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Into the Next Millennium
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The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

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THE INTERNATIONAL CRIMINAL TRIBUNAL for the former Yugoslavia (ICTY) was established by Security Council Resolution 827 of 25 May 1993.[1] Article 1 of the ICTY Statute states: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." The provisions that follow in the ICTY Statute give the Tribunal specific subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).

There is little doubt that the decisions and practice of the ICTY and of its sister tribunal, the International Tribunal for Rwanda (ITR)[2] will have a significant impact on the development of the law of armed conflict. Judicial decisions are a subsidiary means for the determination of rules of international

law, not a source of law equivalent to treaties, custom or general principles of law. Further, there is no rule of precedent in international law as such. The decisions and practice of the ICTY, if they are to have a positive impact on the development of the law of armed conflict, must persuade external decision makers such as foreign ministry officials, officials in international organizations, other judges, military officers, and academic critics of their relevance and utility. Judicial decisions affect the development of the law of armed conflict insofar as they address legal lacunae (treaty negotiators can and do accept gaps in the law—judges cannot), as they add flesh to the bare bones of treaty provisions or to skeletal legal concepts such as military necessity or proportionality, and as they identify and give legitimacy to new legal developments, such as emergent custom.

Applying its own statute, some of the Tribunal's decisions will be statute dependent and of limited relevance to the general development of the law of armed conflict.[3] The ICTY has developed its own approach to procedural and evidentiary issues, topics essentially unaddressed in the law of armed conflict. Further, the Tribunal is concerned exclusively with offenses occurring in the territory of the former Yugoslavia. At times, one might regard the various factual scenarios as having been drafted for an exceptionally difficult Jessup moot court competition. One is, however, constantly reminded of the bitter reality of devastation and death that compelled the creation of the Tribunal. The complexity of the situation in the territory of the former Yugoslavia has compelled the Tribunal to devote substantial parts of most of its decisions to determining the nature of the conflict and the content of the body of applicable law. The treaty-based law of armed conflict has been drafted by and agreed to by representatives of States. The applicability of this body of law is dependent upon the classification of a particular conflict. A relatively elaborate body of law applies during international conflicts; a much more skeletal body of law applies to internal conflicts.

This "two box" approach to the law is rooted in the reluctance of many states to accept what they perceive to be interference in their internal affairs. One might query why States would wish to do worse things to their own citizens in an internal conflict than to foreigners in an international conflict. Bearing in mind the complexity of the conflict(s) in the territory of the former Yugoslavia and the similar complexity of many other contemporary conflicts, one might also query the continuing utility of the two-box approach. The analytical contortions of the ICTY judges on the subject both demonstrate the need for a unified approach and suggest how such an approach might evolve.

As of 31 December 1997, the ICTY has confirmed twenty public indictments naming seventy-four indictees,[4] including three Muslims, fifteen Croats and fifty-six Serbs. It had ninteen indictees in custody, including three Muslims, four Serbs and twelve Croats. One trial, that of Dusko Tadič, a Bosnian Serb, had been completed, and the conviction was being appealed. One indictee, Drazen Erdemovič, a Bosnian Croat fighting on the Bosnian Serb side, submitted a guilty plea but then appealed his sentence. Two other trials were ongoing—that of Timofil Blaskič, a Bosnian Croat, and the joint trial of Hazim Delič, Esad Landzo, Zdravko Mucič, and Zejnil Delalič, three Bosnian Muslims and one Bosnian Croat. In addition, two trials, those of Zlatko Aleksovski, a Bosnian Croat, and Zlavko Dokmanovič, a Croatian Serb, were scheduled to start in January 1998, with several others to follow. The Office of the Prosecutor (OTP) of the ICTY has made a conscientious effort to devote resources to investigate offenses allegedly committed by Croats, Muslims, and Serbs in an evenhanded fashion. A glance at the list of indictees indicates that to date: (a) a substantial majority of the indictees are Serbs (usually from Bosnia), a significant number of the indictees are Croats (also usually from Bosnia), and a small number of the indictees are Bosnian Muslims; and (b) all of the Muslim indictees and almost all of the Croat indictees, but very few of the Serb indictees, are now in custody.

Two comments about the approach of the OTP to investigations and indictments are necessary. First, the vast number of alleged offenses committed in the territory of the former Yugoslavia and the limited resources of the OTP mandate a selective rather than a comprehensive approach. The basic preference has been to conduct investigations related to persons of particular importance, to particularly atrocious incidents, or to persons alleged to be responsible for particularly heinous acts. Inasmuch as investigations are continuing, the fact that certain persons have not yet been indicted is not necessarily significant. The availability of evidence or of an accused has occasionally affected decisions to conduct investigations. The OTP conducts its own investigations; it cannot and does not rely on untested information provided by others. Second, because of the complexity of the conflict and the fact that the ICTY Statute does not address the issue of included offenses, indictments have tended to include three types of charges for each alleged incident: an Article 2 (grave breaches) charge if the prosecution can establish the conflict is international, an Article 3 (violation of the laws or customs of war) charge if the conflict is determined to be internal, and an Article 5 (crimes against humanity) charge if the prosecution can establish that the offense

occurred within the context of a widespread or systematic attack against the civilian population.

To date, the ICTY has contributed to the development of the law of armed conflict by its decisions related to the application of the grave breach provisions of the Geneva Conventions of 1949; to the scope of the concept of violations of the laws or customs of war, particularly in internal conflicts; to the meaning and scope of crimes against humanity; to the scope of individual criminal responsibility, including the doctrine of command responsibility; and to potential defenses, including duress and the doctrine of reprisals. This article discusses each of these issues in turn. It will conclude with an assessment of probable future developments.

Application of the Grave Breach Provisions

Article 2 of the ICTY Statute gives the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions. Common Article 2 of the Geneva Conventions indicates that the Conventions apply in their entirety to all armed conflicts involving one or more High Contracting Parties on each side; to all cases of total or partial occupation of the territory of a High Contracting Party by the forces of another High Contracting Party; and to armed conflicts with Powers which are not parties to the Conventions if these Powers accept and apply the provisions thereof. A reasonable argument can be made that the grave breach provisions are part of customary law and apply to all international conflicts.[5] In any event, the Geneva Conventions applied throughout the territory of the former Yugoslavia during the period of conflict as a matter of treaty obligation.[6] It should also be noted that Common Article 3 of the Geneva Conventions, which applies to non-international conflicts, encourages parties to such conflicts to enter into special agreements to bring into force all or part of the other provisions of the Conventions. All of the parties to the conflict have entered into a web of special agreements pursuant to Common Article 3 or to other general principles of humanitarian law.[7]

Unfortunately, simply stating that the sovereign entities in the territory of the former Yugoslavia were bound by the Geneva Conventions as a matter of treaty or custom does not resolve the issue of whether or not the grave breach provisions were relevant. At various times: (a) the Socialist Federal Republic of Yugoslavia (SFRY), which was succeeded on 29 April 1992 by the Federal Republic of Yugoslavia (FRY), was engaged in armed conflict against one or more of Slovenia, Croatia, and Bosnia; (b) Croatia was engaged in armed

conflict against the SFRY, the so-called Republic of Serbian Krajina (RSK), the FRY, and Bosnia; (c) Bosnia was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska (RS), Croatia, the HVO (the Bosnian-Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdic; and (d) Slovenia was engaged in armed conflict with the SFRY. One is tempted to cut the Gordian knot and simply argue that all the fighting that occurred in the territory of the former Yugoslavia between 1991 and 1995 was part of one large international conflict. It is difficult, however, to fit all the fighting into an international armed conflict framework. As one example, it is difficult to see how the fighting between the Bosnian government and the Abdic faction can be regarded as part of an international conflict.

The decision on the *Defence Motion for Interlocutory Appeal on Jurisdiction* (hereinafter *Tadič Jurisdiction Decision*) rendered on 2 October 1995 gave the Appeals Chamber a first opportunity to address the conflict classification issue.[8] The offenses with which Tadič was charged occurred in Bosnia in 1992; they involved a Bosnian Serb perpetrator and Bosnian Croat or Muslim victims.

At the trial level, the defense argued that the conflict in issue was not international and that there were no Common Article 3 agreements bringing the grave breach provisions into effect.[9] The prosecutor argued that for a variety of reasons the conflict was international and, to the extent the conflict had internal aspects, the grave breach provisions applied as a result of relevant Common Article 3 agreements.[10] The United States, in an *amicus* brief, argued that the events in the former Yugoslavia should be regarded as parts of a single international conflict and that violations of Common Article 3 could be prosecuted under the grave breach provisions of the Geneva Conventions.[11] On appeal, the prosecution also argued that the Security Council had determined that the conflict in the former Yugoslavia was international and that this determination should be given full effect.[12]

The Appeals Chamber declined to decide on the nature of the conflict, leaving the issue to be resolved as a matter of mixed fact and law by the Trial Chamber. It did indicate in its decision that classification was a complex issue and that the Security Council was also aware of this complexity.

> [W]e conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context.[13]

The Appeals Chamber went on to adopt a relatively conservative approach to Article 2 of the ICTY Statute, deciding that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts."[14] The majority observed further:

> Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, The Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches," because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches," because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina.[15]

This particular observation, although unnecessary to the decision and of debatable accuracy, has had a substantial impact on consideration of the issue by the various trial chambers in subsequent cases.

Although the defense would appear to have conceded the point and the prosecution argued in support of it, the Chamber was unwilling to consider the possibility of prosecuting under Article 2 of the Statute for grave breaches occurring in an internal conflict if appropriate Common Article 3 agreements had been concluded. It did, however, envisage the possibility of such prosecution under Article 3 of the Statute.[16] Implicitly, the Chamber decided that it was not possible to prosecute violations of Common Article 3 under the grave breach provisions of the Geneva Conventions. The relatively cautious approach to interpretation of Article 2 of the ICTY Statute taken by the majority can be contrasted with a much more progressive approach adopted in a separate opinion by Judge Abi-Saab. He was of the view that the Tribunal should assume jurisdiction under Article 2 for acts committed in internal conflicts on the basis of either a new interpretation of the Geneva Conventions or the establishment of a new customary rule ancillary to the Conventions.

> As a matter of treaty interpretation—and assuming that the traditional reading of "grave breaches" has been correct—it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the "subsequent practice" and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose of the effect of including internal conflicts within the regime of "grave breaches." The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of "grave breaches" is extended to internal conflicts. But the first seems to me as the better approach. And under either, Article 2 of the Statute applies—the same as Article 3, 4 and 5—in both international and internal conflicts.[17]

The majority judgment in the *Tadič Jurisdiction Decision* set the standard for consideration of the conflict classification issue by the Trial Chambers.

The major decisions at the trial chamber level addressing the classification issue to date have been the Rule 61 proceeding[18] concerning Ivica Rajič[19] and the *Tadič Trial Decision.*[20] These decisions have tended to focus on three related questions: (a) did an international conflict exist when the offenses were committed? (b) was the accused linked in an appropriate fashion to one side of the international conflict? and (c) were the victims in the hands of a party to the conflict or occupying power of which they were not nationals? Most of the victims are civilians, and Article 4 of the Civilians Convention states in part: "Persons protected are those who . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals." In the absence of any other relevant international decisions, and for better or worse, particular heed has been paid by the trial chambers to the *Nicaragua* decision of the International Court of Justice when considering conflict classification.[21] The *Nicaragua* decision was concerned with State responsibility for violations of international humanitarian law, not with individual criminal responsibility. Further, it was concerned with the peculiar facts of the U.S.-supported "contra" struggle in Nicaragua, and these facts are not necessarily similar to the facts arising in the territory of the former Yugoslavia.

In the Rajič Rule 61 proceeding, a trial chamber consisting of Judges McDonald, Sidhwa, and Vohrah reviewed and reconfirmed an indictment against Ivica Rajič alleging that Bosnian Croat forces under his command attacked the Bosnian village of Stupni Do on 23 October 1993 and committed several offenses for which Rajič was responsible, including the grave breach of wilful killing recognized by Article 2(a) of the ICTY Statute. Bearing in mind the *Tadič Jurisdiction Decision*, the trial chamber was of the view that it was

necessary to establish an undefined quantum of third-State (Croatian) involvement in the clashes between Bosnian government and Bosnian Croat (HVO) forces to convert an internal conflict into an international conflict. The prosecution advanced two theories: (a) the conflict was international because of the direct military involvement of Croatian forces engaged in combat with Bosnian forces in Bosnia; and (b) the conflict was international because, in the hostilities between Bosnia and the Bosnian Croats, the Bosnian Croats were closely related to and controlled by Croatia and its armed forces. In brief:

> 13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5,000 to 7,000 members of the Croatian Army as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia.

The Chamber indicated, however, that the existence of an international conflict between Bosnia and Croatia during the appropriate period was not enough, by itself, to establish that grave breaches had been committed by Bosnian Croats. It was also essential to establish that Croatia exerted such political and military control over the Bosnian Croats that the latter might be regarded as an agent or extension of Croatia. The Chamber addressed the issue as follows:

> 25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the [United States] over a force with a high degree of dependency on [the United States]" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. ¶ 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the

> acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

The Chamber then went on to determine whether the Bosnian civilian victims were protected persons in that they were in the hands of a party to the conflicts of which they were not nationals:

> 37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. . . . Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were—for the purposes of the grave breaches provisions of Geneva Convention IV—protected persons *vis-à-vis* the Bosnian Croats because the latter were controlled by Croatia.

The *Tadič Trial Decision* has the most elaborate discussion of the conflict classification issue to date. The Trial Chamber in this case consisted of Judges McDonald, Vohrah, and Stephen. As indicated earlier, Tadič is a Bosnian Serb who committed offences against Bosnian Muslims or Croats in Bosnia in the summer of 1992. In brief, the majority, consisting of Judges Vohrah and Stephen, held that the Geneva Conventions did apply in Bosnia throughout the period covered by the indictment, because of an ongoing international armed conflict between Bosnia and the SFRY/FRY.[22] The majority then made two unsubstantiated assertions in a single paragraph: that (a) the armed forces of the Republika Srpska (the VRS) and the RS as a whole were, at least from 19 May 1992 onwards, legal entities distinct from the FRY armed forces (VJ) and from the FRY, and (b) members of the VRS were nationals of Bosnia.[23] May 19, 1992 was significant as the date of the dissolution of the old SFRY national army (the JNA) into two new components, the VRS and the VJ, and the formal withdrawal of the VJ from Bosnia. This was in spite of the majority observation that:

115. The formal withdrawal of the JNA from Bosnia and Herzegovina took place on 19 May 1992; the VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 and did not return to Serbia. This was so whether or not they were in fact in origin Bosnian Serbs. This applied also to most other officers and non-commissioned officers. Although then formally members of the VRS rather than of the former JNA, they continued to receive their salaries from the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the pensions of those who in due course retired were paid by that Government. At a briefing of officers concerned with logistics, General Dorde Dukic, then of the VRS but who had, until 18 May 1992, been Chief of Staff of the Technical Administration of the JNA in Belgrade, announced that all the active duty members of the VRS would continue to be paid by the federal government in Belgrade, which would continue to finance the VRS, as it had the JNA, with the same numerical strengths of officers as were registered on 19 May 1992. The weapons and equipment with which the new VRS was armed were those that the units had had when part of the JNA. After 18 May 1992 supplies for the armed forces in Bosnia and Herzegovina continued to come from Serbia.

Relying on its unanalyzed conclusions that the VRS and RS were legally distinct from the VJ and the FRY and that members of the VRS were Bosnian nationals, the majority went on to review the *Nicaragua* case in order to determine the proper rule for applying general principles of international law relating to State responsibility for *de facto* organs or agents to the specific circumstances of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign power in the continuation of that conflict. The majority noted that the ICJ had a set a particularly high standard for determining whether or not the United States was responsible for the activities of the contras. The central portion of the ICJ judgment on this point was quoted:

585. . . . United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. . . . *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective*

control of the military or paramilitary operations in the course of which the alleged violations were committed.[24]

The majority identified two substantial differences between the facts of the *Nicaragua* case and the facts in the Tadič case: first, the VRS was an occupying force, not a raiding army,[25] and second, the FRY clearly did control Bosnian Serb military activities until approximately 19 May 92.[26]

> 588. Consequently, the Trial Chamber must consider the essence of the test of the relationship between a *de facto* organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opština Prijedor, can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). . . .
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> In doing so it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro). It must also be shown that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

It was the position of the majority that the law applicable to State responsibility was also relevant to determining which body of law applied for individual criminal responsibility. In order to establish State responsibility, it was necessary to establish that the FRY exercised effective control over the VRS or the RS. Logistical support, personnel support, and common aims were insufficient.

> 598. This leads the Trial Chamber to a consideration of two relationships of especial importance to the question which this Trial Chamber must determine. The first is the relationship of General Mladič, and hence the VRS Main Staff, to Belgrade. . . . The only evidence which the Prosecution was able to adduce as to the command and control relationship between the VRS Main Staff and Belgrade was that provided by Colonel Selak. He said, speaking of a Prosecution exhibit displaying a link between the Main Staffs of the VRS and VJ after 18 May 1992 (Prosecution Exhibit 174):

> [T]here was no real chain of command because officially the Commander of the army of the Republika Srpska was Colonel General Ratko Mladič. So this [link] is just *pro forma* because other relations between the Chief of Staff, the main staff of the Yugoslav Army and the main staff of the army of the Republika Srpska were not really existing but, in fact, they did co-ordinate.

Coordination is not the same as command and control. The only other evidence submitted by the Prosecution was that, in addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade. No further evidence was offered by the Prosecution on the nature of this relationship.

599. What then of the second relationship, namely that between the SDS (and hence the *Republika Srpska*) and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)? Unlike the situation confronted by the Court in the *Nicaragua* case, where the United States had largely selected and installed the political leaders of the *contras*, in the *Republika Srpska* political leaders were popularly elected by the Bosnian Serb people of the Republic of Bosnia and Herzegovina. Indeed, as previously noted, the independence of the *Republika Srpska* itself was declared at a vote of the Assembly of the Serbian People of Bosnia and Herzegovina on 9 January 1992. The Assembly and its leaders played a role in the overall conduct of the war both in the Republic of Bosnia and Herzegovina and beyond, in addition to the supply of paramilitary forces to supplement the fighting strength of the new VRS units, which forces took part in the military operations in opština Prijedor. . . .

605. Thus, while it can be said that the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of *matériel* by the VJ, had the capability to exercise great influence and perhaps even control over the VRS, there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS, or to influence those operations beyond that which would have flowed naturally from the coordination of military objectives and activities by the VRS and VJ at the highest levels. In sum, while, as in the *Nicaragua* case, the evidence available to this Trial Chamber clearly shows that the "various forms of assistance provided" to the armed forces of the *Republika Srpska* by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) was "crucial to the pursuit of their activities" and, as with the early years of the *contras'* activities, those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations, evidence

> that the Federal Republic of Yugoslavia (Serbia and Montenegro) through the VJ "made use of the potential for control inherent in that dependence," or was otherwise given effective control over those forces and which it exercised, is similarly insufficient.

On the basis of its assessment of the law as contained in the *Nicaragua* decision (the effective control test) and its assessment of the facts, the majority found that the VRS and the RS could not be regarded as *de facto* organs or agents of the FRY. As a consequence, the civilian victims in the *Tadič* case could not be regarded as protected persons within the meaning of the Geneva Civilians Convention, because they were not in the hands of a party, of which they were not nationals, to an armed conflict. The Bosnian victims were in the hands of their Bosnian (Serb) fellow nationals. As a consequence, the grave breach provisions of the Geneva Conventions recognized in Article 2 of the ICTY Statute did not apply.[27]

Judge McDonald, continuing to adopt the approach she had formulated in *the Rajič Rule 61 Proceeding*, filed a robust dissent in which she argued that the majority had misinterpreted the *Nicaragua* decision and in any event had misapplied its mistaken interpretation to the facts. In her view, *Nicaragua* established two distinct tests for attributatility: effective control and agency. She summarized her analysis as follows:

> 25. The separate opinion of Judge Ago [in the *Nicaragua* case], also cited by the majority, explains with lucidity the concept that a State can be found legally responsible even where there is no finding of agency. He states:
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> > [T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, *that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State*. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other

> inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[28]

Therefore it appears that there are two bases on which the acts of the VRS could be attributed to the Federal Republic of Yugoslavia (Serbia and Montenegro): where the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro), which could be established by a finding of dependency on the one side and control on the other; or where the VRS was specifically charged by the Federal Republic of Yugoslavia (Serbia and Montenegro) to carry out a particular act on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) thereby making the act itself attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). In *Nicaragua*, the court required a showing of effective control for this latter determination.

If "effective control" is the proper test, Judge McDonald, interpreting the same evidence and accepting the same facts, concluded that the FRY did effectively control the VRS, that the creation of the VRS was a legal fiction, and that the attack which provided the opportunity for Tadič to commit offenses had to have been planned before the VRS was created on 19 May 1992.

> 7. The evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same: to create an ethnically pure Serb State by uniting Serbs in Bosnia and Herzegovina and extending that State from the Federal Republic of Yugoslavia (Serbia and Montenegro) to the Croatian Krajina along the important logistics and supply line that went through opština Prijedor, thereby necessitating the expulsion of the non-Serb population of the opština.
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> 8. Although there is little evidence that the VRS was formally under the command of Belgrade after 19 May 1992, the VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. This finding is supported by evidence that every VRS unit had been a unit in the JNA, the

> command and staffs remaining virtually the same after the re-designation. The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade.... The ties between the military in Bosnia and Herzegovina and the SDS political party, which advocated a Greater Serbia, similarly remained unchanged after the re-designation.
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> 9. In addition, the evidence establishes that the VRS, in continuing the JNA operation to take over opština Prijedor, executed the military operation for the benefit of the Federal of Yugoslavia (Serbia and Montenegro).

The prosecution has appealed the Trial Chamber decision in Tadič, arguing:

- The Trial Chamber erred in relying upon the *Nicaragua* case and the "effective control" test to determine the applicability of the grave breach provisions of the Geneva Conventions.
- The provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law only require that the perpetrator be demonstrably linked to a party to an international armed conflict of which the victim is not a national, for the grave breach provisions to be rendered applicable.
- Assuming the *Nicaragua* case is to be relied upon, the decision in the *Nicaragua* case also applied an "agency" test, which is a more appropriate standard for determining the applicability of the grave breach provisions.
- In any event, assuming that the "effective control" test mentioned in the *Nicaragua* case is applicable to determining the applicability of grave breach provisions, the Trial Chamber erred in finding that this test is not satisfied on the facts of this case, which also satisfy the "agency" test outlined in the *Nicaragua* case.[29]

The main argument advanced by the prosecution is that the *Nicaragua* case is not relevant to the determination of the applicablity of the grave breach provisions or to determining individual criminal responsibility. It is essential to establish the existence of an international armed conflict in Bosnia at the time when Tadič is alleged to have committed his crimes. It is then necessary to establish that the perpetrator (Tadič) has a demonstrable link to one party to the international armed conflict while the victim is linked to a neutral or to a party on the other side. Further, as an aside, although Article 4 of the Civilians Convention defines "protected persons" as persons in the hands of a party of

which they are not nationals, determination of nationality is not a simple process when States are in the process of decomposition. A simplistic assumption that persons must be nationals of a new State simply because they live in its territory at the moment of creation is inappropriate.[30]

Violations of the Laws or Customs of War

Article 3 of the ICTY Statute gives the Tribunal power to prosecute persons violating the laws or customs of war. Certain violations are enumerated in the article, but the list is open-ended. In the *Tadič Jurisdiction Decision*, the Appeals Chamber considered the meaning of the expression "violation of the laws or customs of war" in the ICTY Statute. Its assessment may have an impact outside the Tribunal. The defense argued that Article 3 applied exclusively to international conflicts.[31] The prosecution argued that the expression "laws or customs of war" was at one time viewed as a term of art referring to laws or customs applicable exclusively to declared wars. As declared wars became uncommon, the expression was viewed as a term of art applicable to all international armed conflicts. In the opinion of the prosecution, with the development of treaty law specifically intended to apply to non-international armed conflicts, and of customary law applicable to non-international armed conflicts, the expression "laws or customs of war" had become a term of art which applies to all armed conflicts, although it does not bear the same content in international and non-international conflicts. The prosecution also argued that Article 3 enabled the Tribunal to prosecute all violations of applicable international humanitarian law treaties. Specifically, with reference to the Tadič case, the prosecution argued that the ICTY had the power to prosecute for violations of the rules in Common Article 3 of the Geneva Conventions committed in international or internal conflicts.[32]

Although the Appeals Chamber utilized a relatively conservative approach with respect to Article 2, it adopted an extremely progressive and creative approach concerning Article 3 of the Statute. The Chamber adopted the approach favored by the prosecution and went on at some length to elaborate upon its implications and upon the content of the relevant customary law, particularly that part of customary law which, in its view, applies to all armed conflicts regardless of classification. It is reasonable to assume that the Chamber focused its analysis on this part of customary law, both because it shared the view it apparently assigned to the Security Council that the conflicts in the territory of the former Yugoslavia are many and of mixed character, and because the content of this part of customary law had not been reviewed by a

tribunal in the past. In paragraph 94 of the *Jurisdiction Decision*, the Appeals Chamber set forth the requirements for an offense to be subject to prosecution under Article 3 of the Statute:

- The violation must constitute an infringement of a rule of international humanitarian law.
- The rule must be customary in nature, or if it belongs to treaty law, the required conditions must be met.
- The violations must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law," although it may be regarded as falling afoul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory.
- The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

The Chamber regarded Article 3 of the Statute as a general or residual clause covering all violations of humanitarian law not falling within Articles 2, 4, or 5. In so doing, it did not avoid or evade the classification issue. Classification remains relevant (a) when the sole source of a rule is a treaty which applies to a specific type of conflict (Protocol I, the Geneva Conventions and the Hague Conventions apply to international conflicts. Protocol II applies to internal conflicts.), or (b), when the customary law applies to a specific type of conflict.

Concerning treaty provisions, other than the grave breach provisions of the Geneva Conventions, the Chamber indicated it has jurisdiction to punish under Section 3 of the Statute:

> 143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary

> international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34). It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law, as are most customary rules of international humanitarian law.

Although the Chamber has adopted a very progressive approach concerning the content of customary law applicable to internal conflict, it did not state that customary law is identical for all conflicts. In particular, it held:

> 126. The emergence of the aforementioned general rules on internal conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules and not the detailed regulation they may contain has become applicable to internal conflicts.

The decision therefore, envisages charges under Article 3 of the Statute: (a) where an armed conflict must be established but classification is irrelevant because the basis for the charge is a rule of customary law which applies to all armed conflicts; (b) where an armed conflict must be established and classified as international because the basis for the charge is a rule of treaty or customary law which applies exclusively to international conflicts; or (c) where an armed conflict must be established and classified as internal because the basis for the charge is a rule of treaty or customary law which applies exclusively to internal conflicts.

As a general statement, evidenced by practice before the International Court of Justice, proof that a rule is a part of customary law is an extremely difficult task.[33] The Appeals Chamber has, however, provided a relatively elaborate discussion of the current content of customary law. In particular, it has indicated that the following rules apply to all conflicts regardless of classification:

- The rules in Common Article 3 (para 102);
- The principles in UN General Assembly Resolution 2444 (paras. 110 and 112); and

• The principles in UN General Assembly Resolution 2675 (paras. 111 and 112).

In addition to elaborating upon the content of customary law applicable to all conflicts and also to internal conflicts, the Chamber countered a defense assertion that the law applicable to internal armed conflicts did not entail individual criminal responsibility. Indeed, neither Additional Protocol II nor Common Article 3 contain provisions referring to criminal liability, although each of the Geneva Conventions does contain a relevant provision that states in part: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."[34] The Tribunal addressed the issue as follows:

> 128. . . . Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (*See* THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, Part 22, at 445, 467 (1950)). The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by governments officials and international organizations, as well as punishment of violations by national courts and military tribunals (*id.*, at 445–47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:
>
> > "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*Id.*, at 447).
>
> 129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

> 130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflict.

The Chamber's interpretation of the scope of customary law embraced by the expression "violations of the laws or customs of war" is indeed quite progressive. Reputable authorities have been of the view that no customary law exists for internal conflict[35] and that there is no basis for an assignment of criminal responsibility for acts occurring in internal conflicts except by a domestic court in the State where the conflict occurred.[36] Further, the basis for the conclusion that a body of customary law applicable to all conflicts exists might also be subjected to criticism. Extracts from the oral argument of the United States in the *Nuclear Weapons Advisory Opinion* case highlight the distinction between the approach of the Tribunal and the more traditional approach:

> It is a fundamental principle of international law that restrictions on States—particularly those affecting the conduct of armed conflict—cannot be presumed; they must, rather, be found in conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations. The Court made this vital point in the case of *Nicaragua v. United States (I.C.J. Reports 1986*, p.135), recalling that
>
> > in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.
> >
> > An even higher standard applies in establishing the existence of peremptory norms of international law, which must be accepted and recognized by the international community as norms from which no derogation is permitted. . . .[37]
>
> As the Court has clearly established, customary international law is created by a general and consistent practice of States, followed out of a sense of legal obligation. The Court has noted in the *North Sea Continental Shelf* case that the incorporation of a norm into customary international law requires "extensive and virtually uniform" State practice.[38]
>
> As a matter of law, the General Assembly's resolutions could only be declarative of principles of customary international law to the extent that such principles have in fact, been recognized already by the international community.[39]

When contrasted with the rigorous approach adopted by the International Court of Justice and other tribunals towards proof of customary law in other areas of international law, the substantiation provided by the Appeals Chamber for its conclusions concerning customary law is limited. The support for the conclusion that a certain common body of customary law applied to both international and internal conflicts consists primarily of two UN General Assembly Resolutions, 2444 of 19 December 1968 and 2675 of 9 December 1970, and a quotation from the *Nicaragua* decision.[40] Support for the conclusion that there is a significant body of customary law applicable to internal conflicts is more firmly based, consisting of examples from the Spanish Civil War of 1936–1939 (para. 100), the Chinese civil war that ended in 1949 (para. 102), the Nicaragua contra struggles of the 1980s (para. 103), the 1967 conflict in Yemen (para. 105), the Congo civil war of the 1960s (para. 106), the 1980s conflict in El Salvador (para. 107), and various declarations by States and international organizations urging States involved in internal conflicts to comply with certain minimum standards.

It must, however, be conceded that tribunals which have addressed the issue of the customary law content of international humanitarian law have tended to avoid detailed proofs. The International Military Tribunal at Nuremberg,[41] the tribunal which decided the *High Command Case*,[42] and even the ICJ itself in the *Nicaragua Case*[43] have all tended to reach essentially unsubstantiated conclusions on these matters. In the words of Theodor Meron:

> Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The "ought" merges with the "is," the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.[44]

Indeed, the Appeals Chamber, in the *Jurisdiction Decision*, has provided the most sophisticated and rigorous judicial determination to date of the customary law aspects of international humanitarian law. One might hope,

however, that the ICTY will return to some of these issues in future to strengthen their legal foundations.

Crimes against Humanity

In contrast to both the relatively conservative approach taken concerning Article 2 of the Statute and the somewhat progressive approach taken concerning Article 3, in the *Tadič Jurisdiction Decision* the Appeals Chamber adopted a relatively middle-of-the-road approach concerning the interpretation of Article 5 with respect to crimes against humanity. The approach taken in the Charter of the International Military Tribunal at Nuremberg[45] and in the judgment of the International Military Tribunal (IMT)[46] was to link crimes against humanity to other offenses within the jurisdiction of the IMT and, in particular, to link crimes against humanity to the existence of an international armed conflict. On the other hand, Control Council Law No. 10,[47] which provided the basis for several subsequent trials at Nuremberg by American tribunals, defined crimes against humanity but did not restrict the jurisdiction of tribunals empowered under it to offenses committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[48] As a result, the tribunals in some of the subsequent proceedings regarded crimes against humanity as offenses which need not have a link with international armed conflict.[49]

Article 5 of the ICTY Statute gave the Tribunal the power to prosecute persons committing crimes against humanity "when committed in armed conflict." The defense argued that insofar as Article 5 purported to regulate conduct in internal conflict it offended against the *nullum crimen* principle, because in customary law crimes against humanity require a nexus with international armed conflict.[50] The prosecution responded that under existing customary law, crimes against humanity did not require a nexus with any form of armed conflict and that as a result, since Article 5 adopted an approach that was more restrictive than customary law, it did not breach the *nullum crimen* principle.[51] The Tribunal decided (para. 141), "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." It went on to indicate the prosecution argument may well have been correct, and in any event Article 5 was in compliance with the *nullum crimen* principle.

The Trial Chamber in the *Tadič Trial Decision* devoted substantial space to consideration of crimes against humanity. Article 5 of the ICTY Statute gives the Tribunal the power to prosecute persons responsible for crimes against

humanity "when committed in armed conflict" and "directed against any civilian population." The Trial Chamber accepted the test set out by the Appeals Chamber in the *Tadič Jurisdiction Decision* for the existence of an armed conflict: "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Finding the existence of an armed conflict (para. 628), it then considered the nexus between the act or omission and the armed conflict. The prosecution position—that the nexus was that the act must occur during the course of an armed conflict—was accepted, but the Chamber added two caveats: the act must be linked geographically as well as temporally with the armed conflict, and the act must not be unrelated to the armed conflict, i.e., it must not be done for purely personal motives of the perpetrator (paras. 633, 634). Concerning "directed against any civilian population," the Chamber held that "any" made it clear that crimes against humanity could also be committed against stateless persons or civilians of the same nationality as the perpetrator (para. 635). Further, "civilian" would clearly exclude combatants, but it would otherwise be given a very broad definition, including, for example, hospital patients and resistance fighters who had laid down their arms (paras. 639–43). The requirement that crimes against humanity be directed against a civilian "population" was construed as requiring not that the entire population of a State or territory be victimized, but that such crimes be of a collective nature, not single or isolated acts (para. 644). The prosecution argued that the term "population" in Article 5 implied that the accused must participate in a widespread or systematic attack against a relatively large victim group. The defense position was that violations must be both widespread and systematic. The Chamber accepted the prosecution approach:

> 648. It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population," and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement.

The Chamber went on to consider whether or not single acts could constitute crimes against humanity:

> 649. A related issue is whether a single act by a perpetrator can constitute a crime against humanity. A tangential issue, not at issue before this Trial Chamber, is whether a single act in and of itself can constitute a crime against

> humanity. This issue has been the subject of intense debate, with the jurisprudence immediately following the Second World War being mixed. The American tribunals generally supported the proposition that a massive nature was required, while the tribunals in the British Zone came to the opposite conclusion, finding that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims and that "what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system, specifically, the Nazi regime." Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution."

Although the Statute did not address the issue, the Chamber turned next to the issue of whether a discriminatory intent was a requirement for all crimes against humanity and not only for persecution under Article 5(h). No such requirement was contained in the Nuremberg Charter, Control Council Law No. 10, or the Tokyo Charter. Nevertheless, the Chamber imposed such a requirement in its interpretation of the Statute.

> 652. Additionally this requirement is not contained in the Article on crimes against humanity in the I.L.C. Draft Code nor does the Defence challenge its exclusion in the Prosecution's definition of the offence. Significantly, discriminatory intent as an additional requirement for all crimes against humanity was not included in the Statute of this International Tribunal as it was in the Statute for the International Tribunal for Rwanda, the latter of which has, on this point, recently been criticised. Nevertheless, because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the *Report of the Secretary-General*, and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5.

The Chamber then addressed what has been referred to as the "policy element." Crimes against humanity involve a deliberate policy made by an entity to target a civilian population.

653. . . . Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands *Hoge Raad* in *Public Prosecutor v. Menten*:

> The concept of "crimes against humanity" also requires—although this is not expressed in so many words in the above definition [Article 6(c) of the Nürnberg Charter]—that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.

Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.

Further, it decided that the policy could be determined by non-State actors as well as by States.

654. An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy "because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nürnberg Charter]." While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* State, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.

Finally, the Chamber considered the intent necessary for crimes against humanity and concluded:

> 659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

The prosecution is at present appealing two of the findings of the Trial Chamber on the law applicable to the ICTY related to crimes against humanity. With reference to the finding that crimes against humanity cannot be committed for purely personal motives, the prosecution argues that the motive for committing crimes against humanity is irrelevant.[52] With reference to the finding that all crimes against humanity require a discriminatory intent, the prosecution argues that the ICTY Statute includes no such requirement, that customary law does not require a discriminatory intent for all crimes against humanity, and that Article 5 of the ICTY Statute is intended to reflect customary law.[53]

Individual Criminal Responsibility

Article 7 of the ICTY Statute addresses individual criminal responsibility. Article 7(1) of the Statute provides, in part: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."

Forms of Criminal Participation. The *Tadič Trial Decision* provides the first extended judicial consideration of this provision. It states:

> 692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

The Chamber elaborated on the meaning of "substantially":

> 688. . . . While there is no definition of "substantially," it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed. For example, if there had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions.

It defined "aiding and abetting" as follows:

> 689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

The Chamber also discussed the significance of physical presence during the commission of an offense:

> 690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.
>
> 691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to

> be "concerned with the killing." However, the acts of the accused must be direct and substantial.

Command Responsibility. Article 7(3) addresses command responsibility:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The scope of Article 7(3) has been addressed in two preliminary motions decided in the *Blaskič* case, one concerning the *mens rea* required for charges alleging command responsibility, and the other concerning whether or not the failure to punish provision in Article 7(3) offended the *nullum crimen* principle. In the *mens rea* motion, the defense argued that the "knew or had reason to know" standard should be defined as: "(1) actual knowledge; or (2) wanton disregard of objective facts within the accused's actual possession compelling the conclusion that the accused's subordinates where about to commit or had committed the criminal acts alleged in the indictment."[54]

In response, the prosecution argued that a decision on *mens rea* at the pre-trial stage was premature, as the issue was too abstract in the absence of evidence to be considered at trial. If the issue was appropriate for consideration before the trial, the prosecution argued that a proper statement of the *mens rea* standard was:

- Actual knowledge proved by direct evidence, or
- Actual knowledge proved by circumstantial evidence, the "must have known" standard. The prosecution argued that the Tribunal should not reject the "must have known" *mens rea* standard because, although it may be conceptually similar to actual knowledge established by means of direct evidence, the evidentiary implications of knowledge inferred from circumstantial evidence are significantly different. In particular, where the crimes of subordinates are a matter of public notoriety, are numerous, or occur over a prolonged period or in a wide geographical area, there is a presumption that the commander had the requisite knowledge in the absence of evidence to the contrary, or
- Wanton disregard not only of facts within his actual possession but also of facts that are not within his actual possession by reason of a failure on his part to supervise properly his subordinates and in particular to require and obtain

adequate reports or information and to be apprised of the actions of his subordinates. The appropriate *mens rea* standard under international law is wanton disregard of information of a general nature within the reasonable access of a commander indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates.[55]

The Trial Chamber rejected consideration of the substantive issues related to *mens rea* as premature but granted the accused permission to raise the issues again at trial.[56]

Concerning the defense motion alleging that the provision related to failure to punish liability offended the *nullum crimen* principle, the Chamber found "that the case law and the international conventions which enshrine the principle of the command responsibility of whoever fails to punish subordinates who have committed crimes are fully adequate."[57]

> 10. As regards international case-law, in the Tokyo trials, the Prime Minister of Japan, Hideki Tojo, was found guilty by the International Military Tribunal for the Far East on the following grounds:
>
> > (He) took no adequate steps to punish offenders (who ill-treated prisoners and internees) and to prevent the commission of similar offences in the future. (. . .) He did not call for a report on the [Bataan death march]. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished. (. . .) Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon that Government of enforcing performance of the laws of war." [20 Tokyo Trials, 49845-49846].
>
> Although in its motion the Defence pleads that he "was found criminally responsible for both failure to prevent the recurrence of crimes and failure to punish; proof of both elements was required for criminal liability to attach" (p. 21), the reasoning underlying that decision in no way justifies this argument. The decision clearly held Tojo responsible for having failed to punish his subordinates and thus emphasised that "No one was punished." That statement is based on the following reasoning: failing to punish subordinates inevitably means failing to prevent the recurrence of crimes, whereas by punishing subordinates, such recurrence is naturally prevented, with the result that failure to punish alone is sufficient grounds for command responsibility.

The Chamber also found support for its view in the *Hostage Case* (para. 11).

As to treaty law basis for failure to punish liability, the chamber stated:

12. In respect of conventional law, it should be noted that the existence of such a principle of responsibility is also specified in the provisions of Protocol I. A review of the official record of the Geneva diplomatic conference which adopted the Protocol shows that Articles 86 and 87 were adopted by consensus by the delegations of more than 90 States present at the 45th plenary meeting. . . .

Thus Protocol I imposes, in Article 86(2), penal or disciplinary responsibility on the part of superiors who did not take all practicable measures within their competence "to prevent or repress the offence" committed by their subordinates. As sanctioning the perpetrator of the crime is the effective means of repressing the offense, the Protocol further considers that an omission to punish constitutes a failure to comply with an obligation which engages command responsibility. And as Article 87(3) provides that the High Contracting Parties and the Parties to the conflict must demand of any commander that he implement the penal and disciplinary measures against the perpetrators of violations, it demonstrates even more clearly and specifically that, according to the Protocol, any failure to punish an offense is grounds for command responsibility.

Potential Defenses

Duress. Article 7(4) of the ICTY Statute addresses the issue of superior orders: "The fact than an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." Although the statutory provision ensures that superior orders, of themselves, will not constitute a defense, in most cases the issue of superior orders will be linked with duress, and neither the Statute nor the older case law adequately addresses duress as a potential defense. This poses a significant problem, because in general, duress may constitute a complete defense to all criminal charges in civil law systems, but it is not a defense to murder-type charges in common law systems. In the *Erdemovič Case,* Drazen Erdemovič, a Bosnian Croat who was a member of a Bosnian Serb killing squad at Srebrenica which killed approximately 1,200 unarmed civilians and who personally killed between ten and a hundred persons, submitted a guilty plea to a crime against humanity charge. With his guilty plea, however, he also stated:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you're sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for

my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[58]

The Trial Chamber, composed entirely of judges from civil law systems—Jorda (France), Odio Benito (Costa Rica), and Riad (Egypt)—accepted the guilty plea after devoting substantial heed to its validity in the judgment. Although the Chamber did not consider that a duress defense had been established in the case of Erdemovič, it also indicated that in certain carefully circumscribed circumstances duress could constitute a complete defense to a crime against humanity charge (paras. 13–21).

Erdemovič appealed his sentence, and the duress issue was considered by the Appeals Chamber. The Appeals Chamber issued four separate opinions addressing duress and by a majority of three to two found that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[59] Judge McDonald (USA) and Judge Vohrah (Malaysia) in a joint separate opinion, and Judge Li (China) in a separate and dissenting opinion held that duress was not a complete defense. Judge Cassese (Italy) and Judge Stephen (Australia) submitted separate dissenting opinions indicating that duress could constitute a complete defense in cases involving the killing of innocent persons, in limited circumstances.

Judge McDonald and Judge Vohrah found that no customary international law rule could be derived on the question of duress as a defense to the killing of innocent persons (paras. 46–55). They then reviewed a large, but not exhaustive, number of national systems in an attempt to determine whether there was an applicable general principle of law recognized by civilized nations. They concluded: "66. . . . it is, in our view, a general principle of law recognized by civilized nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress." On the other hand, "67. The rules of the various legal systems of the world are, however, largely inconsistent regarding the specific question whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons." The two judges then went on to deny duress as a complete defense, on policy grounds.

75. The resounding point from these eloquent passages is that the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role. It is noteworthy that the authorities we have just cited issued their cautionary words

> in respect of domestic society and in respect of a range of ordinary crimes including kidnapping, assault, robbery and murder. Whilst reserving our comments on the appropriate rule for domestic national contexts, we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions. We are not concerned with the actions of domestic terrorists, gang-leaders and kidnappers. We are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations. The facts of this particular case, for example, involved the cold-blooded slaughter of 1,200 men and boys by soldiers using automatic weapons. We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered. Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war, to punish perpetrators of crimes against humanity and war crimes, and to deter the commission of such crimes in the future? If national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. If national law denies duress as a defence even in a case in which a single innocent life is extinguished due to action under duress, international law, in our view, cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale. It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them. Indeed, Security Council Resolution 827 (1993) establishes the International Tribunal expressly as a measure to "halt and effectively redress" the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace.

They considered, but rejected, possible exceptions such as proportionality or cases where the victims would die regardless of the participation of the accused. Their preferred approach was to consider duress exclusively as a mitigating

factor during the sentencing phase. The rejection of duress as a complete defense was, however, applicable to soldiers alone:

> 84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.

Judge Li, in his separate dissenting opinion, adopted somewhat similar reasoning (paras. 5–12). Judge Cassese submitted a forceful dissenting opinion:

> 11. I also respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah and on the following grounds:
>
> (i) after finding that *no specific international rule* has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the *general* rule on duress should apply—subject, of course, to the necessary requirements. In logic, if no exception to a general rule be proved, then the general rule prevails. Likewise in law, if one looks for a *specific* rule governing a specific aspect of a matter and concludes that no such rule has taken shape, the only inference to be drawn is that the specific aspects is regulated by the rule governing the general matter:
>
> (ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of "practical policy considerations" and has concluded by upholding "policy considerations" substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal.* This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law

and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. . . .

12. In short, I consider that: (1) under international criminal law duress may be generally urged as a defence, provided certain strict requirements are met; when it cannot be admitted as a defence, duress may nevertheless be acted upon as a mitigating circumstance: (2) with regard to war crimes or crimes against humanity whose underlying offence is murder or more generally the taking of human life, no special rule of customary international law has evolved on the matter; consequently, even with respect to these offences the *general rule on duress* applies; it follows that duress may amount to a defence provided that its stringent requirements are met. . . .

The relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defence, namely:

(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;

(ii) there was no adequate means of averting such evil;

(iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;

(iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.

In addition, the relevant national legislation supports the principle that the existence in law of any special duty on the part of the accused towards the victim may preclude the possibility of raising duress as a defence.

17. It is worth insisting on the fourth requirement just mentioned, in order to highlight its particular relevance to war-like situations. According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.

Judge Stephen, in a separate and dissenting opinion, agreed with Judge Cassese and critized the rationale of the common law approach and the desirability of transferring it to the international arena (paras. 64–67).

Reprisals. A reprisal is an illegal act resorted to after the other side in an armed conflict has committed unlawful acts and continues them after being called upon to cease. The reprisal is not a retaliatory act or a simple act of vengeance; it is a crude law-enforcement device. It must be roughly proportionate to the original wrongdoing, and it must be terminated as soon as the original wrongdoer ceases illegal actions.[60] In certain circumstances, the defense of reprisal may be raised to charges for offenses within the jurisdiction of the ICTY. Reprisals against several categories of persons and objects are prohibited by the treaty law applicable to international armed conflict. In particular, reprisals are prohibited against civilians and civilian objects. For all practical purposes, the only legitimate reprisal targets in international conflict are combatants and certain other military objectives. The treaty law of internal conflicts does not address the reprisal issue. UN General Assembly Resolution 2675 indicates that reprisals against civilians are prohibited in all circumstances.[61]

The question of the reprisal defense was litigated in the Rule 61 proceeding concerning Milan Marti in February 1996. The prosecution argued that the Chamber should decide that reprisals against civilians were prohibited in all conflicts, including internal conflicts, because (1) an explicit prohibition already existed in treaties applicable to international conflict; (2) UNGA Resolution 2675 reflects the state of customary law for all conflicts; (3) Article 4 of Protocol II requiring protection of civilians "in all circumstances" implicitly prohibits reprisals; and (4) reprisals are an ineffective means of law enforcement.[62] The Trial Chamber agreed:

> 17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[63]

Future Developments

The jurisprudence of the ICTY is a work in progress. The ICTY judges were initially elected for a four-year term that expired on 16 November 1997. Five of the sitting judges have been reelected, and six new judges have been elected,

commencing four-year terms on 17 November 1997. The duration of the ICTY is uncertain and dependent on budgetary approval by the United Nations General Assembly. Certainly, there is enough work to keep the ICTY fully employed beyond 2001. It is reasonable to assume that the ICTY jurisprudence will have an impact on the development of the law of armed conflict for some time to come, particularly as this jurisprudence is analyzed in foreign ministries, defense departments, and academic journals.

It is practicable to make preliminary assessments of what has happened to date. The various and continuing efforts of the several ICTY Chambers to grapple with the extreme complexity of the facts in the Yugoslav conflict(s) to determine the applicable law are, it is suggested, to be commended rather than criticized. The simplistic approaches of much scholarly writing in this area have produced convenient but essentially unreasoned solutions. For obvious reasons, no one raised the issue of whether or not World War II was a "war" in the trials following that conflict. Most contemporary conflicts do raise issues related to conflict classification, and these issues must be faced as long as the bodies of law applicable to international and internal conflicts differ in complexity and sophistication, as they do at present. The approach of the Appeals Chamber to elaborating upon customary law applicable to all conflicts, individual criminal responsibility for offenses committed in internal conflicts, and customary law in internal conflicts will have an enormous impact on the future jurisprudence of the ICTY. It may also, to the extent it is viewed as credible by outside observers, precipitate and contribute to a long-term trend toward the development of a uniform body of customary law applicable to all conflicts. The "two box" approach to the law of armed conflict for international and internal conflict is a viable teaching tool but presents substantial difficulties when applied to a refractory reality.

The work of the ICTY in elaborating upon the meaning and scope of crimes against humanity, command responsibility, the defense of duress, and the doctrine of reprisals has begun, but much remains to be done concerning these and other issues. It is unlikely that defendants in future cases will decline to raise the defense of legitimate reprisal when the single relevant decision to date has been made in a Rule 61 proceeding. It is also unlikely that defendants will decline to raise the defense of duress when the Appeals Chamber ruling in Erdemovič has been so hotly contested. Further, bearing in mind the mixed civilian and military leadership roles of several of the accused now in custody, the ICTY will be compelled to assess the extent to which the doctrine of command responsibility applies to civilian leaders.

It is also reasonable to assume that the ICTY will make a substantial contribution to the law concerning the conduct of hostilities. Three observations are relevant in this regard. First, to the extent practicable, the ICTY OTP has paid due heed to the ruling of the Appeals Chamber in the Tadič Jurisdiction decision and has attempted to frame charges which are applicable to both international and internal armed conflicts. One example is Count 3 of the Amended Indictment against General Blaskič, which charges him with "an unenumerated Violation of the Laws or Customs of War, as recognized by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal and Customary Law, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II (unlawful attack on civilians)."[64] One potential result of this charging practice is that the Chambers will respond by developing substantially uniform standards for all forms of conflict.

Second, it is probable that the Chambers will consider for the first time charges such as inflicting terror on the civilian population. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited by both Article 51(2) of Protocol I and Article 13(2) of Protocol II. The dictionary defines terror as "extreme fear," but many lawful acts in armed conflict cause extreme fear. The prohibition must, therefore, refer to unlawful acts or unlawful threats of violence, the primary purpose of which is to spread extreme fear among the civilian population. Threats to wipe out a city or to exterminate its population would be clear examples of prohibited threats. Whether or not unlawful acts do in fact spread terror among the civilian population can be determined by psychological evidence; whether or not the primary purpose of unlawful acts is to spread terror can be inferred from the circumstances. For example, conducting cat-and-mouse sniping against the civilians of a besieged city whereby some civilians would be attacked on a random basis and all civilians would be in a constant state of extreme fear would appear to be an example of a deliberate attempt to spread terror.

Third, it is possible that a body of law based on the uncodified concept of crimes against humanity will be developed in parallel with the existing law concerning the conduct of hostilities. It would be practicable to prosecute certain attacks against the enemy as crimes against humanity contrary to Article 5 of the Statute. The Report of the Secretary General discussing the ICTY Statute states in part that "crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[65] Although there is no

precedent for crimes against humanity charges related to attacks against the enemy, there would not appear to be any conceptual barrier against using such charges in appropriate circumstances. The most appropriate charges would appear to be under Article 5(a) for attacks where death occurs, and under Article 5(i) for other injuries including mental suffering. It would be essential to establish that the prohibited acts were committed as part of a widespread or systematic attack against a civilian population. If the ICTY does elaborate a body of law for the conduct of hostilities based on an imprecise concept of crimes against humanity and, at a minimum, independent of conflict classification, the relatively precise law of armed conflict may be shaken to its foundations.

Notes

These comments are made in a personal capacity and necesarily reflect neither the author's views in an official capacity nor the views of either the Office of the Prosecutor or the United Nations.

1. The ICTY Statute is contained in the Annex to the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993). The language of the Statute itself is found at 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]. It was adopted unanimously by the Security Council at its 3217th meeting, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993).

2. Security Council Resolution 955 Establishing the International Tribunal for Rwanda, Including the Statute of the Tribunal (1994), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 1, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ITR Statute]. The ITR Statute was adopted by the Security Council on November 8, 1994, and is an Annex to Resolution 955.

3. As examples, the Trial Chamber *Decision on the Motion for Release by the Accused Slavko Dokmanovič* (ICTY No. IT 95-13a-PT) issued on 22 October 1997 addresses the ICTY power of arrest, and the Appeals Chamber *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (ICTY No. IT 95-14-AR 108bis) issued on 29 October 1997 addresses the ICTY power to issue orders to States and to State officials.

4. ICTY Fact Sheet January 19, 1998.

5. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348–70 (1987), and Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, May 3, 1993, paras 35–37.

6. The Socialist Federal Republic of Yugoslavia (SFRY) ratified Geneva Conventions I–IV in 1950 and Additional Protocols I and II in 1979. The Federal Republic of Yugoslavia has acknowledged that it is bound by these agreements as a successor State. Croatia deposited a declaration of succession to Geneva Conventions I–IV and Additional Protocols I and II on May 11, 1992, and because of previous ratification by the SFRY, these instruments came into force for

Croatia retroactively on October 8, 1991, the date of Croatian independence. *See* International Committee of the Red Cross, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: Succession of Croatia, July 9, 1992 (on file with author). Bosnia-Herzegovina deposited a declaration of succession to Geneva Conventions I–IV and Additional Protocols I and II on December 31, 1992, and because of previous ratification by the SFRY, these instruments came into force retroactively on March 6, 1992, the date of Bosnian independence. *See* International Committee of the Red Cross, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: Succession of Bosnia-Herzegovina, Feb. 17, 1993 (on file with author).

7. Croatia has entered into the following agreements: (a) a Declaration of Respect for International Humanitarian Law at the Hague on November 5, 1991 (Presidents of all six republics of the former Yugoslavia made the same declaration); (b) a memorandum of Understanding with the SFRY on November 27, 1991 in Geneva; (c) a Set of Rules of Procedures and a Plan of Operation for a Joint Commission to Trace Missing Persons and Mortal Remains, signed in Pecs, Hungary, with the SFRY on December 16, 1991, pursuant to the November 27, 1991, MOU; (d) an Addendum to the November 27, 1991, MOU signed in Geneva on May 23, 1992, with the Federal Republic of Yugoslavia (FRY); and (e) an Agreement on Release and Repatriation of Prisoners signed in Budapest on August 7, 1992, and concluded in the framework of the November 27, 1991, MOU and the May 23, 1992, Addendum to the MOU.

Bosnia-Herzegovina has entered into the following agreements: (a) a Declaration of Respect for International Humanitarian Law at the Hague on November 5, 1991 (Presidents of all six republics of the former Yugoslavia made the same declaration); (b) an Agreement under common Article 3 of the Geneva Conventions signed in Geneva on May 22, 1992, by representatives of the President of Bosnia-Herzegovina (Izetbegovic), the President of the Serbian Democratic Party (Karadzic), the President of the Croatian Democratic Community (Bikic), and the President of the Party of Democratic Action (Izetbegovic again); (c) an Agreement to implement the May 22, 1992, agreement signed in Geneva on May 23, 1992, and involving representatives of the same groups; (d) an Agreement to establish the Bosnia-Herzegovina ICRC Plan of Action following the May 22, 1992, agreement signed in Geneva on June 6, 1992, by representatives of the President of Bosnia-Herzegovina, the President of the Serbian Democratic Party, and the President of the Croatian Democratic Community (the representative of the President of the Party of Democratic Action was not able to attend the meeting and was not invited to ratify the agreement); (e) a Programme of Action on Humanitarian Issues Agreed between the Co-Chairman to the London Conference on August 27, 1992, and the Parties to the conflict, signed on separate but identical documents by Radovan Karadzic, by Alija Izetbegovic (who indicated in handwriting that he was signing as President of the Republic of Bosnia-Herzegovina), and by Mate Boban; and (f) an Agreement on the Release of Transfer of Prisoners signed in Geneva on October 1, 1992, on the basis of the agreement of May 22, 1992, by representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Croatian Community, and the Party of Democratic Action.

8. In re Dusko Tadič: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (The Prosecutor v. Dusko Tadič), 1995 I.C.T.Y. No. IT-94-1-AR72 (Oct. 2), *majority decision reprinted in* 35 I.L.M. 32 (1996) [hereinafter Jurisdiction Decision].

9. In re Dusko Tadič: Defence Brief to Support the Motion on the Jurisdiction of the Tribunal (The Prosecutor v. Dusko Tadič), 1995 I.C.T.Y. No. IT-94-I (June 23), at 11-12 [hereinafter Defence Brief].

10. In re Dusko Tadič: Response to the Motion of the Defence on the Jurisdiction of the Tribunal (The Prosecutor v. Dusko Tadič), 1995 I.C.T.Y. No. IT-94-I (July 7), at 36–46 [hereinafter Response Brief].

11. In re Dusko Tadič: Amicus Curiae Brief Presented By the Government of the United States of America (The Prosecutor v. Dusko Tadič), 1995 I.C.T.Y. No. IT-94-I (July 17), at 25–36.

12. In re Dusko Tadič: Prosecution Response to the Defence Interlocutory Appeal Brief (The Prosecutor v. Dusko Tadič), I.C.T.Y. No. IT-94-I, (Sept. 1), at 2–13.

13. Jurisdiction Decision, *supra* note 8, para. 77, at 57.

14. *Id.*, para. 84, at 60.

15. *Id.*, para. 76.

16. *Id.*, para. 85, at 60, paras. 143–44, at 73.

17. Jurisdiction Decision, *supra* note 8, at 6 (separate opinion of Judge Abi-Saab).

18. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.11, July 25, 1997. Rule 61 addresses the procedure to be followed in case of failure to execute a warrant and provides for an *ex parte* proceeding before one of the trial chambers, during which the prosecutor presents some of the evidence in the case and attempts to have the indictment reconfirmed. As there is no finding of guilt or innocence, it is not a trial *in absentia*.

19. Prosecutor v. Ivica Rajić Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, I.C.T.Y. No. IT-95-12-R61, Sept. 13, 1996.

20. Prosecutor v. Dusko Tadič, Opinion and Judgment, I.C.T.Y. No. IT-94-I-T 7 (May 1997) (hereinafter Tadič Trial Decision).

21. Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.), Merits, Judgment, 1986 I.C.J. Reports 14.

22. *Supra* note 20, paras 118–20, 569.

23. *Id.*, para 584.

24. *Supra* note 21, para 115 (emphasis added).

25. *Supra* note 8, para 586.

26. *Id.*, para 587.

27. *Id.*, paras 607–08.

28. *Supra* note 21, Sep. Op. Judge Ago, para. 16 (emphasis added).

29. Brief of Argument of the Prosecution (Cross-Appellant) The Prosecutor v. Dusko Tadič I.C.T.Y. No. IT-94-I-A (Jan. 12, 1998), at 5–45.

30. *Id.* at 13–30.

31. Defence Brief, *supra* note 9, at 12.

32. Response Brief, *supra* note 10, at 47–53.

33. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 53 (1974-75).

34. *See* Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art 146.

35. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 620 (1982).

36. *See, e.g.*, Peter Rowe, *War Crimes and the Former Yugoslavia: The Legal Difficulties*, 32 MIL. L. & L. WAR REV. 317, 331–33 (1993); Daphna Shrag & Ralph Zacklin, *The International*

Criminal Tribunal for the Former Yugoslavia, 5 EUR. J. INT'L L. 360, 366 (1994); Frits Kalshoven, Paper Prepared for Symposium on the International Criminal Tribunal for Former Yugoslavia, The Hague (Feb. 16, 1995) (unpublished manuscript).

37. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1995 I.C.J. 75 (CR 95/34) (Nov. 15) (Verbatim Record).

38. *Id.* at 77.

39. *Id.* at 79.

40. *Supra* note 21, at para 218, *citing* Corfu Channel, Merits, 1949 I.C.J. Rep. 22.

41. Judgment, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 253–54 (1947) [hereinafter Nuremberg Judgment].

42. The Judgment of the Tribunal (in The German High Command Trial), 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 59, 86–94 (1949).

43. *Supra* note 21.

44. Meron, *supra* note 5, at 361.

45. Charter of the International Military Tribunal, art. 6(c), *in* THE LAWS OF ARMED CONFLICT 911, 913–14 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988) [hereinafter Nuremberg Charter].

46. Nuremberg Judgment, *supra* note 41, at 254–55.

47. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, *in* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 558, 558-62 (1993).

48. Nuremberg Charter, *supra* note 45, art. 6(c).

49. The Tribunals in the *Einsatzgruppen Case* and the *Justice Case* decided no link with armed conflict is necessary. *See* LEVIE, *supra* note 47, at 395-99. The Tribunals in the *Flick Case* and the *Ministries Case* decided otherwise. *See id.* at 399.

50. Defence Brief, *supra* note 9, at 12–13.

51. Jurisdiction Decision, *supra* note 8, paras. 72, 138–42.

52. *Supra* note 29, at 59–66.

53. *Id.* at 67–77.

54. Defence Motion in *Limine* Regarding Mens Rea Required for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portion of Indictment, Prosecutor v. Tihomir Blaskič, I.C.T.Y. Case No. IT-95-14-T, filed Dec. 4, 1996.

55. Response of the Prosecutor to the Defence Motion in *Limine* Regarding Mens Rea for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portions of the Indictment, Prosecutor v. Tihomir Blaskič, I.C.T.Y. Case No. IT-95-14-T, filed Jan. 20, 1997.

56. Decision Rejecting the Defence Motion in *Limine* Regarding Mens Rea Required for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portions of the Indictment, Prosecutor v. Tihomir Blaskič, I.C.T.Y. Case No IT-95-14-T, filed Apr. 4, 1997.

57. Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging "Failure to Punish" Liability, Prosecutor v. Tihomir Blaskič, I.C.T.Y. Case No IT-95-14-T, Apr. 4, 1997, para 9.

58. Sentencing Judgment, The Prosecutor v. Drazen Erdemovič, I.C.T.Y. Case No. IT-96-22-T, Nov. 29, 1996, para 10.

59. Judgment of the Appeals Chamber, Prosecutor v. Drazen Erdemovič, I.C.T.Y. Case No. IT-96-22-A, Oct. 7, 1997, para 19.

60. FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971); Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y.B. INT'L L. 43 (1990).

61. G.A. Res. 2675, U.N. GAOR 25th Sess., Supp. No. 28, U.N. Doc A/8028 (1996).

62. Brief on the Applicable Law for Rule 61 Hearing, Prosecutor v. Milan Martič, I.C.T.Y. Case No. IT-95-11 (1996).

63. Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Milan Martič, I.C.T.Y. Case No. IT-95-11-R61, Mar. 13, 1996.

64. Amended Indictment, Prosecutor of the Tribunal v. Tihomir Blaskič, I.C.T.Y. Case No. IT-95-14-T, Nov. 15, 1996.

65. SG Report, *supra*, note 5, para 48.