on the language of Protocol I. These rulings specifically

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[104] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Nov. 10, 1995) (Indictment); Prosecutor v. Dario Kordic and Mario Cerkez, No. IT-95-14 (Nov. 10, 1995) (Indictment).

[105] During the course of the trial, proceedings against the accused were suspended for an eleven-month period while both the prosecution and defense engaged in legal efforts to compel the government of Croatia to release state documents to both parties. These efforts were ultimately unsuccessful. *See* Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment), para. 42-47.

[106] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment).

[107] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-PT, para. 30 (Mar. 2, 1999) (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3). *See* discussion *infra* Part IV, Section C(1).

[108] *Blaškic*, No. IT-95-14, para. 167 (ICTY Trial Judgment). *See*discussion *infra* Part IV.A(1)(a).

[109] As previously noted, the ICTY examines potential offenses that occurred during a number of different periods of armed conflict in the former Yugoslavia since 1991. Offenses related to a number of these conflicts have to be examined in the context of either an internal or international armed conflict. *See supra* note 95 (listing the various conflicts under the jurisdiction of the ICTY).

cite and endorse the customarily recognized status of the principles enumerated in Articles 48 through 52 of the Protocol.[110] As this jurisprudence specifically supports the customary basis of the "attacking civilians" and "attacking civilian objects" charges enumerated in MCI No. 2, this article examines these, and other jurisdictional rulings in detail.

Finally, based on these same rulings, the ICTY Prosecutor revised the specific offenses of "unlawful attacks on civilians [or] civilian objects" to directly reflect the language of the 1977 Additional Protocols, and to eliminate references to GC IV.[111] These refined charges and elements reflected in the cases of *Prosecutor v. Galic*[112] and *Prosecutor v. Strugar*,[113] are quite similar to the offenses of "attacking civilians" and "attacking civilian objects" enumerated in MCI No 2.[114] Section IV, Part B, of this article discusses the most recent of the unlawful-attack cases.

A. Origin and Evolution of ICTY Offenses of "Unlawfully Attacking Civilians" and "Unlawfully Attacking Civilian Objects"

Article 3 of the Statute of the Tribunal establishes the competence and jurisdiction of the ICTY to prosecute individuals for violations of the laws and customs of war. The jurisdictional requirements include, but are not limited to, the following:

> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

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[110] *See generally supra* note 103; *see also* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT, paras.17-22 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction); and *see* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal). *See* discussion *infra* Part IV.C(3).

[111] *See* Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended), and Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). *See* discussion *infra* Part IV.B.

[112] Prosecutor v. Stanislav Galic, No. IT-98-29 (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter*). *See* discussion *infra* Part IV.B, analyzing the adjudication of these charges and elements from the *Galic* Judgment.

[113] Identical charges and elements were offered for consideration to the Trial Chamber in the case of *Prosecutor v. Pavel Strugar*, No. IT-01-42, paras. 14-25 (10 Dec. 2003) (ICTY Third Amended Indictment).

[114] MCI No. 2, *supra* note 7.

> (b) wanton destruction of cities, towns, 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 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.[115]

These statutory provisions were designed to reflect the general protections found in the 1907 Hague Convention IV, as well as select protections encompassed in the 1949 Geneva Conventions but not specifically enumerated as grave breaches.[116] Specifically, they incorporate the protections set forth in Article 3 common to the 1949 Geneva Conventions (Common Article 3) and in GC IV. Article 3 of the ICTY statute does not incorporate language from the 1977 Additional Protocols.[117]

At the same time, violations of these provisions can also be adjudicated under Article 5 of the ICTY Statute, pertaining to crimes against humanity.[118] Under this scenario, the above Article 3 conditions must be in place, as well as evidence that the violations took place in a "widespread or systematic" manner against the relevant population.[119]

1. Judgment Analysis: Prosecutor v. Tihomir Blaškic *and* Prosecutor v. Dario Kordic and Mario Cerkez

The first ICTY judgments adjudicating charges of "unlawful attack on civilians" and "attacks on civilian objects" developed in the cases of

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[115] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3.
[116] Grave breaches of the 1949 Geneva Conventions are specifically enumerated as charges under ICTY Statute Article 2. *Id.*
[117] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 57, paras. 33-35.
[118] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 5.
[119] *See* Prosecutor v. Tadic, No. IT-94, para. 248 (July 15, 1999) (Appeals Chamber Judgement) para. 248; Prosecutor v. Kunarac No. IT-96-23, para. 85 (June 12, 2002) (Appeals Chamber Judgment).

Prosecutor v. Tihomir Blaškic[120] and *Prosecutor v. Dario Kordic and Mario Cerkez*.[121] All three accused were high-ranking Bosnian-Croat military or civilian commanders in central Bosnia, operating as part of the self-declared Croatian Defense Council (HVO).[122] The prosecutor charged these accused with ordering and participating in a series of military attacks against undefended Bosnian-Muslim villages in central Bosnia during late 1992 and early 1993.[123] These attacks were alleged to be part of a larger campaign designed to drive the Bosnian-Muslim inhabitants from their homes and villages in order to "ethnically cleanse" various regions of central Bosnia then falling under HVO control, thus categorizing them as a crime against humanity.[124] The prosecution charged each accused with having "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of unlawful attacks on civilians and civilian objects and wanton destruction not justified by military necessity."[125] This conjunctive charge served to address violations relating both to the technical conduct of hostilities and to the residual responsibilities of an occupying power to protect the civilian population within the context of an international armed conflict.

Given the commonality of the alleged crimes and charges in *Blaškic* and *Kordic*, the *Kordic* Trial Chamber adopted most of the legal findings with respect to the law of armed conflict originating in the earlier-decided *Blaškic* judgment.[126] Thus, the analysis in this article focuses primarily on *Blaškic*, and notes the *Kordic* judgment only with respect to the finding concerning the offense.

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[120] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment).

[121] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment) (appeal pending).

[122] *Blaškic*, No. IT-95-14 (ICTY Trial Judgment); *Kordic & Cerkez*, No. IT-95-14/2-T (ICTY Trial Judgment) (appeal pending); *see also* discussion *infra* Part III, providing historical context for these cases.

[123] *Id.*

[124] *Id.*

[125] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Nov. 10, 1995) (Indictment).

[126] *See generally* Part I, General Requirements for Application of Articles 2, 3, and 5 of the Statute, where the *Kordic* Trial Chamber takes detailed note of the prior *Blaskic* decision. *See generally Kordic & Cerkez*, No. IT-95-14/2-T (ICTY Trial Judgment) (appeal pending).

a. Prosecutor v. Tihmor Blaškic

The *Blaškic* Trial Chamber applied a two-step process in examining the groundbreaking charges and the purported legal bases for these charges. The first step defined whether the criminal charges forwarded by the Prosecutor were tenable under the customarily recognized LOAC, and thus under the jurisdiction of the ICTY Statute Article 3 and 5.[127] The second step defined the legal elements of the charges based on these laws.[128]

In addressing the first step, the *Blaškic* Trial Chamber examined the broad customary and treaty background of the LOAC with respect to the prohibitions against attacking civilians and civilian objects. The Trial Chamber found "beyond doubt" that both the 1907 Hague Regulations (IV) and the 1949 Geneva Conventions constituted customary international law.[129]

After affirming the customary nature of these treaty instruments in the context of an international armed conflict, the *Blaškic* Trial Chamber proceeded to define how jurisdiction and potential criminal liability can be formulated under ICTY Statute Article 5 (Violations of the Laws and Customs of War), pertaining to both international armed conflict, and also internal armed conflict. This analysis first necessitated an examination of the appropriate balance between the minimum protections offered to civilians under customary law and the right of belligerents to conduct legitimate warfare.[130] The Trial Chamber then

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[127] *Blaškic*, No. IT-95-14, para. 160-173 (ICTY Trial Judgment).

[128] *Id.* paras. 179-187.

[129] *Id.* para. 164. This finding is based upon the *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808*, which formed the basis for U.N. Security Council Resolution 827 establishing the ICTY and outlining the fundamental standards of customary law on which the ICTY Statute is based. *See Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution* 808, *supra* note 57, paras. 34-35.

[130] In making this observation, the Trial Chamber again referred back to the *Report of the UN Secretary-General*, quoting:

> The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that the resort to certain methods of waging war is prohibited under the rules of warfare.

reviewed GC Common Article 3 within the context of the ICTY Statute and the 1907 Hague Regulations, finding first that Common Article 3 applied, as a matter of custom, to both internal and international armed conflicts.[131] It further found, without substantive explanation, that Common Article 3 "satisfactorily covered the prohibition on attacks against civilians as provided for by Protocols I and II."[132] Finally, citing the prior *Tadic* Appeal Decision of the ICTY, the *Blaškic* Trial Chamber reiterated that customary international law imposes criminal liability for serious violations of GC Common Article 3 for crimes against "protected persons."[133] On these bases, the Trial Chamber determined that the

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See Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 168 (Mar. 3, 2000) (ICTY Trial Judgment) (citing the *Report of the UN Secretary-General*, *supra* note 57, para. 43).

[131] *Id.* (echoing an earlier ICTY Appeals Chamber Decision, the Trial Chamber noted that Common Article 3 reflects "elementary considerations of humanity applicable under customary international law to any armed conflict, whether it is of an internal or international character."); *see also* Prosecutor v. Duško Tadic, No. IT-94-1-AR72, para. 102 (Oct. 2, 1995) (Appeals Chamber Decision on the Defence [sic] Motion for Interlocutory Appeal on Jurisdiction) (cited as the Tadic Interlocutory Appeal Decision) (referencing, in turn, the 1986 International Court of Justice decision that explicitly ruled that GC Common Article 3 reflects customary international law with respect to all conflicts, including international conflicts); *see* Nicaragua v. U.S., 1986 I.C.J. 14, at 218 (27 June 1986) (holding that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts); s*ee generally* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK (June 2000), 131 (policy)**,** 228 (practice) [hereinafter LAW OF WAR DESKBOOK] (commenting on this development, the *Law of War Deskbook* notes that this position appears to be in accord with U.S. government policy, which extends the applicability of Common Article 3 to include non-conflict operations other than war.)

[132] Accordingly, with GC Common Article 3 as an established foundation for the charges of "unlawful attack," the *Blaškic* Trial Chamber found it unnecessary to decide on whether Protocol I specifically constituted customary international law. In making this circuitous route around the issue of the customary status of Protocol I, however, the Trial Chamber provided no historical support for its conclusion that the relevant portions of Protocol I and II are included within GC Common Article 3. *Blaškic*, No. IT-95-14, para. 168-70 (ICTY Trial Judgment). Reviewing this decision four years after judgment, the *Blaškic Appeals Chamber* broadly avails itself to the customary status of Protocol I. *See* Prosecutor v. Tihomir Blaškic, No. IT-95-14, paras. 110-116 (July 29, 2004) (ICTY Appeals Chamber Judgment). *See* discussion *infra* Part IV.C.

[133] In defining "protected person," the *Blaškic* Trial Chamber reaffirmed the test specified in the *Tadic* decision:

> [W]hether at the time if the alleged offense, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offenses are said to have been committed. If the answer to that question is negative, the

ICTY had jurisdiction over the charged offenses under its Statute, which confers jurisdiction to charge individual or superior criminal responsibility for violations of the laws and customs of war.[134]

After establishing the basis for jurisdiction over the charged offenses, the *Blaškic* Trial Chamber next reviewed the charges and their supporting legal elements. The Trial Chamber found that the charges were tenable under Article 3 of the ICTY Statute. Since the single charge alleged both "unlawful attacks on civilians and civilian objects" and "wanton destruction not justified by military necessity,"[135] the Trial Chamber did not draw a distinction between the protections offered to civilians in the hands of an occupying power pursuant to GC IV[136] and those civilians who—though not in an occupied status—were subject to the "effects of battlefield combat" within the meaning of Protocol I.[137] Thus, such a conjunctive charge would be appropriate only in cases alleging violations of both GC IV and Protocol I.

In affirming the prosecution's charge of "unlawful attack on civilians and civilian objects and wanton destruction not justified by military necessity," the *Blaškic* Trial Chamber stated as follows:

> The Trial Chamber deems that the attack must have caused deaths or serious bodily injury within the civilian

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> victim will enjoy the protection of the proscriptions contained in [GC] Common Article 3.

Prosecutor v. Duško Tadic, No. IT-94-1-T, para. 615 (May 7, 1997) (ICTY Trial Judgment); *see also Blaškic*, No. IT-95-14 (ICTY Trial Judgment).

[134] *Blaškic*, No. IT-95-14, paras. 175-6 (ICTY Trial Judgment); *see also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 134 (Oct. 2, 1995) (Interlocutory Appeal Decision). Under the statute of the ICTY, Article 3-based charges pertain to "Violations of the Laws and Customs of War". *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95. Statute Article 7(1) defines direct criminal responsibility, and Article 7(3) defines superior responsibility for criminal acts of subordinates. *Id*.

[135] *Blaškic*, No. IT-95-14, para. 12 (ICTY Trial Judgment).

[136] 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC IV]. Article 4 pertains to the general protections of civilians in the hands of an occupying power of which they are not nationals; Article 53 pertains to the concept of wanton destruction not justified by military necessity, and is exclusive to the GC IV. *Id.*

[137] Protocol I, *supra* note 14, pt. IV, sec. I, chs. 1-4 (General Protections of the Civilian Population Against the Effects of Hostilities, Pertaining to Civilians, Civilian Populations and Civilian Objects); *see* GC IV, *supra* note 136, arts. 51-52.

> population or damage to civilian property. The parties of the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offense when not justified by military necessity. Civilians within the meaning of Article 3 [of the Tribunal Statute] are persons who are not, or no longer members of the armed forces. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.[138] This paragraph may be more simply broken into the following elements:
>
> (1) The attack must have affected civilians within the meaning of Article 3 of the Tribunal Statute, i.e., persons who are not, or are no longer, members of the armed forces.
>
> (2) The attack must have killed or caused severe bodily injury to civilians, or caused damage to civilian property.
>
> (3) The attack can be:
>
> (A) conducted by intentionally targeting civilians or civilian property;
>
> (B) conducted with willful ignorance of the civilian status of the target; or
>
> (C) conducted without distinction between military targets and civilian persons or property.
>
> (4) The attack must not be justified by military necessity.

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[138] *Blaškic*, No. IT-95-14, para. 180 (ICTY Trial Judgment). As discussed *infra*, the *Blaškic* Appeals Chamber specifically refuted some aspects of this paragraph. *See also* Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 109 (July 29, 2004) (ICTY Appeals Chamber Judgment).

b. Targeting Civilians and the Concept of Military Necessity

One of the most legally problematic conclusions in *Blaškic* is the statement that "targeting civilians or civilian property is an offense *when not justified by military necessity*."[139] While adhering to the principle in GC IV proscribing the gratuitous destruction of civilian property,[140] the wording of this statement implies there may be circumstances under which the intentional targeting of civilians—as distinguished from an attack against a legitimate military target that unavoidably results in civilian casualties as collateral damage—would be legally justified.[141]

Referencing the *Blaškic* findings, the *Kordic* Trial Chamber stated in its subsequent judgment as follows:

> Prohibited attacks are those launched deliberately against civilians or civilian objects in the course of armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries with the civilian population or extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognized in international law including the relevant provisions of Protocol I.[142]

The *Kordic* Trial Chamber similarly held open the possibility that the deliberate targeting of civilians could be legally justified under the doctrine of military necessity.

Not surprisingly, these particular findings by the *Blaškic* and *Kordic* Trial Chambers and their inherent contradiction to Protocol I (Arts. 51(2) and 85(3)(a)) have met with some critical discussion.[143] The prohibition against the deliberate targeting of civilians and civilian objects are

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[139] *Blaškic,* No. IT-95-14, paras. 180 (ICTY Trial Judgment) (emphasis added).
[140] GC IV, *supra* note 136, art. 147 (Grave Breaches).
[141] *Blaškic,* No. IT-95-14, para. 180 (ICTY Trial Judgment).
[142] Prosecutor v. Dario Kordic, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment).
[143] DORMANN, *supra* note 69, at 132-33; *see also* 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 Blaškic, 13 LEIDEN J. INT'L L. 931, 936-43 (2000).

widely viewed as absolute under customary law.[144] Most recently, the *Blaškic* Appeals Chamber unequivocally weighed on that specific issue as well,[145] stating,

> [T]he Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgment, according to which . . . . [t]argeting civilians or civilian property is an offense when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.[146]

In spite of this absolute prohibition on targeting civilians, one previous ICTY Trial Chamber judgment, the *Prosecutor v. Kupreskic, et al.*, provides some guidance on exceptional circumstances under which civilians or a civilian population may be the object of a lawful attack by a belligerent.[147]

c. Judgment Analysis: Prosecutor v. Kupreskic, et al.[148]

The *Kupreskic* Trial Chamber identified the following three abstract circumstances under which the legal protections of civilian objects could be reduced, suspended, or ceased entirely: "(1) when civilians abuse their rights; (2) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (3) at least to some authorities,

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[144] This customary prohibition is also codified by the Statute of the ICC, Article 8(2)(b)(i). *See Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10*, *supra* note 21.

[145] *See* Prosecutor v. Blaškic, No. IT-95-14, paras. 108-9 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[146] *Id*. para. 109.

[147] The Prosecutor v. Zoran Kupreskic, No. IT-95-16, para. 515 (Jan. 14, 2000) (ICTY Trial Judgment). While the offense of unlawfully attacking civilians or civilian objects was not charged in the indictment, the Trial Chamber believed that the issue merited review on the theory that the accused were indirectly arguing a defense based on the principle of *Tu Quoque* or reciprocal unlawful conduct. *Id.* On appeal, the ICTY Appeals Chamber overturned a number of convictions because of issues of fact, however, it left intact relevant findings of law pertaining to this issue. *See* the Prosecutor v. Zoran Kupreskic, No. IT-95-16 (Oct. 23, 2001) (ICTY Appeals Chamber Judgment).

[148] *Kupreskic,* No. IT-95-16 (ICTY Trial Judgment).

when civilians may legitimately be the object of reprisals."[149] The Trial Chamber extensively examined the issue of reprisals, ultimately concluding that an absolute prohibition on reprisals should be considered reflective of the modern law of armed conflict.[150] The Trial Chamber also briefly addressed the issue of collateral damage, noting that this was more properly an issue of proportionality and discrimination than of the direct targeting of civilians.[151]

The *Kupreskic* judgment analyzed the remaining issue regarding the abuse by civilians of their rights and obligations as non-belligerents under the customary law of armed conflict as follows:

> In the case of clear abuse of their rights by civilians, international rules operate to lift the protection, which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital "[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy," for example if an artillery post is set up on top of the hospital. Similarly, if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down by Article 4(A)(2) of the Third Geneva Convention of 1949.[152]

Thus, setting aside the argument concerning the customary status of the prohibition on reprisals against civilians and civilian objects, the only circumstance under which a civilian population can lawfully become the object of an attack under the doctrine of military necessity occurs where

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[149] *Id*. para. 522.

[150] *Id*. paras. 515-36. As a matter of treaty law, Articles 50-55 of Protocol I explicitly ban reprisals against civilian and civilian objects under treaty. Protocol I, *supra* note 14, arts. 50-55. A significant number of treaty signatories, however, have lodged reservations or clarifications concerning this issue. *See* Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL L. REV. 184, 224-29 (2003). The United States, which is not a party to the protocol, has similarly stated (ca. 1987) its understanding that the prohibition against reprisals does not reflect customary law. Matheson, *supra* note 65.

[151] *Kupreskic,* No. IT-95-16, para. 524 (ICTY Trial Judgment).

[152] *Id*. para. 523.

such civilians have purposefully abused such protections by acting against an enemy belligerent.

B. ICTY Conduct-of-Hostilities Offenses Based on 1977 Additional Protocols to the Geneva Conventions of 1949

Most recent in the chronology of ICTY conduct-of-hostilities cases are *Prosecutor v. Stanislav Galic*[153] and *Prosecutor v. Pavle Strugar*.[154] The prosecutor charged individuals in both indictments with unlawful attacks on civilians and civilian objects.[155] These charges, based on Article 3 of the ICTY Statute, incorporate offenses described in Articles 51(2) of Protocol I and Article 13(2) of Protocol II, both of which provide that civilians shall not be the object of attack.[156] The accused in *Galic* was also charged with "unlawfully inflicting terror upon civilians" as a violation of the laws and customs of war.[157] Article 51(2) of Protocol I and Article 13(2) of Protocol II, provides the legal foundation underlying this terror charge, which prohibit "acts or threats of violence, the primary purpose of which is to spread terror among the civilian population."[158]

By design, these charges allege only violations of Article 3 of the ICTY Statute or of relevant articles of the 1977 Additional Protocols; they do not refer to the 1949 Geneva Conventions.[159] In this manner, the breadth of the charged offenses—relating to the general protection of civilians from the effects of hostilities by belligerents—is a departure from the charges in *Blaškic* and *Kordic*, which related specifically to

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[153] Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended).

[154] Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). In August 2003, co-indictee Miodrag Jokic agreed to plead guilty to Counts 1-6 of the second amended indictment. *See* Prosecutor v. Miodrag Jokic, No. IT-01-42/1S, para. 116 (Mar. 18, 2004) (Sentencing Judgment).

[155] *Strugar*, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment) (Counts 4 and 7).

[156] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3. *See also Galic*, No. IT-98-29 (ICTY Indictment, as amended); *and Galic*, No. IT-98-29, para. 152 (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i)).

[157] *Galic*, No. IT-98-29 (Indictment, as amended of the indictment) (Count 1); *see also Galic*, No. IT-98-29, para. 139 (Pre-trial brief).

[158] *Galic*, No. IT-98-29 (ICTY Pre-trial brief).

[159] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3.

actions against a civilian population by an occupying power in violation of GC IV. This change reflects the evolving concept that the protections afforded to civilians and civilian objects from the effects of combat are not contingent upon the side of the battlefield on which the civilians are located, nor upon the status of the territory, whether occupied or merely defended.[160] Rather, the relevant issue is a determination of whether the civilians and civilian objects in question were entitled to protected status under the customary law of armed conflict at the time of the offense.[161]

1. Judgment Analysis: Prosecutor v. Stanislav Galic[162]

Stanislav Galic was a Colonel who had served in the former Yugoslav Peoples Army (JNA) as an Infantry Division commander before the outbreak of hostilities in Bosnia in April 1992.[163] He remained in Bosnia after the JNA withdrew from Bosnia in May 1992, and the nascent Bosnian-Serb military subsequently appointed him as an officer in their armed forces, which later evolved into the Army of the Republika Srpska.[164] In September 1992, the Bosnian-Serb military authorities appointed him the commander of the Sarajevo-Romanija Corps, then conducting military operations in and around the encircled Bosnian capital city of Sarajevo and[165] subsequently promoted him to the rank of General-Major.[166] From September 1992 through August 1994, he exercised command of the Corps and its approximately 17,000

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[160] This concept is reflected in Protocol I, Article 51(7), which prohibits both parties to a conflict from "direct[ing] the movements of civilians in order to shield military objectives, or render certain areas immune from military operations"; and Protocol I, Article 57(4), which directs all parties to a conflict to "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects." Protocol I, *supra* note 14, arts. 51(7) & 51(4).

[161] Prosecutor v. Duško Tadic, No. IT-94-1-T, para. 615 (May 7, 1997) (ICTY Trial Judgment); Prosecutor v. Tihomir Blaškic, No. No. IT-95-14-T, para. 177 (Mar. 3, 2000) (Trial Judgment). In this context, "protected" refers to the minimum yardstick of protected status provided by the customarily recognized GC Common Article 3. It can also incorporate, however, the more specific protections within the meaning of the 1949 Geneva Conventions with respect to persons and objects.

[162] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[163] *Id.* para. 603-604.

[164] *Id.*

[165] *Id.*

[166] *Id.* The rank of General-Major in the former JNA, as well as the current day Army of the Republika Srpska (VRS) is nominally equivalent to that of a U.S. Army Brigadier General. *See* DEFENSE INTELLIGENCE AGENCY, BOSNIA FACTBOOK (unclassified) (1996).

soldiers.[167] Based on the conduct of these operations, which included a prolonged and deliberate campaign of sniping, shelling, and terror against non-combatants in the city, the ICTY Prosecutor charged General-Major Galic with various offenses.[168] Among these charges are the offenses of "unlawful attack against civilians and/or civilian objects" and "unlawfully inflicting terror on civilians" as violations of the laws and customs of war.[169] On 5 December 2003, a majority of the Trial Chamber found General-Major Stanislav Galic guilty of the offenses of "unlawfully attacking civilians" and "unlawfully inflicting terror on civilians."[170]

As reflected in the Prosecutor's pre-trial filings in this case, these unlawful-attack charges have their legal basis in the principle of distinction inherent in the law of armed conflict.[171] This principle obligates military commanders to direct their operations only against military objectives, and prohibits the targeting of civilians and civilian objects as the object of attack.[172] In accordance with this principle, the ICTY Prosecutor opined that the following types of attacks against the civilian population were unlawful:

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[167] Units of the Bosnian Serb Sarajevo-Romanija Corps encircled Sarajevo from mid-May 1992, until the termination of hostilities following the Dayton Agreement in November 1995. *Galic*, No. IT-98-29-T, para. 197-205 (Judgment and Opinion). General-Major Galic was the Corps Commander from September 1992 through August 1994. *Id.* para. 613. The prosecutor has also charged General-Major Dragan Milosevic, who assumed command of the Corps from Galic, for similar violations of the law of armed conflict during his tenure in command. *See* Prosecutor v. Stanislav Galic and Dragomir Milosevic, IT-98-29 (Apr. 24, 1998) (Initial Indictment).

[168] Prosecutor v. Stanislav Galic and Dragomir Milosevic, IT-98-29 (Apr. 24, 1998) (Joint Initial Indictment).

[169] *Id.* para. 17.

[170] An ICTY Trial Chamber consists of three judges. A majority of two judges found General-Major Galic guilty with respect to his individual responsibility in planning, ordering, and directing an unlawful campaign of attacks against the civilian population of Sarajevo. One judge dissented with respect to both his individual responsibility, and the existence of an unlawful campaign. *See generally Galic*, No. IT-98-29-T (Judgment and Opinion). All three judges, however, agreed as to General Galic's criminal responsibility with respect to the issue of "superior or command responsibility," noting his failure to prevent such acts or to punish the perpetrators of such attacks, notwithstanding any legal finding of the existence of a campaign directed against the civilians. *Id.*

[171] Prosecutor v. Stanislav Galic, No. IT-98-29, para. 156. (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i)).

[172] Protocol I, *supra* note 14, arts. 48 & 51(1).

> (1) attacks deliberately directed against the civilian population as such, whether directed at particular civilian objectives or at civilian areas generally;
> (2) attacks aimed at military and civilians objectives without distinction; and
> (3) attacks directed at legitimate objectives, which cause civilian losses clearly disproportionate to the military advantage anticipated.[173]

This framework provides the basis for the criminal charges by the ICTY Prosecutor when alleging unlawful attacks against civilians or civilian objects or unlawfully inflicting terror on civilians as violations of the laws and customs of war. In addressing these submissions in the *Galic* Judgment, the Trial Chamber generally agreed with ICTY Prosecutor on these points, and in some cases expanded upon them by defining the elements of the offense:

a. The Crime of Attack on Civilians[174]

As finder of law and fact, the *Galic* Trial Chamber defined the specific elements of the offense of "attack on civilians" as follows:

> (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, [and]

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[173] *See generally Galic*, No. IT-98-29, para. 157 (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i))). With respect to number (3), "attacks directed at legitimate objectives, which cause civilian losses clearly disproportionate to the military advantage *anticipated*" [emphasis added], this language is designed to closely follow Article 51 of Protocol 1. *See* Protocol 1, *supra* note 14. This contradicts earlier language by another ICTY Trial Chamber ruling which noted that . . . "incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage *gained* [emphasis added] by the military attack." *See* Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1, para. 426 (Feb. 22, 2001) (ICTY Trial Judgment). *See also* discussion *infra* Part IV.C.

[174] All three judges agreed with respect to identifying the offense of attacks on civilians as a violation of the laws and customs of war, the elements, and the requisite mental element. *See* Prosecutor v. Stanislav Galic, No. IT-98-29-T, para. 56 (Dec. 5, 2003) (Judgment and Opinion).

> (2) The offender willfully made the civilian population or individual civilians not taking a direct part in hostilities the object of those acts of violence.[175]

In examining the first element, the Trial Chamber noted that previous decisions identified a number of acts that qualify as direct attacks against civilians. These include attacks clearly directed against civilians[176] and indiscriminate attacks (i.e., attacks which strike civilians or civilian objects and military objectives without distinction).[177]

To determine the *mens rea* for the acts of violence against the civilian population or individuals not taking part in hostilities element, the Trial Chamber heavily relied on the grave breach provisions of Article 85 of Protocol I.[178] Article 85, Protocol I defines a "grave breach" in this context as "willfully making the civilian population or individual civilians the object of attack."[179] The ICRC Commentary on Article 85 explains the term willfully as follows:

> [T]he 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 a lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.[180]

Accepting this definition, the Trial Chamber further noted that willfully attacking civilians must be reckless rather than merely negligent.[181] The prosecutor must prove that the perpetrator was aware, or should have been aware, of the civilian status of the persons attacked.[182] In cases of doubt as to the status of the persons in question,

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[175] *Id.*
[176] *Id*. paras. 49-55.
[177] *Id*. para. 57.
[178] *Id*. para. 54.
[179] *Id*.
[180] *Id*. para. 54 (citing the ICRC Commentary to Protocol I, para. 3474).
[181] *Id*.
[182] *Id.* para. 55.

it must be shown that a reasonable person would not have believed that the individual attacked was a combatant.[183]

The *Galic* Trial Chamber also examined another form of indiscriminate attack, one which violates the "principle of proportionality."[184] On the issue of proportionality, the Trial Chamber provided the following general guidance:

> Once the military character of a target has been ascertained, commanders must consider whether striking this target is expected to cause incidental loss of 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. If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.[185]

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[183] *Id.*

[184] *Id*. para. 58.

[185] *Id*. The *travaux préparatoires* of Additional Protocol I concerning Article 51(5)(b), 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." *Galic*, No. IT-98-29-T (Judgment and Opinion) (ICRC Commentary, para. 2209). The Commentary explains, "a military advantage can only consist in ground gained or in annihilating or in weakening the enemy armed forces". *Id.* para. 2218. Australia and New Zealand stated at the time of ratification, in almost identical wording, that "the term "concrete and direct military advantage anticipated," used in Articles 51 and 57 of Additional Protocol I, means *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved." *See Galic*, No. IT-98-29-T, n.106 (Judgment and Opinion) (providing Statements of Understanding made by New Zealand on 8 February 1988 and Australia on 21 June 1991).

The *Galic* Trial Chamber further noted that while the parties to a conflict are under an obligation to remove civilians as much as practicable from the vicinity of military objectives, and to avoid locating military objectives near densely populated areas, the failure of a defending party to abide by these obligations does not relieve the attacking party of a duty to abide by the principles of distinction and proportionality when launching an attack.[186] Thus, in defining the *mens rea* of a disproportionate attack, the Trial Chamber requires proof that such an attack must have been launched "willfully in knowledge of the circumstances giving rise to the expectation of excessive civilian casualties."[187]

b. The Crime of Unlawfully Inflicting Terror upon Civilians[188]

Based on the principles articulated in Article 51 of Protocol I and Article 13 of Protocol II, the Prosecutor of the ICTY charged General-Major Galic with the crime of "unlawfully terror against the civilians" as a violation of the laws a customs of war.[189] The distinguishing feature of this offense was the specific intent reflecting terror as the primary purpose.[190] A majority of the Trial Chamber found this offense to be cognizable under Article 3 of the ICTY statute, and it defined the following elements of the offense:

> (1) Acts of violence directed against the civilian population or individual civilians not taking a direct part in hostilities causing death or serious injury to body or health within the civilian population;
>
> (2) The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; [and]

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[186] *Id.* para. 61.
[187] *Id*. para. 59.
[188] With respect to the offense, elements, and requisite mental element, the *Galic* Trial Chamber did not make a unanimous finding on this charge. The Trial Chamber decision discussed here reflects the majority view. *See generally Galic*, No. IT-98-29-T (Judgment and Opinion). *See also* discussion *infra* Part IV.C(4), analyzing the view of the dissenting judge with respect to this offense.
[189] *Galic*, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended).
[190] *Galic*, No. IT-98-29-T, para. 72 (Judgment and Opinion).

> (3) The above offense was committed with the primary purpose of spreading terror among the civilian population.[191]

The majority explored in detail a number of relevant issues regarding the elements as follows:

In the first element, the phrase "acts of violence" does not include lawful acts against combatants; rather, it refers only to unlawful acts against civilians.[192] Concerning the first element, the Trial Chamber specifically rejected submissions by both the prosecution and defense that the actual infliction of terror constituted an element of the crime of terror.[193] This legal finding negated a requirement to actually prove a causal connection between the unlawful acts of violence and the production of terror.[194] As such, the mere intent of the accused to commit the unlawful act will suffice to establish acts of violence.

With respect to the third element, the majority of the Trial Chamber noted as follows:

> "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state of terror. Thus, the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts—or, in other words, that he was aware of the possibility that terror would result—but that that was the result, which he specifically intended. The crime of terror is a specific-intent crime.[195]

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[191] *Id.* para. 133.
[192] *Id.* para. 135.
[193] *Id.* para. 134. As cited in Paragraph 73 of the *Galic* Judgment, the prosecution submitted that there must be an established causal connection between the intent to commit unlawful acts of terror, and that the population actually experienced terror. *Id.* para. 73. The defense submissions also reflect that actual terror had to be achieved, and that it had to result from illegitimate acts, as opposed to being the result of lawful urban warfare. *Id*. para. 82.
[194] The majority of the Trial Chamber noted that the plain wording of Protocol I, *supra* note 14, art. 51(2), as well as the *travaux preparatoires* specifically exclude the actual infliction. *Id.* art. 51(2); *see Galic*, No. IT-98-29-T, para. 134 n.224 (Judgment and Opinion).
[195] *Galic*, No. IT-98-29-T, para. 136 (Judgment and Opinion).

More broadly, the full Trial Chamber held that select portions of Protocol I applied to the Bosnian conflict based on conventional or treaty law.[196] The judgment further held that the offense of "attacking civilians or civilian objects" had a customary basis as well, reflecting prior decisions from the ICTY Appeals Chamber.[197] This customary basis is discussed in greater detail below. Conversely, only a majority found that the offense of "unlawfully inflicting terror upon civilians" had a basis in conventional law (Protocol I), and there was no definitive ruling concerning any potential customary basis.[198] This article also examines this in the next section.

C. ICTY Rulings on Customary Status of Principles Underlying Relevant Articles of the 1977 Additional Protocols

Several defendants have challenged the legitimacy of charges predicated on the language of the 1977 Additional Protocols, on the ground that the prosecutor did not establish the wider customary status of these instruments.[199] The ICTY resolved these issues in an appropriate and judicious manner in various jurisdictional decisions by the respective Trial Chambers.[200] These decisions, as well as several other more recent Appeals Chamber decisions directly address the customary basis behind those articles of the Additional Protocols that prohibit making civilians

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[196] On 22 May 1992, representatives of the Bosnian-Serb, Bosnian-Muslim and Bosnian-Croatian parties to the conflict signed an agreement brokered under the offices of the International Committee for the Red Cross (ICRC). One portion of this agreement specified that Articles 35-42 and 48-58 of Protocol I would apply to all parties during hostilities. Protocol I, *supra* note 14, arts. 35-42, 48-59. As a result, the full Trial Chamber reasoned that the terms of Protocol I could apply to the accused (a Bosnian-Serb) as conventional law, without having to legally classify the conflict as either internal or international in nature. *See Galic*, No. IT-98-29-T, paras. 202-205 (Judgment and Opinion).

[197] *Galic*, No. IT-98-29-T, para. 19 (Judgment and Opinion).

[198] Prosecutor v. Stanislav Galic, No. IT-98-29-T, paras. 108-13 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting) (appended to the *Galic* Judgment).

[199] *See* Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-PT (Mar. 2, 1999) (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3) *and* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT, paras. 17-22 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).

[200] *Id.*

the object of military attack.[201] These decisions are of particular interest with respect to their applicability to military commissions, since they articulate how the contemporary technical language of these treaty instruments, which were not ratified by the United States, legally incorporate the broader customarily recognized protections afforded to civilians and non-combatants during hostilities.

1. Prosecutor v. Kordic,[202] *Revisited*

In the previously discussed *Kordic* case, the accused made a pretrial motion challenging the validity of the presumed customary status of the 1977 Additional Protocols (both I and II) at the time of the alleged offenses (circa. 1992-93).[203] Accordingly, the accused argued that charges based on the Additional Protocols were beyond the ICTY's jurisdiction's Statute.[204]

In a March 1999 jurisdictional decision on this motion, the *Kordic* pre-trial chamber held as follows:

> It is sufficient here only to address the provisions of Additional Protocols I and II specifically referred to in the indictment. Counts 3, 4, 5, and 6 of the indictment against Dario Kordic and Mario Cerkez refer specifically to Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is

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[201] *Id. See also* Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1 (Feb. 22, 2001) (ICTY Trial Judgment). *See* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal) *and* Prosecutor v. Tihomir Blaškic, No. IT-95-14 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[202] *Kordic & Cerkez*, No. IT-95-14/2-PT (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3).

[203] *Id.* para. 30.

[204] *Id*.

> indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts.[205]

In February 2001, as a part of the subsequent trial judgment, the *Kordic* Trial Chamber revisited this issue.[206] The Trial Chamber noted that since the Additional Protocols were binding as treaty law on both Croatia and Bosnia-Herzegovina at the time, the question of whether the relevant provisions of Protocol I reflected customary law was not properly at issue.[207] Nonetheless, in response to a defense contention offered at trial that Protocol I did not represent customary law, the Trial Chamber noted that it was not persuaded by defense arguments and "reiterate[d] its conclusion contained in the earlier *Decision on Jurisdiction*."[208] The Trial Chamber further ruled that violations of Additional Protocol I incurred individual criminal liability in the same manner that as did other violations of customary international law.[209]

2. Prosecutor v. Dragoljub Kunarac[210]

Almost simultaneously, a separate ICTY Trial Chamber affirmed the customary nature of the same principles, enumerated in Protocol I, governing the protection of the civilian population from the effects of

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[205] *Id*. para. 31.

[206] Prosecutor v. Dario Kordic and Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (Trial Judgment).

[207] In this particular case, both the Croatian-backed Croatian Defense Council (HVO) and the Bosnian Muslim political leadership had agreed to abide by the provisions of Protocol I regardless of the nature of the hostilities in question. In this respect, the Trial Chamber ruled that the relevant articles of Protocol I applied based on treaty law. *See Kordic & Cerkez*, No. IT-95-14/2-T, paras. 165-67 (Trial Judgment).

[208] *Kordic & Cerkez*, No. IT-95-14/2-PT (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3).

[209] *Kordic & Cerkez*, No. IT-95-14/2-T, paras. 168-169 (Feb. 26, 2001) (Trial Judgment).

[210] Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1, para. 426 (Feb. 22, 2001) (ICTY Trial Judgment).

hostilities.[211] In the case of *Prosecutor v. Dragoljub Kunarac, et al.*, the Trial Chamber made the following general findings with respect to the customary status of principles found in Articles 48, 50, 51, and 57 of Protocol I:

> As a group, the civilian population shall never be attacked as such. Additionally, customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage *anticipated* [author's italics].[212]

In this particular instance, the *Kunarac* Trial Chamber went beyond the language of Additional Protocol I pertaining to the issue of proportionality as stated in Article 51.[213] This was subsequently addressed in the more recent *Galic* Judgment (December 2003).[214] To this end, the *Galic* judgment noted,

> the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words "expected" and "anticipated".[215]

At the same time, the *Galic* Trial Chamber also acknowledged that with respect to "expected" or "anticipated," the broad consensus among Protocol I member states was that this interpretation should reflect "the decisions taken on a basis of all information available at the relevant time, and not on the basis of hindsight."[216]

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[211] *Id.*
[212] *Id.* para. 426. These findings were articulated with respect to select offenses related to ICTY Statute Article 5 based "crimes against humanity." *Id.*
[213] *See supra* Protocol I, *supra* note 14, art. 51.
[214] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).
[215] *Id.* para. 58 n.109.
[216] *Id.*

3. Prosecutor v. Pavle Strugar, Miodrag Jokic[217]

In early 2002, the customary nature of the relevant articles of the Additional Protocols was again raised during the pre-trial stage of the *Prosecutor v. Pavle Strugar,*[218] *Miodrag Jokic, et al.* In this instance, the defense challenged the Prosecutor's jurisdiction to impose criminal charges based on the customary status of Articles 51 and 52 of Protocol I and Article 13 of Protocol II.[219] The defense alleged a technical defect with respect to the use of the Additional Protocols as charging vehicles because these treaties represented conventional law of a more contractual nature to which neither party to the conflict had specifically agreed, as opposed to applicable custom.[220]

In ruling on the jurisdictional motion, the *Strugar* Trial Chamber affirmed the customary nature of Articles 51 and 52 of Protocol I and Article 13 of Protocol II, as a "reaffirmation and reformulation" of the "norms of customary international law designed to prohibit attacks on civilians and civilian objects."[221] The ruling noted that the articles at issue did not contain new principles, but rather that they codified long-standing principles found in earlier codes predating the 1907 Hague Rules and the 1949 Fourth Geneva Convention.[222] The Trial Chamber further found that these specific principles in the articles were customary before 1991.[223]

The defense appealed this jurisdictional ruling, reading the Trial Chamber's decision to hold that Articles 51 and 52 of Protocol I and Article 13 of Protocol II in their entirety constituted customary

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[217] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).
[218] *Id.*
[219] *Id.* para. 9.
[220] *Id.*
[221] *Strugar, Jokic*, No. IT-01-42-PT, paras. 17-22 (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).
[222] *Id*. paras. 17-19. In the *Strugar* Trial Chamber's analysis, they found that the drafting history of the Additional Protocols clearly indicated the *opinio juris* of multiple states concerning Article 51 of Protocol I. It also determined that Protocol I, art. 52, articulated a long-standing customary principle of international law, namely that civilian objects must not be the target of military attack. Protocol I, *supra* note 14, art. 52. The Trial Chamber further noted that this principle, codified in Article 51 of Protocol I, and is a reaffirmation of a similar provision contained in Geneva Convention IV. *Id.* art. 51.
[223] *Strugar, Miodrag Jokic*, No. IT-01-42-PT, para. 21 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).

international law.[224] In addressing the defense's jurisdictional appeal, the *Strugar* Appeals Chamber upheld the customary law status of the principles prohibiting attacks on civilians and unlawful attacks on civilian objects articulated in Articles 51 and 52 of Protocol I and Article 13 of Protocol II.[225] The Appeals Chamber, however, left unanswered the broader issue of whether the Articles embodying those underlying principles themselves represented customary international law, simply affirming the Trial Chamber's opinion that these principles constitute a customary basis for charging and jurisdiction.[226] As such, the Appeals Chamber deemed it unnecessary to render a decision on the customary status of Articles themselves.[227]

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[224] The *Strugar* defense challenged Paragraph 22 of the jurisdictional decision on the basis that it improperly permitted the prosecution to use the relevant articles of Protocols I and II as independent charging vehicles regardless of their customary status. Paragraph 22 states as follows:

> The reference to the Additional Protocols by the use in the Indictment of words "as recognized by" is to be understood as a reference to a clear and relatively legal instrument in which the relevant prohibitions under customary international law is reaffirmed. The Defense's objection to the use of the reference to instruments, which are not listed as [a] source of customary law by the Secretary-General Report, is therefore rejected.

Id. para. 22.

[225] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal). As stated in paragraph 9 of the decision:

> [T]he Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined "whether the principles contained in the relevant provisions of the Additional Protocols have attained the status of customary international law," and in particular the principles explicitly stated in the Indictment: the prohibitions of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status, and in this it was correct.

Id. para. 9.

[226] *Id.* para. 13 (reflecting that "[as] the basis of the relevant counts in the indictment is customary international law, the appellant has no basis for further complaint").

[227] *Id*. para. 11. As noted in the decision, on concurring that there was no error on the part of the trial chamber in "failing to identify the relevant [AP I and II] Articles as treaty law," the Appeals Chamber had no further obligation to comment on the customary status of these articles as charging instruments. *Id.*

The *Strugar* Appeals Chamber also addressed the appellants' contention they were entitled to a ruling as to whether the articles in question represented customary law or treaty law to the extent that these articles appeared to serve as the charging basis.[228] In response, the Appeals Chamber stated that the Trial Chamber did not have to decide this issue because the appellants had incorrectly interpreted the Trial Chamber's decision as reflecting the use of the Additional Protocols themselves as charging instruments, rather than the principles underlying them.[229] Next, citing ICTY precedent regarding jurisdiction and criminal responsibility, the Appeals Chamber held that "[c]ustomary international law establishes that a violation of these principles entails individual criminal responsibility."[230]

In summation, the *Strugar* appellate jurisdictional decision establishes the concept that once the international community recognizes a treaty-based principle as customary law, the principle itself can serve as the charging and jurisdictional basis for individual criminal responsibility.[231] In these circumstances, the actual language of the treaty serves chiefly to specify in both modern and technical terms, the broader customary principles—it does not serve as the basis of the offense.[232] Moreover, *Strugar* holds that the applicability of such a principle as treaty law is both distinct from and subordinate to its customary law status.[233] Thus, in the view of the ICTY, the relevant customary principles

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[228] *Id*. para. 12-13.

[229] *Id.* para. 13.

[230] *Strugar, Jokic*, No. IT-01-42-PT, para. 10 (ICTY Appeals Chamber Decision on Interlocutory Appeal). In affirming the Trial Chamber decision, the Appeals Chamber noted,

> [T]he Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

Id. This observation on individual criminal responsibility for violations of customary international law mirrors previously discussed decisions in the *Tadic*, *Kordic*, and *Blaškic* cases.

[231] *Id.*

[232] *Id.* para. 6.

[233] *Id.* paras. 11-13. One the Appeals Chamber affirmed that the customary principles of the relevant Articles of Protocol I were the charging basis, it became unnecessary to examine potential treaty applicability. *Id.*

constitute the actual charging basis, while the treaty instruments themselves merely serve to clarify those principles.[234]

4. Prosecutor v. Stanislav Galic,[235] *Revisited*

Based on the *Strugar* jurisdictional decisions, the *Galic* judgment reflected the Trial Chamber's unanimous view that the customary principles with respect to the protection of civilians articulated in Protocol I (Article 51) form the basis of the ICTY statutory offense of "attacking civilians and/or civilian objects."[236] The same cannot be said, however, for the charge of "unlawfully inflicting terror upon civilians."[237] In this instance, the minority in the judgment contested both a customary, and also a conventional basis of the offense.[238]

In evaluating the terror offense on both a treaty basis and a customary basis, the *Galic* majority opinion does little to definitively support either foundation. Despite having previously affirmed the customary principle in Protocol I (Article 51(2)) that "the civilian population and civilian objects are not to be made the object of attack," the majority was unwilling to definitively adjudge as customary the principle enshrined in the second sentence of the article; namely, that "acts or threats of violence, the primary purpose which is to spread terror among the civilian population, are prohibited."[239]

Instead, the majority opinion seeks merely to buttress a treaty-based jurisdictional argument by applying what is often referred to as the Tadic Jurisdictional Test, derived from the October 1995 *Tadic* Jurisdictional Decision.[240] This test allows the ICTY to adjudicate under Article 3 of the ICTY Statute, offenses alleging the violation of "any treaty which:

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[234] *Id.* para. 6.
[235] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).
[236] *Id.* paras. 20-25.
[237] Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended) (Count 1, unlawfully inflicting terror upon civilians, charged as a violation of the laws and customs of war).
[238] *See* Prosecutor v. Stanislav Galic, No. IT-98-29-T, paras. 108-113 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting) (appended to the *Galic* Judgment).
[239] *Id.*
[240] *See* Prosecutor v. Duško Tadic, No. IT-94-1-A (Oct. 2, 1995) (Jurisdictional Decision).

(1) was unquestionably binding on the parties at the time of the alleged offense; and (2) was not in conflict with or derogating from peremptory norms of international law. . . ."[241] In applying this test, the *Galic* judgment notes that Protocol I applied as treaty to the parties on the basis of a 22 May 1992 agreement,[242] and further that "the second part of Article 51 (2) neither conflicts with nor derogates from peremptory norms of international humanitarian law."[243] In affirming that this general treaty principle is in accord with the norms of international law, the majority did not address the issue of customary law with respect to this offense.[244]

In dissent, the minority used a more recent Appeals Chamber decision to argue that the ICTY does not have jurisdiction over this offense precisely because no basis exists to ground this offense either as a violation of the Statute of the ICTY or of customary international law.[245] The dissent further opined that since this is the first time the ICTY adjudicated this offense, the customary nature of both the offense itself and criminal liability for the offense must be established in accord with the principle of *nullum crimen sine lege*.[246] Moreover, the dissent cautioned that the few references cited by the majority opinion would not by themselves suffice to allow a finding that the offense and criminal liability for the offense were indeed customary at the time (1992-1994).[247]

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[241] *Galic*, No. IT-98-29-T, para. 98 (Judgment and Opinion) (J. Nieto-Navia, dissenting) (Judgment) (citing *Tadic*, No. IT-94-1-AR72, para. 143 (Jurisdictional Decision)).

[242] *Galic*, No. IT-98-29-T, paras. 22-25 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[243] *Id*. paras. 99-105. In this section of the judgment, the majority reviews the observations of a number states with respect to the language of the terror clause of Protocol I, Article 51(2), both during the formulation of the treaty, and the subsequent ratification of Protocol I. *supra* note 14, art. 51(2).

[244] *Galic*, No. IT-98-29-T, para. 138 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[245] *See id.*, app., paras. 110-112 (providing the separate and partially dissenting opinion of Judge Nieto-Navia citing the *Ojdanic* Interlocutory Appeals Decision (No. IT-99-37AR72, para. 10 (May 21, 2003)).

[246] *Nullum crimen sine lege*—"no crime before law." *Id*. This principle, articulated in the 1993 Report of the Secretary General, is designed to safeguard individuals from being held criminally liable for acts not codified as violations of customary law at the time they were committed. *See Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*, *supra* note 57, para. 34.

[247] *Galic*, No. IT-98-29-T, app., para. 113 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

V. Part III: Propriety of the Use of Protocol I Principles as a Legal Basis for Charges

The previously examined charges and elements developed in ICTY cases offer significant degrees of support for the customary legal basis of the charges and elements U.S. military commission prosecutors intend to use. The charges and elements articulated in *Galic* and *Strugar* offer particularly promising models for several reasons.

The foundation of charges and elements on recognized principles pertaining to the customary prohibition of targeting civilians and civilian objects as articulated in Protocol I (Arts. 48-52)—rather than on GC Common Article 3—preempts any potential conflict with the current U.S. legal doctrine holding that Common Article 3 applies only to internal armed conflicts.[248] Protocol I governs armed conflicts of an international character.[249]

Although the United States has not ratified Protocol I and is therefore neither bound as a matter of treaty law nor entitled to invoke its provisions as a state party, the international jurisprudence discussed in this article articulates the widely held contemporary view that many of the principles reflected in relevant portions of Articles 51 and 52 of Protocol I constitute customarily established norms of the laws of armed conflict. This understanding of the relevant portions of Articles 51 and 52 as a codification of customary law is ideologically compatible with a historical pattern of consistent policy statements by the U.S. government.[250] It is important to note that the scope of legal principles embodied in Protocol I that the United States recognizes as customary is somewhat more restricted than that recognized by the ICTY, and further that the U.S. view would obviously govern military commissions. Nonetheless, despite these narrow doctrinal differences between the United States and the ICTY, considerable common ground exists with respect to the customary nature of conduct-of-hostilities offenses and charges.

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[248] LAW OF WAR DESKBOOK, *supra* note 131, at 130. Despite the observation that universal application to all conflicts is apparently U.S. policy on the issue as cited in the LAW OF WAR DESKBOOK, this remains unspecified in statute. *Id*. The *Expanded War Crimes Act of 1997* explicitly linked violations of Common Article 3 to "non-international armed conflict." 18 U.S.C. § 2441 (c) (3) (2000).

[249] Protocol I, *supra* note 14, art. 1.

[250] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42 (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal).

At a minimum, the principles set forth in relevant portions of Articles 51 and 52 that the United States consistently recognizes, and affirmed by the international community in various manifestations, can be considered settled tenets of the customary law of war. Since the proposed military commissions will have jurisdiction over violations of the "laws of war," these principles are an appropriate basis for charges irrespective of the United States' status as a non-party to the legal instrument that technically codifies them.

A. Model Charges Apply to Attacks Against Civilians in Non-Occupied Territories

As an additional advantage, the charges and elements discussed previously, [251] properly address the non-occupied status of the civilians and civilian objects unlawfully attacked. Unlike the protections afforded to civilians by GC IV, many of which are treaty restricted to civilians under military occupation, Articles 48 through 52 of Protocol I apply more broadly to safeguard civilians and civilian objects from the effects of "battlefield hostilities" without regard to the status of the territory as occupied or merely defended.[252] This broader protection in the principles embodied in Protocol I renders immaterial the issue of control over the civilian population and civilian objects at the time of the offense.[253] Thus, the only relevant issue is whether the international law entitled protected status to the civilians and civilian objects is in question. Moreover, the applicability of such charges founded on the relevant principles of Protocol I is not related to or dependant upon a determination of an accused's status as a lawful combatant; rather, the only requirement is a nexus between the act and a state of armed conflict.[254]

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[251] *See generally supra* Part IV.(B).

[252] Protocol I, *supra* note 14.

[253] *Id.*

[254] As noted in the *Kunarac* Judgment and reflected in Protocol I, the customary law of war obligates parties to the conflict to distinguish between civilians and combatants, and not attack a military object if it is likely to cause civilian casualties or damage which would be in excess to the military advantage anticipated. *See supra* notes 212-214. In this context, this article's authors believe the key elements are the phrases "party to the conflict" and "military advantage anticipated." Whether or not other parties recognize the attacking party at the time as a lawful or privileged belligerent is not germane. The fact that the opposing party may question the legitimacy of a belligerent party does not relieve the challenged belligerent from the obligations to conduct their military operations within the confines of the law of war. Consequently, the requisite

1. Charges Modeled on Violations of Principles in Protocol I Articles 51 and 52 Can Allege Grave Breaches

Charges based on principles enshrined in Articles 51 and 52 of Protocol I have the flexibility to allege serious offenses against customary law equivalent to grave breaches based on principles articulated in Article 85(3) of Protocol I. Specifically, Article 85(3) enumerates the following prohibitions under the law of armed conflict:

> (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);
> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury or damage to civilian objects, as defined in Article 57 paragraph 2 (iii);
> (d) making non-defended localities and demilitarized zones the object of attack;
> (e) making a person the object of attack in the knowledge he *is hors de combat*;[255]

2. Terror Charge Incorporates the Element of Specific Intent

Like the unlawful-attack charges in several of the ICTY cases, the terror charge and elements formulated by the prosecution in *Galic* provides a good potential blueprint for a similar charge of unlawfully inflicting terror on civilians as an offense prosecutable by a U.S. military commission. The *Galic* formulation is particularly commendable for its specific-intent element—alleging that the acts or threats of violence were carried out with the primary purpose of spreading terror among the

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considerations by "parties to the conflict" in planning and executing military attacks will be the same, regardless of whether the "military advantage anticipated" belongs to a recognized privileged belligerent, or an unprivileged one.

[255] Protocol I, *supra* note 14, arts. 85(3) (a-e). Subparagrah f, governing the perfidious use of protected emblems, is not applicable. *Id.* art. 85(3)(f).

civilian population—which elevates the egregious nature of this crime.[256] Further, as reflected in the *Galic* Judgment, the actual "infliction of terror" is not the required as a threshold of the commission of the offense.[257] Simply establishing the intent will suffice in establishing the "act of violence."[258] Despite the absence of a decision concerning the customary basis of this offense in the *Galic* Judgment, it can be credibly argued that by the year 2000, this offense was indeed customary (as noted earlier, the U.S. Government advocated the customary nature of this principle as early as 1987).[259]

B. Other Issues Regarding Use of ICTY-Based Charges and Elements at U.S. Military Commission

The ICTY has not fully adjudicated through appeal, the charges and elements discussed in the *Galic* and *Strugar* cases.[260] The defense, and on occasion, the prosecution can challenge the offenses and elements noted in a decision. Moreover, the ICTY Appeals Chamber has the competence to reject or modify them *sua sponte* as a component of its role as the "final arbitrator of law at the International Tribunal."[261] Nonetheless, ICTY decisions are merely instructive in nature on U.S. institutions with respect to the status of customary law.[262] Any technical modifications to the charges and elements in cases currently under appeal before the ICTY should not affect the United States' ability to model charges and elements for a case before a U.S. military commission after those originally submitted by the ICTY, so long as they continue to reflect principles of existing customary law.[263]

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[256] Prosecutor v. Stanislav Galic, No. IT-98-29-T, para. 133 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting).

[257] *Id.* paras. 82, 134.

[258] *Id.* paras. 134-136.

[259] Matheson, *supra* note 65, at 426. Protocol I, *supra* note 14. *See* International Committee for the Red Cross IHL Treaties, *available at* http://www.ICRC.org/ihl.nsf) (last visited Apr. 26, 2004).

[260] At the time of writing, pre-appeals proceedings are underway in *Galic,* with an anticipated Appeals Judgment in early 2005.

[261] Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 14 n.28 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[262] *See* Ford v. Garcia, 289 F.3d 1283, 1290-1292 (2002). In the case of *Ford v. Garcia*, the 11th Circuit Court of Appeals noted that recent decisions by the ICTY and ICTR provided modern *insights* into the application of the legal doctrine of command responsibility as articulated by the U.S. Supreme Court in *re Yamishita*, 327 U.S. 1 (1946) [emphasis added].

[263] MCI No. 2, *supra* note 7, para. 3A.

On a similar note, the U.S. government's stated positions with respect to the customary status of the relevant provisions of Protocol I will obviously prevail over the ICTY or other international community views, in crafting charges and elements to be used in a case before a U.S. military commission. Therefore, to the extent that the ICTY examples conflict with U.S. policy or with its status as a persistent objector to the purportedly customary status of any provisions, charges, and elements for a U.S. military commission, the United States would need to alter the ICTY's submissions to reflect the United States' understanding of the current state of customary law.[264]

Another potential issue exists with respect to charges for the 11 September 2001 attacks on the Pentagon. Regardless of the United States' objection to a narrow technical aspect of the definition of "military objective" in Protocol I,[265] legal qualification of the Pentagon as a protected civilian or non-military target would be impossible, particularly in light of the state of armed conflict declared in the President's order on military commissions.[266] Furthermore, it would be very difficult as a legal matter to acknowledge the Pentagon as a legitimate military target but argue that the relatively small number of civilian casualties sustained in the attack against that military target was clearly disproportionate to the military advantage anticipated.[267]

Charges that the attack against the Pentagon constituted a violation of the law of armed conflict would therefore necessarily be founded on a theory that the means and method of the attack—namely the hijacking of civilian aircraft and use of those aircraft as projectiles—against the Pentagon is proscribed under customary law. One possible vehicle for such a charge would be the principles articulated in Article 51(7) of Protocol I, which prohibits the use of civilians to shield military operations.[268] Obviously, with respect to the World Trade Center

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[264] For instance, Article 52(3) of Protocol I is not recognized by the United States as reflective of customary law; similarly, the United States has persistently objected to portions of the definition of "military objective" in Article 52(2). Protocol I, *supra* note 14, art. 52(2), (3); *see* U.S. ARMY CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001 LESSONS LEARNED FOR JUDGE ADVOCATES 51-52 (15 Dec. 2001).

[265] *Id.*

[266] Military Order of 13 November 2001, *supra* note 3.

[267] The noncombatant status of the DOD contractors and other civilian DOD employees further complicates the issue of the determination of civilian casualties.

[268] Additional Protocol I, *supra* note 14, art. 51(7).

attacks, there should be no issue concerning the manifestly civilian status of the population and objects attacked.

VI. Conclusion

The ICTY's jurisprudence concerning war crimes committed in the former Yugoslavia serves as a solid foundation for both the customary nature of specific conduct-of-hostilities offenses and for the charges and elements enumerated in MCI No. 2. The ICTY's resolution that the customary principles underlying Articles 48-52 of Protocol I can be an appropriate legal basis for charges, thereby eliminating the need to rely on the articles themselves, is a particularly significant and applicable development given the United States' status as a non-party to that instrument. The ICTY jurisprudence establishes a critical bridge between the generally broader provisions of the 1907 Hague Rules IV and 1949 Geneva Conventions, and the application of the more recent and technically descriptive Additional Protocol I with respect to the customary law of armed conflict. Moreover, these charges and elements are associated with an existing body of international jurisprudence establishing criminal liability for violations of the law of armed conflict (both as an individual, and under the doctrine of superior responsibility).

At the same time, the international judicial forum responsible for creating this body of jurisprudence over the past eleven years was established by United Nations Security Council in 1993, to address the conflict then occurring in the former Yugoslavia.[269] The ICTY Appeals Chamber further serves as the appellate authority for the International Criminal Tribunal for Rwanda established in November 1994.[270] There is no specific association between ICTY trial and appellate related jurisprudence pertaining to the state of customary law, and the events of 11 September 2001. Consequently, U.S. military commissions relying (in part) on jurisprudence originating from the ICTY should be above reproach in that they may be improperly constituting "customary law" strictly to suit any current U.S. political agenda.

ICTY-formulated criminal charges and related jurisprudence are also independent of the Statute and Rules of the International Criminal Court

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[269] U.N. SCOR 808, 3175th mtg., para. 1, S/RES/808 (1993).

[270] U.N. SCOR 955, 3453rd mtg., para. 1 S/RES/955 (1994). *See also Statute of the International Criminal Tribunal for Rwanda*, R. 12 *bis*, *available* at http://www.ictr.org.

(ICC). As such, the U.S. government's reliance on ICTY jurisprudence supporting the customary legal basis for similar charges would not set a precedent for U.S. acquiescence to the controversial ICC Statute. Rather, the United States' embrace of non-objectionable portions of relevant charging tools independently established and adjudicated by an appropriate international judicial forum could demonstrate the U.S. commitment to the basic principles and standards of international criminal law despite its non-participation in the ICC treaty process.

Overall, the contemporary work of the ICTY with respect to adjudicating offenses that violate the laws and customs of war provides a significant legal foundation with respect to the law of armed conflict. The ICTY has produced a well-reasoned, growing body of relevant jurisprudence, which is entirely compatible with the common-law system. While the ICTY Statute remains the primary basis of jurisdiction, trial and appellate benches extensively rely on customary international law and associated state practice in the course of their opinions and judgments. This is particularly true with respect to conduct-of-hostilities offenses. The work of the ICTY should be the first port of call for those legal professionals who will seek to rely on the customary provisions of the law of armed conflict before a U.S. Military Commission.