THE ELEVENTH ANNUAL WALDEMAR A. SOLF LECTURE: THE CHANGING NATURE OF THE LAWS OF WAR[1]

HER EXCELLENCY JUDGE GABRIELLE KIRK MCDONALD[2]

I. Introduction

Thank you for inviting me here today to share with you some of my experiences as a Judge and now President of the International Criminal Tribunal for the former Yugoslavia. I must confess to having been a little daunted when I was initially informed that I would be expected to provide

1. This article is an edited transcript of a lecture delivered on 9 February 1998 by Judge Gabrielle Kirk McDonald to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Solf who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of the Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

2. Judge Gabrielle Kirk McDonald is the President Judge of the International Criminal Tribunal for the Former Yugoslavia. Judge McDonald was elected by the United Nations General Assembly to serve as one of the original eleven judges on the International Tribunal September 1993. She was re-elected on 20 May 1997 for a second four-year term and on 19 November 1997, the Judges of the ICTY endorsed by acclamation her nomination as President. Judge McDonald was the presiding judge of the trial chamber that heard the first war crimes case in an International Tribunal since Nuremberg and Tokyo after World War II. Prior to her election to the International Tribunal, Judge McDonald had a varied and successful law career. After graduating from Howard University School of Law in 1966, *cum laude* and first in her class, Judge McDonald began a legal career which took her from the NAACP Legal Defense and Educational Fund to the position of federal district judge in Houston, Texas (1979-1988). After resigning this position, Judge McDonald became a partner with a major law firm in Texas and has taught at several law schools in the United States. Judge McDonald was serving as the Distinguished Visiting Professor of Law at the Thurgood Marshall School of Law, Texas Southern University, when she was elected to the Tribunal.

two hours of entertainment. Since the time has been reduced to one hour, I am certain that you and I will find this experience more enjoyable.

I consider it to be a true honor to address you. Here at the Judge Advocate General's School, you are given an opportunity to learn about an area of the law that has been neglected and dormant for decades: the law of war. It is now alive again, being applied and developed, yet few people know about it. You are the exception. With the knowledge you are acquiring here, you will be in a position to make a significant contribution to the development of jurisprudence in this specialized field. I hope that you will find my remarks thought-provoking.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has competence to prosecute persons for serious violations of international humanitarian law.[3] It is truly in its infancy and as such has not developed a comprehensive or complete set of rules governing the conduct of armed conflicts. Therefore, I will not give you today a "ten commandments of warfare." You have your military manuals and your rules of engagement and some of you have undoubtedly participated in drafting them. However, with the emergence of ad hoc criminal tribunals and the probability, if not certainty, that a permanent International Criminal Court will be established this year, those who engage in the conduct of warfare should be aware that their behavior may be judged by standards developed by the international community.

Therefore, what I will do is to give you the benefit of our limited jurisprudence, which has addressed some of the issues pertaining to the laws of war and has changed in specific ways the normative framework of such law. When I say limited, I am referring to the fact that my fellow judges and I have only been called upon to consider a finite number of matters, for we have heard only one full trial and one sentencing procedure, the latter

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3. The International Committee of the Red Cross defines this body of law as comprising:

> [i]nternational rules, established by treaty or custom, which are specifically intended to solve humanitarian problems, directly arising from international or non-international armed conflicts, and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

Jean Pictet, *International Humanitarian Law: Definition*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW (UNESCO, Henry Dunaut Institute, Mutinus Nyhoff Publishers 1988).

also being subject to review by our Appeals Chamber. The Appeals Chamber considered jurisdictional issues in a decision rendered prior to the commencement of that trial and heard an appeal of the sentencing ruling on both jurisdictional issues and the availability of duress as a complete defense to the killing of unarmed civilians. Today, I will focus on these issues and suggest possible consequences of these rulings.

II. The Cycle of Impunity

I would first like to provide some background for my remarks. The twentieth century is best described as one of split personality: aspiration and actuality. The reality is that this century has been the bloodiest period in history. As improvements in communications and weapons technology have increased, the frequency and barbarity of systematic abuses of fundamental rights have likewise escalated, yet little has been done to address such abuses.

A cursory study of any history book reveals that impunity is not a new phenomenon. However, the crystallization of the cycle of impunity is very much a twentieth century concept: perpetrators of massive human rights violations have often been supported, rather than held accountable, by the international community. The result has been to encourage repetition by the perpetrators and by those who are inspired by their impunity. Perhaps the most infamous example is Hitler's observation to his senior officers in 1939: "Who after all speaks today of the annihilation of the Armenians?"

The voice of aspiration is the evolution among States from individual to common values. Beginning at the close of the nineteenth century, the community of nations, by limiting warfare, has first gradually and then regularly, recognized that individuals possess certain incontrovertible rights as members of the human family, and that States, acting individually and collectively, have both an interest and a duty to observe and to enforce those values. Such reasoning provided the basis for the creation of international organizations, beginning with the League of Nations and the United Nations and for undertakings such as the Nuremberg trials, the four Geneva Conventions of 1949, and for the subsequent human rights covenants, treaties, and mechanisms to enforce at national and supra-national levels the proclaimed rights.

It is here that the effects of the split personality are discernible. The Armenians whom Hitler predicted would not be remembered are perhaps the best example. Between a half and one and a half million Armenians

were interned and killed between 1915 and 1921.[4] Most of the males were executed, the women and children were forced to march into the desert without food, shelter, or means to defend themselves against desert tribesmen. To date, this destruction of human life has been a non-event. Neither the victims of these acts have been acknowledged, nor the perpetrators brought to justice.

That such suffering should be memorable only as an instructive (or should I say destructive) example is proof of how wide the chasm is between theory and reality. With few, but notable, exceptions, there has been no reckoning for the great majority of mass violations of human rights throughout this century; perpetrators have either not been identified, or have not been required to account for their crimes.

The prevalence of such impunity has placed expediency above both principle and pragmatism.[5] As recent events demonstrate, allowing perpetrators of such atrocities to remain in power not only puts the world's stamp of approval on impunity but allows the cycle to be repeated. By virtue of the stature of such perpetrators, it also sets a norm of behavior which their subordinates follow. These crimes are committed against individuals, yet they are also crimes against all humanity; there must be respect for the principles of equality of all human life and for the universal application of justice and of the law. To undertake to protect rights and then fail to prevent or to redress their abuse is both inconsistent and an affront to that universality. The law is abused and debased by such conduct.[6]

The Tribunal is committed to the proposition that there will be no lasting peace without justice. As a practical matter, when victims are denied justice it may lead to acts of vengeance.[7] The failure to identify and to attach responsibility to individuals results in the stigmatization of entire societies and the possibility of renewed conflict as in Rwanda, Burundi,

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4. Figures are disputed but President Bush is quoted as saying that more than one million people were killed. *See Bush Avoids the Word Genocide on American Massacre Anniversary*, JERUSALEM POST, Apr. 22, 1990.

5. While short-term pragmatism may dictate a de facto granting of impunity, long-term stability requires the creation of conditions conducive to peace and reconciliation.

6. See the comments of the political secretary of the British High Commission in Istanbul: "it were better that the Allies had never made their declarations in the matter and had never followed up their declarations by the arrests and deportations that have been made [*sic*]." FO 371/6500/, app. A (folio 385-118, 386-119), 11 August 1920 [British Foreign Office papers].

7. Such as the assassinations in the 1920s of several individuals allegedly responsible for atrocities committed by the government of Turkey against the Armenians.

and the former Yugoslavia where recent bloodshed has been ascribed to what are termed "ancient ethnic hatreds." Impunity is also a failure to acknowledge on a broader level that atrocities have been committed, which precludes societal reconstruction and reconciliation; perpetrators retain their power and influence, preventing the return of refugees and the reinstitution of a pluralistic society.

These are not mere words; scholars estimate that over one hundred seventy million non-combatants have been killed in episodes of mass killings in the twentieth century. A further forty million combatants have died in conflicts. That is a total of over two hundred and ten million people, or one in every twenty five persons alive today—truly a figure that defies the imagination.

This brings me to the theme of my talk today: war and the changing nature of the laws of war. Laws whose purpose is to govern the conduct of war should by definition be based on the way war itself is conducted. The primary coalescence of this law took place in two stages, around one hundred yeas ago, and in the aftermath of the Second World War, fifty years ago. In the intervening decades the way in which wars are fought has changed; we can no longer strictly characterize conflict as international or internal, as belligerent or insurgent.

As the number of States increased dramatically, a variety of factors—a desire for economic development, the fears of minorities within the new States, discrimination by majority groups, interference, often military, in new States by former rulers—caused frequent bloodshed. These 'conflicts' were characterized by the involvement of various parties and by the perception of civilians as targets, by reason of their association with combatants, rather than as casualties. As the distinction between war and civil strife blurred, so too did that between non-combatant and combatant.

As the Appeals Chamber stated, "a State-sovereignty-orientated approach has gradually been supplanted by a human-being orientated approach."[8] Therefore, I submit that the dichotomy that characterizes

8. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, paras. 72 & 73 (2 Oct. 1995) [hereinafter Tadic Interlocutory Appeal Decision].

international humanitarian law—whether the conflict is international or internal—is untenable at the end of the twentieth century.

III. The International Tribunals

The ICTY has reflected this change in focus through its jurisprudence. Before going on to discuss this and related substantive issues, I would like to give you a brief sketch of the Tribunal, what it does and how it does it.

The Security Council, having found that the widespread violations of international humanitarian law occurring within the former Yugoslavia constituted a threat to international peace and security, exercised its powers under Chapter VII of the Charter of the United Nations to establish the ICTY. As a subsidiary organ of the Council, all member States are required to cooperate fully with it and to comply with requests for assistance or with orders it issues.

The ICTY is governed by its Statute, adopted by the Security Council following a report by the United Nations Secretary-General. Its eleven judges are drawn from States around the world. The proceedings are also governed by Rules of Procedure and Evidence adopted by the judges in February 1994, and amended from time to time. The ICTY is not subject to the national laws of any jurisdiction and has been granted both primacy and concurrent jurisdiction with the courts of States.

Subject-matter jurisdiction is stated in Articles 2 to 5 of the Statute which consists of the power to prosecute persons responsible for grave breaches of the Geneva Conventions of 1949 (Article 2), for violating the laws or customs of war (Article 3), for committing genocide, as defined in the Statute (Article 4), and for crimes against humanity when committed in armed conflict (Article 5), which are beyond any doubt part of customary international law.

Our sister institution, the International Criminal Tribunal for Rwanda, is located in Tanzania and Rwanda. It has jurisdiction over violations of international humanitarian law committed in Rwanda in 1994 and over Rwandan citizens committing such crimes. Its subject-matter jurisdiction is limited to genocide, crimes against humanity and violations of common Article 3 and of Additional Protocol II. It thus applies those components

of international humanitarian law which beyond doubt apply to internal conflicts.

The Tribunals are composed of two Trial Chambers and a Registry each, and share an Appeals Chamber and a Prosecutor's Office. I am the only American among the eleven judges of the ICTY, which is based in The Netherlands.

Since its establishment nearly five years ago, the Tribunal has evolved and is on the road to fulfilling its potential. As Presiding Judge on the first full trial, and now as President, I have been involved closely in that growth and I offer the following comments based on that experience. However, the Tribunal speaks through its judicial pronouncements, and thus my remarks should be construed accordingly.

A. Procedural Law

One of our major contributions has been how we practice law. When the judges were installed in November 1993, the field of international criminal procedure was essentially a vacuum. Since then, we have literally created an international judicial institution—the first of its kind. We had no rules of procedure or evidence and no courtroom. In just over four years of operation, the Tribunal has filled the void by establishing a code of procedure, and a body of case law. We have completed one full trial, one sentencing procedure and three appellate proceedings. Four further trials are in progress; five trials, a sentencing procedure, and one appeal are pending. In addition to some three hundred procedural decisions interpreting our rules, we have developed jurisprudence concerning matters such as the international protection of victims and witnesses. Equally important, we have codified procedures on a range of practical matters, such as a legal aid system, a code of conduct for counsel, the maintenance of a purpose-built detention unit supervised by the I.C.R.C., the rights of persons detained there, and counseling and support for victim witnesses, for whom the act of testifying is often extremely traumatic.

B. Substantive Law

The Tribunal was established by the community of States to prosecute horrendous crimes committed in a conflict which has been characterized as both internal and international. In deciding the issues before it, the Tribunal has been called upon to consider some of the issues that go to the heart of the nature of warfare. Our resulting jurisprudence has effects on

both the conceptual elements of humanitarian law and on its practical effect: the conduct of individual soldiers in the field.

Turning first to the conceptual: the categorization of conflicts as international or internal does not in any way vitiate the egregious nature of the crimes committed, nor the unspeakable suffering already endured by their victims. Indeed, the ambiguity regarding the classification obscures the necessity of protecting the rights of individuals in armed conflicts. There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities committed in internal conflicts more leniently than those engaged in international wars. In our decisions on Articles 2 and 3 of the Statute, we have approached this issue in two ways. In attempting to ascertain the character of the conflicts in the former Yugoslavia, we have both extended and limited the scope of international humanitarian law.

1. Article 3

First, the expansive approach. Article 3 of our Tribunal's Statute states that the Tribunal "shall have power to prosecute persons violating the laws or customs of war." It lists as examples five proscribed acts, including the use of poisonous weapons, wanton destruction and attack of undefended areas, and plunder of property. In his report which led to the establishment of the Tribunal, the Secretary General noted that Article 3 was based on rules of customary law, primarily the 1907 Hague Convention (IV) Respecting the Laws and Customs of War and annexed Regulations.

In *The Prosecutor v. Tadic*,[9] the defense challenged the Tribunal's jurisdiction under Article 3, arguing that the Hague Regulations were only applicable in international conflicts, and that as the conflict was internal, the Tribunal lacked jurisdiction. The defense also claimed that even if the prohibitions detailed in the Hague Regulations were applicable in any armed conflict, the prohibitions themselves did not entail the individual criminal responsibility of those who committed any of the prohibited acts.

The Trial Chamber found that it had jurisdiction, because laws or customs of war had become a part of customary international law and thus the

9. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T.

character of the conflict was irrelevant. It further held that violations constitute criminal acts, for which the perpetrators are liable.

The majority of the Appeals Chamber held that Article 3,

> is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically, violations of the Hague law on international conflicts; infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches'; violations of common Article 3 and other customary rules on internal conflicts; [and] violations of agreements binding on the parties to the conflict considered qua treaty law.[10]

In making this finding, the majority stated that four conditions must be satisfied to render a violation subject to Article 3: (1) the commission of a proscribed act must constitute an infringement of international humanitarian law; (2) that law must be customary in nature, or if it is derived from a treaty, the treaty's conditions must be met; (3) the violation must constitute a breach of a rule protecting important values which has important consequences for the victim; and (4) the violation of the law must entail the individual criminal responsibility in international law of the perpetrator of the violation, under customary or conventional law.[11]

The Chamber reviewed state practice in civil conflicts ranging from the Spanish Civil War to the fighting in Chechnya, the views of some of the members of the Security Council as to the scope of Article 3, and the practice of international organizations such as the International Committee of the Red Cross (ICRC) and the General Assembly. Based on this analysis, the Chamber found that there had developed a body of customary international law governing the conduct of internal conflicts, applying to such areas as the protection of civilians and civilian objects and the prohibition of certain means and methods of warfare proscribed in international armed conflict.

The Chamber then found that violations of such laws were crimes under international law. The Chamber drew on the dicta of the Nuremberg Tribunal and further examples of State practice to conclude that there was "no doubt [that violations] entail individual criminal responsibility, regard-

10. Tadic Interlocutory Appeal Decision, *supra* note 8, para. 89.
11. *Id.* para. 94.

less of whether they are committed in internal or in international armed conflicts . . . . No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition."[12]

It is here that the Tribunal has contributed most to the changing nature of the laws of war. By expanding the applicability of Article 3, the Chamber amplified the protections afforded to those caught up in internal conflicts. However, I should add that the Appeals Chamber imposed two limitations on its findings: only certain proscriptions on international armed conflicts had been extended to internal wars; and the extension included the essence of the prohibitions, rather than the detailed provisions.

2. Article 2

By contrast, if you look at our jurisprudence on Article 2 of our Statute, you might say that the Tribunal has gone in the opposite direction. Again, I am talking about the *Tadic* case. The defense challenged jurisdiction under Article 2, alleging that it applied only to international armed conflicts and that the offenses charged occurred in an internal conflict.

Trial Chamber II, over which I presided, found that as "the element of internationality forms no jurisdictional criterion of the offences created by Article 2."[13] Article 2 applied to both international and internal conflicts. Our Chamber reasoned that the Report of the Secretary-General had made it clear that the rules of international law intended for application should clearly be part of customary law and that the reference to the law of the Geneva Conventions in Article 2 had become part of this customary law. Moreover, we held that Article 2 is self-contained, save in relation to the definition of protected persons and things. Therefore, there was no ground for importing into our Statute the whole of the terms of the Geneva Conventions. In other words, Article 2 of the Geneva Conventions was designed to make grave breaches applicable to international armed conflicts and we considered that our Statute was concerned with the grave breaches, rather than with the context in which they were committed.

After an appeal by the defense, the Appeals Chamber created a standard. The majority ruled that a determination that the armed conflict in

12. *Id.* para. 129.

13. Trial Chamber Opinion and Judgment, Case No. IT-94-1-T, para. 53 (7 May 1997) [hereinafter Trial Chamber Opinion].

question was international was indeed required for jurisdiction under Article 2. It first stated that the "grave breaches" provision of the Geneva Conventions "are widely understood to be committed only in international armed conflicts."[14] Yet the Chamber admitted "that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights, which . . . tend to blur in many respects the traditional dichotomy between civil wars and civil strife."[15]

The Chamber found that "the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves."[16] It stated that "[c]learly, these provisions of the Geneva Conventions apply to persons or objects only to the extent that they are caught up in an international armed conflict."[17] Unfortunately, the Appeals Chamber gave little guidance on how to determine whether a particular conflict is international or internal in nature, or whether a person is "protected," except for finding that he or she must be caught up in an international conflict.

Two of the three Separate Opinions disagreed with the majority on this point. One judge found that Article 2 was applicable in internal and international armed conflicts, while another concluded that the Chamber should view the armed conflict in the former Yugoslavia, as a whole, as international.

The Appeals Chamber, then, wielded a double-edged sword. By extending the scope of Article 3, the Chamber sought to make the Tribunal's statutory jurisdiction incontrovertible. Such a wide expansion was legally appropriate, but it led to the limitations that were imposed on our

14. Tadic Interlocutory Appeal Decision, *supra* note 8 , para. 71.
15. *Id.* para. 83.
16. *Id.* para. 81.
17. *Id.* para. 81.

Article 2 jurisdiction. Thus, what was given with one hand was taken with the other.

Failure to clarify, at least in part, the relationship of these two canons of our Statute could have resulted in substantive problems in their relative interpretation and application.

Unclear as to the effect of these dispositions, the Trial Chamber in *Tadic* considered it wise to receive evidence on the issue of the character of the conflict. After a four and a half month trial, in May 1997, the majority of the Trial Chamber held that while the conflict in question was initially international in character, at the time relevant to the indictment,[18] the victims were not in the hands of a party to the conflict or occupying power of which they were not nationals. The majority reasoned that after 19 May 1992, Bosnian citizens could be considered in the hands of non-nationals and thus "protected persons" as defined by Article 4 of Geneva Convention IV only if the Bosnian Serbs (the captors) were agents of the Federal Republic of Yugoslavia.[19]

The majority found that the Bosnian Serb Army was largely established, equipped, staffed, and financed by the Yugoslav Peoples' Army. It then applied the test developed by the International Court of Justice in the Nicaragua case,[20] which requires a showing of effective control to prove agency; it found that there was no direct evidence of such "effective control." It was of the view that the forces in whose hands these particular Bosnian citizens found themselves "could not be considered as de facto

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18. After 19 May 1992
19. The majority stated:

> [I]t is neither necessary nor sufficient merely to show that the V.R.S. [Bosnian Serb Army a.k.a. the Army of the Republika Srpska] was dependent, even completely dependent, on the V.J. [Belgrade Serb Army] and the Federal Republic of Yugoslavia (Serbia and Montenegro) for the necessities of war. It must also be shown that the V.J. and the Federal Republic of Yugoslavia . . . exercised the potential for control inherent in that relationship of dependency or that the V.R.S. has otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia.

Trial Chamber Opinion, *supra* note 13, para. 588.

20. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

organs or agents of the Federal Republic of Yugoslavia."[21] Thus, Article 2 did not apply to the offenses charged in the indictment.

I disagreed with the majority by finding that Article 2 did indeed apply to the circumstances of the case. I was of the view that at all times relevant to the indictment, the armed conflict in the area in question was international in character and that the victims were "protected persons." I found that the majority had misapplied the Nicaragua test, and created one that was even more demanding. In my opinion, "the proper test of agency from Nicaragua is one of 'dependency and control' and a showing of effective control is not required";[22] such a standard being one for determining State, and not individual, responsibility. However, I also concluded that the more rigorous "effective control standard" was also satisfied because I considered that the evidence supported beyond reasonable doubt the finding that the Bosnian Serb Army was an agent of the Federal Republic of Yugoslavia and that the victims were accordingly protected persons.

The majority's finding that Article 2 was not applicable necessitated a verdict of not guilty for the accused on all eleven of the charges indicted under Article 2. But the accused had also been indicted under Article 3, for violations of common Article 3 of the Geneva Conventions, for the same acts as those indicted under Article 2. We thus rested our legal findings as to the guilt of the accused on Article 3.

Applying the Appeals Chamber tests, the Trial Chamber found the accused guilty of various offenses, including cruel treatment and murder. Thus, even though Article 2 was expressly designed, unlike Article 3, for the protection of non-combatants, our experience indicates that Article 3 will be used as a "safety net," even if it may not have been so intended.

What, then, are the effects of the double-edged sword? Well, as the *Tadic* Judgement indicates, it has little practical consequence for the accused. If the Prosecutor is able to meet the lower jurisdictional pre-requisites for Article 3, we have a means for adjudicating guilt without going to Article 2. But this is not to pretend that the current status of Article 2

21. Trial Chamber Opinion, *supra* note 13, para. 607.
22. *Id.* para. 4.

has no consequences for the Tribunal. Indeed, they may be extremely grave, both for the Tribunal and for national prosecutions.

In both the former Yugoslavia and in other conflicts, there are simply too many potential accused for any international tribunal ever to try them all. It is thus essential that the bulk of prosecutions are undertaken by national authorities, in accordance with the principle of universal jurisdiction. The need to prove internationality of the conflict places a further hurdle in the track of national prosecutions under the grave breaches regime. It is possible that either States will not follow our jurisprudence or that the Tribunal's affirmation of the application of common Article 3 and other parts of international humanitarian law to internal conflicts may establish a viable national prosecutorial alternative. However, even though there is universal jurisdiction over grave breaches and a mandatory obligation to search for and to prosecute or extradite those who commit such offences, only one fourth to one third of the 188 countries that have signed the Geneva Conventions have national legislation adequate to prosecute grave breaches. There were no such prosecutions until 1994.[23] If States were not willing to make such changes to their domestic laws to prosecute grave breaches, they may be even more reluctant to incorporate international norms applicable to internal conflicts, which have been applied to international conflicts, only by virtue of customary international law. In a recent discussion, Lord Avebury, told me he had unsuccessfully tried to incorporate common Article 3 into British penal legislation.

However, a recent positive development in this area has in fact occurred in the United States, which now includes violations of common Article 3 within its definition of war crimes.[24] However, the limited jurisdiction of the Statute over only United States citizens and members of the armed forces, reduces its potential effectiveness. Would death squad commanders or mercenaries who sought sanctuary in the United States be subject to criminal prosecution in this country?

The present view of the Tribunal regarding grave breaches has the effect of limiting States' jurisdiction to international armed conflicts. Although the Appeals Chamber's discussion of Article 3 clarified the law, bringing it into line with the reality of modern warfare, its decision to limit

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23. Paul Berman, Legal Adviser on International Humanitarian Law at the International Committee of the Red Cross, in conversation with the author, November 1997.

24. War Crimes Acts of 1996, 18 U.S.C.S. § 2441 (Law. Co-op. 1997).

Article 2 went against the grain. The state of the law is thus once again out of step with the state of world affairs.

There is, however, the opportunity for a change in the Tribunal's limitation of Article 2 to international conflicts. The Appeals Chamber noted that the opinion of the United States that Article 2 applies to international and internal conflicts, as stated in the amicus brief it filed, indicated a possible change in State practice and opinio juris, which, if supported by further similar developments, could bring about a change in the customary law of grave breaches. Perhaps the first step on this road is a 1994 decision by a Danish court which applied the grave breaches provisions to the Bosnian conflict without considering the character of the conflict, although I should add that the Appeals Chamber considered this case when reviewing Article 2.[25] If State practice continues in the direction of the Danish court, the Tribunal could reconsider its finding. However, this matter may be left to future ad hoc Tribunals or the permanent International Criminal Court.

Other implications of the Tribunal's jurisprudence on this matter may only be evident in the longer term. One of the Tribunal's roles is to establish a historical record of what happened in the former Yugoslavia, of what led to the perpetration of such appalling atrocities and how they were committed. Such a role is as important as prosecutions, if the Tribunal is truly to contribute to the maintenance of international peace and security, in the region and beyond. The limitations on the applicability of Article 2 may distort the record by not providing an account of the involvement in the conflict of foreign actors, which is a feature common to many so-called 'internal' wars. A conflict could, of course, be attributed to wholly internal factors. However, if it was instigated and supported by foreign States, a true record demands that such actions are also addressed. A standard that requires direct evidence of effective control to render the conflict international, or even the very requirement that it be international, forecloses reference to the fact of foreign involvement. Thus, only a part of the historical record is established.

The danger of distorting the record is four-fold: (1) outside agents/actors escape responsibility and culpability for their actions; (2) the absence of an accurate account prevents comprehensive reconciliation and deterrence of future atrocities; (3) historical amnesia is encouraged in the States that may have participated in the conflict and those States where the

25. Prosecutor v. Refik Saric, Case No. IT-95-12-R61, para. 82 (13 Sept. 1996) (Appeals Chamber Decision).

conflict occurred; and, (4) perhaps most seriously, it accords further legitimacy to the international-internal debate, thereby clouding the evolution of humanitarian law and misplacing the focus on the character of the hostilities rather than the protection of individuals in conflicts.

It is worth noting that to date, our Trial Chambers have issued four decisions pursuant to Rule 61 of our Rules of Procedure and Evidence in which they held the conflicts in the former Yugoslavia to be international. Under this procedure, the Chamber may hold a public and ex parte hearing to receive evidence from the Prosecutor in support of an indictment in cases of a failure or refusal by States to execute arrest warrants.[26] In one of these decisions—*Prosecutor v. Rajic*[27]—the Chamber based its finding on evidence that established Croatia's direct military involvement in the conflict and its control over Bosnian Croat forces in central Bosnia. For the remaining three, the Trial Chambers found that the Federal Republic of Yugoslavia had been involved in conflicts within Bosnia. As preliminary decisions, however, the precedential value of these findings is clearly less than the final judgments. Also, if the Judges uphold the strict *Tadic* agency test, a different finding could be made on the same facts with respect to internationality.

It is also with respect to the historical record that, conversely, we can discern a benefit of the current majority view of Article 2. The effect of the Appeals Chamber Decision is to reserve one ground of subject matter jurisdiction for the identification of the complicity of outside States. A prerequisite to obtaining a conviction would be proof of such involvement, be it directly, as in *Rajic*, or indirectly, using a form of the agency test.

Another effect is more subtle. A decision by the Prosecutor not to bring charges under Article 2 has the natural effect of making the issue of involvement of foreign States irrelevant. If charges are lodged only under Article 3 of the Statute, since it has been held to apply to both internal and international armed conflicts, the evidence would focus on internal ele-

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26. Such a Rule 61 proceeding is essentially a reconfirmation of an indictment, and thus the standard of proof required is that a prima facie case be established or reasonable grounds shown. This is the same evidentiary requirement of Rule 47, covering the submission of an indictment by the Prosecutor.

27. Prosecutor v. Ivica Rajic, Case No. IT-95-12-R16.

ments and thus would not need to address the involvement of outside States.

The Appeals Chamber's decision directs the Trial Chamber to look to Article 2 first if it is charged, suggesting that if internationality is to be an issue, it should be charged under Article 2. If the Trial Chamber finds Article 2 not applicable, only then does Article 3 become operative. Thus, if the Prosecutor chooses to ignore the possible involvement of foreign States in armed conflicts in the former Yugoslavia, she could charge under Article 3. Conversely, if she decides to raise the issue of outside involvement, Article 2 would be alleged as a jurisdictional base. In the alternative, a Prosecutor may decide, for whatever reasons unknown to casual observers, to withdraw Article 2 and rely instead on Article 3, thereby removing the issue of outside State involvement. Such vagaries would be removed from consideration if Article 2 were not limited to international conflicts.

3. The Erdemovic Case

Beyond the conceptual, our jurisprudence can have direct effect on individual combatants, the very men and women that you may be called upon to advise or judge in the future. For example, late last year, the Appeals Chamber handed down a judgement on the appeal lodged by Drazen Erdemovic against his sentence of ten years imprisonment after he entered a plea of guilty for crimes against humanity. He had participated in the execution of approximately 1200 unarmed civilian men in a town in eastern Bosnia. The primary issues with which both the Trial Chamber and Appeals Chamber dealt concerned: (1) the pre-conditions that must be satisfied before a plea of guilty can be accepted as valid and (2) whether duress affords a complete defense to a soldier who has killed innocent human beings.

The Trial Chamber found that the plea was made voluntarily and in full cognisance of the nature of the charge and its consequences. In order to determine whether or not the plea was ambiguous or equivocal, the Trial Chamber looked at how the accused explained his conduct, and whether such an explanation would mitigate the penalty. In fact, the Trial Chamber noted that depending on the probative value of such an explanation, it "may also be regarded as a defense for the criminal conduct which might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself."[28] Mr. Erdemovic claimed that he had an obligation to obey the orders of his military superior and asserted that he acted under physical and moral duress. The duress, he claimed, stemmed from his fear for his

own life—he testified that had he refused, he would have been killed together with the victims. They told him, "If you do not wish to do it, stand in line with the rest of them and give others your rifle so that they can shoot you."[29] Further, he feared that if he did not obey those orders, the lives of his wife and child would be in jeopardy. The Trial Chamber found that the duty of the accused, in this particular situation, was to disobey rather than obey and held that "the defense of duress accompanying the superior order will . . . be taken into account at the same time as other factors in the consideration of mitigating circumstances."[30]

The Appeals Chamber rendered four separate opinions in the *Erdemovic* case. The majority of the Appeals Chamber established three preconditions that must be satisfied before a guilty plea can be accepted as valid: the plea must be voluntary, informed, and unequivocal. All five judges agreed that the plea was voluntary. Four judges agreed that the plea was not informed because the accused did not understand the difference between pleading guilty to the more serious charge of crimes against humanity rather than war crimes. On the question of whether the plea was equivocal, it was the status of duress—whether it affords a complete defense or whether it should be used only for mitigation purposes—which was the most contentious issue for the judges.

The majority found that duress was not a complete defense and therefore concluded that the plea was not equivocal. The majority rejected the finding of the Trial Chamber that there is a customary rule that allows duress to be pleaded as a complete defense to murder. To the contrary, the majority found that there is no customary international rule at all that can be discerned on the question of duress as a defense to the killing of innocent people. Duress is generally recognized as a complete defense to murder in civil law jurisdictions, while common law jurisdictions typically reject duress as a complete defense to murder. Given the absence of any customary rule on the question of duress as a defense to murder in international law, the majority looked to the "general principles of law recognized by civilized nations" established as a source of international law under Article 38(1)(c) of the International Court of Justice Statute. The majority was satisfied that only a general principle of duress can be gleaned from the surveyed jurisdictions. That principle is that a person is less blamewor-

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28. Sentencing Judgment, Case. No. IT-96-22-T, para. 14 (29 Nov. 1996) [hereinafter Sentencing Judgement].

29. Prosecutor v. Drazen Erdemovic, Transcript of Proceedings, 20 Nov. 1996, at 0828-29.

30. Sentencing Judgment, *supra* note 28, para. 20.

thy and less deserving of full punishment when he performs a certain prohibited act under duress. However, because of the irreconcilable differences between the rules regarding duress in the various legal systems of the world, the majority employed the general principle to derive a legal rule applicable to the facts of this particular case. They held that "duress cannot afford a complete defense to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives."[31]

In rejecting duress as a complete defense, the majority took into consideration several factors. First, in national systems, the primary rationale behind the rejection of duress as a defense to murder is the potential danger to society. Criminals should not be able to bestow immunity upon their agents by threatening them with violence or death if they refuse to carry out orders. Second, one of the purposes of international humanitarian law is to guide the conduct of combatants and their commanders and to protect the vulnerable and weak in armed conflict situations. Thus, by not allowing duress to be a complete defense, notice is being given "in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defense and thus get away with impunity for their criminal acts in the taking of innocent lives."[32] Third, the majority found that one should frame the issue of duress narrowly, taking into consideration the fact that soldiers are in a different position than others in society. Consequently, soldiers should be expected to exercise a greater resistance to threats to their own lives than ordinary civilians. And fourth, in situations in which an offender is subject to duress, justice can be served in other ways than by allowing duress to act as a complete defense to murder. Mitigation of punishment is a flexible tool that can be used on a case by case basis and one that comports with the general principle that an individual is less blameworthy and less deserving of full punishment when he acts criminally under duress.

In order for law to have effect, it must be rooted in reality. The judges who dissented on this issue would accept duress as a complete defense if a refusal of a soldier to kill innocents would have a tangible effect on whether lives would be lost. In one opinion it was stated, "Law is based on what society can reasonably expect of its members."[33] In this view, if

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31. Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, para. 88 (7 Oct. 1997) [hereinafter McDonald/Vohrah Opinion].

32. *Id.* para. 80.

33. Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22-A, para. 47 (7 Oct. 1997).

a soldier's refusal would not make a difference to the killing of civilians, we should not require that such a soldier become a martyr by giving up his own life. The majority opinion finds, however, that it is "equally unrealistic to expect a reasonable person to sacrifice his own life or the lives of loved ones in a duress situation even if by this sacrifice, the lives of victims would be saved."[34] Is it also not unrealistic to assume that a reasonable person would sacrifice his own life if it would only save the life of a single other person? The dissenting judges' view is grounded on a single-minded assumption of how a reasonable soldier would act in such a situation. The majority further stated, "[e]ither duress should be admitted as a defense to killing innocent persons generally based upon an objective test of how the ordinary person would have acted in the same circumstances or not admitted as a defense to murder at all."[35] We should reject this "half-way house which contributes nothing to clarity in international humanitarian law."[36]

Unable to accept the minority's view of how "a reasonable person" should behave, the majority founded its decision on an "absolute moral postulate" for the implementation of international humanitarian law. We should recall that the Geneva principles were designed to protect non-combatants. If 1200 unarmed civilians are to be considered as prey for soldiers because of an assertion that the soldier's life would be lost to no avail, as a practical matter, such claims of duress would not be infrequent. There would also be no guard against the commission of unspeakable atrocities. That the majority reached this decision should not surprise you since Rule 916 (h) of the *Manual for Courts-Martial* clearly provides that duress is a defense "to any offence except killing an innocent person." Furthermore, since the 1890s, it has been established in the common law of the United States that duress is not a defense to murder in the first degree. Although the majority recognized that the Model Penal Code of the United States, adopted by a few states, views duress as a complete defense to murder, we should recall the context in which we are called to judge criminal culpability. If the Tribunal is to discharge effectively its mandate by ascribing criminal responsibility for serious violations of international humanitarian law rather than ordinary crimes, then the moral imperative must coincide with our purpose.

It is the reality of war, undoubtedly, that soldiers are called upon to act while under duress from superiors, especially when the combatants are

34. McDonald/Vohrah Opinion, *supra* note 31, para. 83.
35. *Id.*
36. *Id.*

members of unstructured forces or paramilitary groups. Will our decisions as judges at the Hague Tribunal change such soldiers' responses to duress conditions? The answer is that our judgment concerning duress may not; nevertheless, an international tribunal has an obligation to recognize the highest standards of international humanitarian law and develop a normative framework that reflects the purposes of Geneva law and incorporates the moral essence of a humane and just society.

IV. The Tribunals and Recent Events

It is often said that "unconscionable atrocities act as the necessary catalyst for constructive action by the world community."[37] The establishment of the ICTY and ICTR is testimony to the truth of that view. Moreover, the Tribunals' success has itself been a contributing factor to a series of recent developments that may signal an increased emphasis on enforcement of norms governing the conduct of warfare. In addition to the first national prosecutions under the grave breaches provisions of the Geneva Conventions, the experience of the ICTY and ICTR has also renewed efforts towards the establishment of a permanent International Criminal Court (ICC). Indeed, our practical experience will be of immense value to the ICC as it begins its work. This summer, a diplomatic conference will convene in Rome for the purpose of reaching agreement on a treaty to establish a permanent ICC. Even after the drafting of a statute by the International Law Commission in 1994 and several meetings of ad hoc committees and the preparatory committee, several important issues remain unresolved. However, a consensus appears to be developing on many issues. It appears that the prosecutor will not be inextricably linked to the Security Council's decision-making process regarding prosecutions. The subject-matter jurisdiction may be limited to genocide, crimes against humanity and war crimes, and possibly aggression. The remaining and perhaps the most important issue is that of State cooperation. In other words, what type of enforcement mechanisms will be available to ensure that States comply with the Court's decisions? Without such mechanisms, the Court will not be able to surmount the problems that the ad hoc Tribunals have faced in this regard.

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37. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 254 (1995).

V. Conclusion

As war itself has changed, the laws of war should follow. Yet, because the international community has clung passionately, politically, to the immovable rock of State sovereignty that keeps alive and keeps dominant archaic perceptions of warfare, the pace of the law has been far slower than the pace of the war. Where before we chiseled at the rock, the ICTY is a drill, the ICC a wrecking ball. For us to use these tools effectively to ensure that the protections afforded to individuals caught in conflicts will actually protect them, we must remain aware of these developments and their implications. We must apply legal principles which are not devoid of morality and of common sense. We must understand the evolutionary history of war and strive to ensure that the rules governing its conduct address those realities.