REVIEW OF RECENT DECISIONS OF THE *AD HOC* INTERNATIONAL WAR CRIMES TRIBUNALS

Since the creation of the International Criminal Tribunal for the Former Yugoslavia in 1993,[1] cases involving significant law of war issues have been the subject of international judicial resolution. These cases represent perhaps the most significant judicial analysis of the law of war to occur since the close of the post-World War II war crimes trials. Although decisions of these tribunals do not have any binding legal effect on the international community, they do have an undeniable and important impact on the development of the customary international law of war. Many of these cases have involved offenses alleged to have been committed during the course of a non-international armed conflict.[2] As a result, the impact of these cases on customary international law is perhaps most profound when assessing the contours of the law of war applicable to such conflicts—an area with minimal conventional legal regulation but a growing body of customary legal regulation.

While the extent of the significance of these decisions is subject to debate, the fact that they have an impact is not. Judicial decisions of international tribunals are an accepted source of evidence of customary international law.[3] Because the analysis contained within these decisions may have an immediate or future impact on what is considered a binding international obligation under the law of war, it is obvious that those involved in the practice of operational law should become familiar with them. The

1. The ICTY was created pursuant to United Nations Security Council Resolution 827 for the purpose of "prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal for the former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993) (including a proposed statute for an International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) (establishing the International Criminal Tribunal for the Prosecution of War Crimes in the Former Yugoslavia (ICTY) and adopting the statute recommended in the Secretary-General's report) [hereinafter International Criminal Tribunal for Yugoslavia Statute].

case comments in the following pages are intended to facilitate this pro-

2. "[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4339 (Yves Sandoz, Christopher Swinarski, & Bruno Zimmerman eds., 1987) [hereinafter OFFICIAL COMMENTARY, PROTOCOL II].

> The expression 'armed conflicts' give an important indication . . . since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within a territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new state.

Id. at ¶ 4341.

Although Serbia was involved in the fighting, alongside the Federal Republic of Yugoslavia, their involvement did not change the character of the conflict from non-international to international. Serbia's involvement was at the behest and with the consent of the Yugoslav Government, the legitimate Government, and was directed at the Kosovo Albanians, not Yugoslavia. Thus, there was no state on state conflict, which would cause the conflict to be characterized as an international armed conflict. The same rationale was used to justify Operation Just Cause, the United State's invasion of Panama, as a non-international as opposed to international armed conflict. The United States "invasion" of Panama on 20 December 1989 was at the request and invitation of the legitimate elected President, President Guillermo Endara. "The United States government never recognized Noriega as Panama's legitimate, constitutional ruler." United States v. Noriega, 117 F.3d 1206, 1211 (1997); *see also* Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 POL. SCI. Q. 539 n.4 (1995). Thus, the conflict between the United States and Manuel Noriega, the Panama Defense Forces, and the forces loyal to Noriega was not State on State; rather, it was a non-international armed conflict between the legitimate Government of Panama and forces assisting the Panamanian Government against insurgents commanded by Manuel Noriega. *But cf*. United States v. Noriega, 808 F. Supp 791 (1992) (holding Manuel Noriega is entitled to Prisoner of War status based on the court's analysis of the invasion of Panama as an Article 2 conflict, an international armed conflict, despite evidence to the contrary from the Department of State and Department of Defense). "The Court finds that General Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty, regardless of the type of facility in which the Bureau of Prisons chooses to incarcerate him." *Id*. at 796.

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The following case comments are intended to provide a brief summary of several significant decisions from these tribunals. Each was written by a student enrolled in the Advanced Law of War Graduate Course elective during the 48th Graduate Course at The Judge Advocate General's School. Each comment focuses on a specific opinion from one of the tribunals, and how that opinion resolved a specific issue related to the law of war. They are not intended to offer in-depth analysis of the decisions, but merely as a review of opinions from the tribunals. They represent what is hoped will be a continuing effort to provide such reviews in the *Military Law Review* of future decisions from these tribunals.

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3. Customary status may be achieved in various ways ranging from diplomatic relations between states, state practice, practice of international organs, state laws, decisions of state and international courts, and state military and administrative practices. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 142 (2d ed. 1995).

THE FINE LINE BETWEEN POLICY AND CUSTOM: *PROSECUTOR v. TADIC* AND THE CUSTOMARY INTERNATIONAL LAW OF INTERNAL ARMED CONFLICT

MAJOR IAN G. COREY[1]

I. Introduction

On 2 October 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia[2] (the Tribunal) rendered a decision in the case of Dusko Tadic[3] that potentially has serious implications for United States participation in internal armed conflicts.[4] In *Tadic*, the Appeals Chamber concluded that certain rules and principles governing the conduct of international armed conflicts now apply to internal armed conflicts as a matter of customary international law.[5]

The United States has long maintained a policy of compliance with the law of war[6] during all armed conflicts, however such conflicts are characterized.[7] Yet the U.S. policy is characterized as nothing more than a pronouncement of policy, rather than the pronouncement of state practice premised on a legal obligation.[8] Regardless of how the United States characterizes this pronouncement, however, the *Tadic* decision may indeed raise it to the level of customary law.

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II. Facts

In February 1994, German officials arrested Dusko Tadic in Munich after Bosnian exiles recognized him as one of the Bosnian Serbs who had participated in a number of atrocities committed against Bosnian Mus-

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2. The International Criminal Tribunal for the Former Yugoslavia was established on 25 May 1993, by United Nations Security Council Resolution 827. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993) [hereinafter S.C. Res. 827], *reprinted in* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA SINCE 1991, BASIC DOCUMENTS 147 (1995) [hereinafter BASIC DOCUMENTS]. *See also* S.C. Res. 808, U.N. SCOR, 48th Sess. 3175th mtg., U.N. Doc. S/RES/808 (1993) [hereinafter S.C. Res. 808], *reprinted in* BASIC DOCUMENTS at 141 (deciding that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" and requesting the United Nations Secretary-General to submit proposals for implementation of the decision). S.C. Res. 827 expressed the Security Council's "grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia . . . including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing' . . . ." S.C. Res. 827. Accordingly, the Security Council established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined . . . ." *Id.* In so doing, the Security Council acted pursuant to its authority under Chapter VII of the United Nations Charter. *See* U.N. CHARTER arts. 39-51.

3. Prosecutor v. Tadic (a/k/a Dule), No. IT-94-1-AR72 (Oct. 2, 1995) (Appeal on Jurisdiction) [hereinafter Tadic Appeal], *reprinted in* INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDICIAL DECISIONS, 1994-1995, at 353 (1999) [hereinafter JUDICIAL DECISIONS]. Dusko Tadic is also known as Dusan Tadic.

4. An internal—or non-international—armed conflict "is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." Sylvie-S. Junod, *Commentary on the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* [hereinafter Commentary on Protocol II], *in* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1305, 1319 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

5. International law "consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) [hereinafter RESTATEMENT]. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Id*. at §102(2).

lims.[9] Germany charged Tadic with crimes against humanity, including aggravated assault and murder, as well as genocide.[10]

Pursuant to Article 9 of the Tribunal's statute,[11] the Trial Chamber formally requested that Germany defer to the Tribunal's jurisdiction.[12] Germany acceded.[13] Subsequently, the Tribunal's prosecutor prepared an indictment charging Tadic with grave breaches of the Geneva Conventions of 1949,[14] violations of the laws and customs of war, and crimes against humanity, pursuant to Articles 2, 3, and 5 of the International Criminal Tri-

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6. The Department of Defense defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law." U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 3.1 (9 Dec. 1998) [hereinafter DOD DIR. 5100.77]. Today, the "law of war" is often referred to as "international humanitarian law." *See, e.g.*, Jean-Jacques Surbeck, *Dissemination of International Humanitarian Law*, 33 AM. U.L. REV. 125, 126 n.5 (1983) ("The view of the [International Committee of the Red Cross] is that 'international humanitarian law' is synonymous with 'law of war.'"). *But see* Alfred-Maurice de Zayas, *Book Review: Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 82 AM. J. INT'L L. 416, 418 (April 1988) ("[H]umanitarian law goes beyond 'the law of the Hague,' or law of war proper, which determines the rights and duties of belligerents in the conduct of operations and limits the means of doing harm, and 'the law of Geneva,' which is intended to safeguard military personnel placed *hors de combat* and persons not taking part in hostilities."). *See also* Tadic Appeal, *supra* note 3, para. 87 (discussing the evolution of terms related to and encompassing the "law of war").

7. *See infra* notes 61-62 and accompanying text.

8. *See id.*

9. *See, e.g.*, William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept. 1995, at 5, 64.

10. *See id.* at 64.

11. *See* U.N. Doc. S/25704, annex, art. 9 (1993) [hereinafter ICTY Statute], *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 5. Article 9 provides that the Tribunal and national courts "shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, art. 9(1). However, Article 9 further provides that the Tribunal "shall have primacy over national courts." *Id.* at art. 9(2). "At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal . . . ." *Id.*

12. *See Activities of the Tribunal*, 1994 ICTY Y.B. 24, 26. *See also* Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic, Prosecutor v. Tadic, No. IT-94-1-D, (Nov. 8, 1994) (acting pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 3.

bunal for the Former Yugoslavia (ICTY) Statute, respectively.[15] The indictment alleged that between May and August 1992, Tadic had, *inter alia*, murdered, raped, and assaulted numerous victims, many of them at the Omarska detention facility used by the Bosnian Serbs to intern Muslims and Croats.[16]

Tadic made his first appearance before the Tribunal on 26 April 1995, entering a plea of not guilty to all charges.[17] Subsequently, Tadic filed a motion attacking the Tribunal's jurisdiction on three grounds: (1) the Security Council lacked the power to establish the Tribunal, such that its establishment was unlawful;[18] (2) the primacy jurisdiction conferred upon the Tribunal had no basis in international law;[19] and (3) the Tribunal lacked subject-matter jurisdiction because the crimes alleged—grave breaches, violations of the laws or customs of war, and crimes against

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13. Before it could remand custody of Tadic to the Tribunal, however, Germany had to enact implementing legislation. Germany enacted such legislation on 10 April 1995; the legislation entered into force the following day. *See State Cooperation*, 1995 ICTY Y.B. 317, 319. Tadic arrived in The Hague, where the Tribunal sits, on 25 April 1995. *See, e.g.*, William Drozdiak, *War Crimes Tribunal Arraigns 1st Suspect; Bosnian Serb Pleads Not Guilty to Charges That He Killed Muslims at Detention Camp*, WASH. POST, April 27, 1995, at A31.

14. *See infra* note 43.

15. *See* Prosecutor v. Tadic, No. IT-94-1 (Feb. 10, 1995) (Indictment) [hereinafter Tadic Indictment], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 27. Articles 2, 3, and 5 of the ICTY Statute give the Tribunal the power to prosecute grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, and crimes against humanity, respectively. *See* ICTY Statute, *supra* note 11, arts. 2, 3, and 5.

16. *See* Tadic Indictment, *supra* note 15. The Tribunal prosecutor subsequently twice amended the indictment. The first amended indictment alleged that Tadic had committed additional crimes of a similar nature at two other detention facilities, Truopolje and Keratem, and extended the period covered to December 1992. *See* Prosecutor v. Tadic, No. IT-94-1 (Aug. 25, 1995) (Indictment (First Amended)) [hereinafter Tadic Indictment (First Amended)], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 243. The amended indictment also alleged persecution on political, racial, and/or religious grounds, as a crime against humanity, and deportation, as both a crime against humanity and a grave breach. *See* Tadic Indictment (First Amended), at 243. Later, the Tribunal prosecutor again amended the indictment to delete the allegations of deportation contained in the First Amended Indictment. *See* Prosecutor v. Tadic, No. IT-94-1-T (Indictment (Second Amended)) (Dec. 14, 1995) [hereinafter Tadic Indictment (Second Amended)], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 335.

17. *See, e.g.*, Drizdiak, *supra* note 13, at A31.

18. *See* Tadic Appeal, *supra* note 3, para. 26.

19. *See id*. para. 50.

humanity—apply only to international armed conflict, whereas the conflict at issue was internal.[20]

The Trial Chamber dismissed Tadic's motion as it related to primacy and subject-matter jurisdiction, but concluded it lacked the competence to rule on the validity of the Tribunal's establishment.[21] As to the primacy of the Tribunal over national courts, the Trial Chamber held that Tadic, not being a state, lacked standing to raise the issue,[22] and that the Tribunal's establishment by the Security Council pursuant to Chapter VII of the United Nations (U.N.) Charter eviscerated any alleged right to be tried by national courts pursuant to national laws.[23]

The Trial Chamber also dismissed Tadic's claim that the Tribunal's jurisdiction under Articles 2, 3, and 5 of the ICTY Statute was limited to crimes committed in the context of an international armed conflict, that the conflict at issue was internal, and that the Tribunal therefore lacked subject-matter jurisdiction.[24] In disposing of this claim, the Trial Chamber determined that the crimes covered by all three articles were applicable in both internal and international armed conflicts.[25] Consequently, the Trial Chamber concluded that it had jurisdiction regardless of the nature of the conflict.[26]

Following the Trial Chamber's dismissal of Tadic's motion challenging the Tribunal's jurisdiction, the Appeals Chamber granted Tadic's motion for an interlocutory appeal on the issue of jurisdiction.[27]

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20. *See id*. para. 65.

21. *See id*. para. 2.

22. *See id*. para. 55. The Trial Chamber also noted that the two states with the greatest interest in Tadic's prosecution, Germany and Bosnia-Herzegovina, had accepted the Tribunal's jurisdiction. *See id.* para. 56. Further, the court noted that the crimes charged were serious breaches of international humanitarian law that transcended the interests of any one state. *See id.* para. 58.

23. *See id*. paras. 61-63. This alleged right derives from the theory of *jus de non evocando*, the notion in some legal systems that an accused should not be removed from the court that has jurisdiction over him. The goal is to protect against the creation of special courts, for the prosecution of politically-charged offenses, that lack traditional due process rights. *See id*. para. 62.

24. *See id*. para. 65.

25. *See id*. para. 65.

26. *See id*. para. 65.

27. *See id*. para. 1.

III. Holding of the Appeals Chamber

Whereas the Trial Chamber had declined to rule on the validity of the Tribunal's establishment,[28] the Appeals Chamber held that the Security Council had properly established the Tribunal.[29] In reaching this conclusion, the court found that the Security Council established the Tribunal pursuant to its wide discretionary powers under Chapter VII of the U.N. Charter.[30] Additionally, the Appeals Chamber decided that the Tribunal was established in accordance with the rule of law, that is, in accordance with international standards of procedural fairness.[31]

As to the primacy of the Tribunal, the Appeals Chamber rejected the Trial Chamber's disposition of the issue on the basis that Tadic lacked standing.[32] However, the court rejected Tadic's challenge on the grounds that the crimes alleged were internationally significant, and that the absence of primacy could result in forum shopping and potentially a windfall to the accused.[33]

The Appeals Chamber next tackled Tadic's claim that the Tribunal's subject-matter jurisdiction under Articles 2, 3, and 5 of the ICTY Statute was limited to crimes committed during an international armed conflict.[34] Upon concluding that the crimes alleged were committed in the context of an armed conflict,[35] the court further concluded that the conflicts in the former Yugoslavia had both internal and international aspects[36] and that the Security Council intended that the Tribunal's subject-matter jurisdic-

28. *See supra* note 21 and accompanying text.
29. *See* Tadic Appeal, *supra* note 3, paras. 28-48.
30. *See id*. paras. 28-40.
31. *See id*. paras. 41-47.
32. Using somewhat harsh language, the Appeals Chamber stated that:

> Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of state sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of state sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

Id. para. 55.

tion extend to both types of conflicts.[37] With respect to the specific articles in question the Appeals Chamber held, contrary to the Trial Chamber's decision, that Article 2 of the ICTY Statute applied only to offenses committed during international armed conflicts.[38] However, the Appeals Chamber upheld the Trial Chamber's decision that Articles 3 and 5 of the

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33. The Appeals Chamber observed that:

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.
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> . . . .
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> Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is there would be a perennial danger of international crimes being characterised as "ordinary crimes" or proceedings being "designed to shield the accused", [sic] or cases not being diligently prosecuted.

Id. para. 58 (citations omitted).

34. Recall that Articles 2, 3, and 5 of the ICTY Statute give the Tribunal the power to prosecute grave breaches, violations of the laws or customs of war, and crimes against humanity, respectively. *See supra* note 11 and accompanying text.

35. *See* Tadic Appeal, *supra* note 3, para. 70.

36. *See id*. para. 77.

37. *See id*. para. 78.

38. *See id*. para. 84. The United States position was that "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." *Id.* para. 83 (quoting an *amicus curiae* brief submitted by the United States). Some commentators have criticized this portion of the Appeals Chamber's holding. *See, e.g.*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); George Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

ICTY Statute applied to offenses committed during both internal and international armed conflicts.[39]

In the process, the Appeals Chamber took a very expansive view of Article 3 of the ICTY Statute, holding:

> 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: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of Common Article 3 *and other customary rules on internal conflicts*; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, [that is], agreements which have not turned into customary international law.[40]

The court then engaged in a lengthy discussion of the development of customary law in the field of internal armed conflict, maintaining that various principles of the law of war now apply in the context of such conflicts.[41] Indeed, the Appeals Chamber concluded, "it cannot be denied that customary rules have developed to govern internal strife."[42]

IV. Analysis

For the military practitioner, the most significant aspect of the Appeals Chamber's decision is its conclusion that some of the rules and principles governing international armed conflict now apply to internal armed conflict as a matter of customary law. Prior to *Tadic*, the law of war applicable to internal armed conflict consisted almost entirely of Common Article 3 to the Geneva Conventions of 1949[43] and Additional Protocol II to the Geneva Conventions.[44] In *Tadic*, however, the Appeals Chamber maintained that the distinction between international and internal armed conflict has increasingly become blurred, such that rules of customary law

39. *See* Tadic Appeal, *supra* note 3, paras. 137, 142.
40. *Id.* para. 89 (emphasis added).
41. *Id.* paras. 96-127.
42. *Id.* para. 127.

have emerged to regulate internal armed conflict.[45] According to the Appeals Chamber, these rules include, *inter alia*,

> protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in the hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[46]

Still, the court noted two limitations on the migration of rules and principles that traditionally governed international armed conflict into the sphere of internal armed conflict:

> (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 essense of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[47]

The significance of the Appeals Chamber's decision becomes especially apparent when considering the route by which the court arrived at its outcome in light of U.S. policy regarding compliance with the law of war.[48]

Citing the difficulty of discerning the operational conduct of forces in the field, the Appeals Chamber relied primarily on "such elements as offi-

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43. Geneva Conventions of 12 August 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.T.S. 3114, 75 U.N.T.S. 3 [hereinafter Geneva Conventions]. The Geneva Conventions consist of: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. "Common Article 3" refers to Article 3, which is identical in all four of the Geneva Conventions.

44. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol II].

45. *See* Tadic Appeal, *supra* note 3, para. 97.

46. *Id.* para. 127.

47. *Id.* para. 126.

48. *See infra* notes 61-62 and accompanying text.

cial pronouncements of States, military manuals and judicial decisions"[49] in deciding that state practice reflected the crystallization of customary law in the arena of internal armed conflict.[50] To this end, the court cited statements by governments,[51] resolutions of the League of Nations and the

49. Tadic Appeal, *supra* note 3, para. 99.

50. While he embraced the court's conclusions, Professor Theodor Meron criticized its reliance on official pronouncements to the exclusion of operational practice.

> One may ask whether the Tribunal could not have made a greater effort to identify actual state practice, whether evincing respect for, or violation of, the rules. Difficult as such efforts are, they could have reinforced the Tribunal's substantive appraisals of principles and rules of customary international law. Without some significant discussion of operational practice, it may be difficult to persuade governments to accept the Tribunal's vision of some aspects of customary law.

Meron, *supra* note 38, at 240.

51. *See, e.g.*, Tadic Appeal, *supra* note 3, para. 100 (citing the British government's protests in 1938 against the targeting of non-combatants during the Spanish Civil War, which had elements of both an internal and international armed conflict); *id.* para. 105 (citing the stated commitment in 1964 of the government of the Democratic Republic of Congo to refrain from attacking civilians and to respect the Geneva Conventions during the civil war, and urging the rebels to do the same); *id.* para. 117 (citing the El Salvadoran government's declaration in 1987 that, while it did not consider Additional Protocol II to the Geneva Conventions of 1949 applicable to El Salvador's civil war, it would nonetheless comply with the provisions of the Protocol).

United Nations,[52] declarations of the European Union,[53] instructions and statements by insurgent groups,[54] and national military manuals.[55]

To be sure, the task of discerning customary international law "is more of an art than a scientific method."[56] Principles of customary international law consist of both a quantitative element (the practice of states) and a qualitative element (a sense of legal obligation typically referred to as *opinio juris*).[57] Even when state practice can be empirically documented, the more difficult task of satisfying the *opinio juris* element remains.[58] Often, state practice is not accompanied by any formal expression of *opinio juris*.[59] Indeed, none of the state pronouncements cited by the Appeals Chamber expressed a *legal* obligation to apply principles and rules governing the conduct of international armed conflict to internal armed conflict.[60] Still, the court seemed to conclude that such pronounce-

52. *See, e.g., id.* para. 101 (citing the League of Nations's adoption of a resolution in 1938 condemning the bombing of civilian populations during both the Spanish Civil War and Sino-Japanese War); *id.* paras. 110-12 (citing resolutions adopted by the United Nations General Assembly in 1968 and 1970 as declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind).

53. *See, e.g., id.* para. 113 (citing a 1990 declaration by the European Community, regarding the internal conflict in Liberia, recognizing the applicability of principles of international humanitarian law to the protection of civilians in internal armed conflicts); *id.* para. 115 (citing a 1995 declaration by the European Union, regarding the civil war in Chechnya, deploring the violations of international humanitarian law with respect to civilians).

54. *See, e.g., id.* para. 102 (citing Mao Tse-Tung's instructions in 1947 to the Chinese Peoples' Liberation Army not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms"); *id.* para. 107 (citing the 1988 commitment by El Salvadoran rebels (the FMLN) to comply with Common Article 3 of the Geneva Conventions and Additional Protocol II).

55. *See, e.g., id.* para. 106 (citing the 1967 "Operational Code of Conduct for the Nigerian Armed Forces," which regulated the conduct of military operations against rebels and provided that the armed forces were duty bound to respect the Geneva Conventions and protect civilians and civilian objects); *id.* para. 118 (quoting the German Military Manual of 1992 which provides that "[m]embers of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts"). This provision in the German Military Manual is strikingly similar to expressions of U.S. policy regarding compliance with the law of war. *See infra* notes 61-62 and accompanying text.

56. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44 (2d ed. 1993).

57. *See supra* note 5.

58. "Without *opinio juris*, there may exist only a history lesson more or less devoid of legal significance." JANIS, *supra* note 56, at 46.

59. *See id.* at 47.

60. *See supra* notes 51-55 and accompanying text.

ments evidenced both practice and *opinio juris* by implication. In light of the U.S. policy on compliance with the law of war, the Appeals Chamber's reasoning has serious implications for the conduct of U.S. operations outside the context of an international armed conflict.

The Department of Defense (DOD) Law of War Program provides that all members of the U.S. armed forces must "comply with the law of war during all armed conflicts, *however such conflicts are characterized*, and with the principles and spirit of the law of war during all other operations."[61] The Chairman of the Joint Chiefs of Staff Instruction that implements the DOD Law of War Program repeats this mandate.[62] Neither articulation expresses a legal obligation to adhere to the law of war during internal armed conflicts (or "other operations"); indeed, the U.S. policy is couched as just that: mere policy. Policy declarations to the contrary notwithstanding, however, the *Tadic* decision easily leads to the conclusion that the United States is now bound by customary law to apply the law of war in internal armed conflicts, if not all operations.

Before *Tadic* at least, characterizing state practice as mere "policy" could not rise, without the additional qualitative element of *opinio juris*, to the level of a pronouncement of customary international law. *Tadic* seriously diminishes the strength of such a characterization, however. This is all the more evident in light of the striking similarity between the language of the U.S. policy, as expressed in *DOD Directive 5100.77* and *Chairman Joint Chiefs of Staff Instruction 5810.01A*, and the provision of the German Military Manual relied on by the Appeals Chamber as evidence of customary law.[63] Indeed, the doctrine expressed by the United States, as the world's only true superpower, as to the applicability of the law of war to internal armed conflict and other operations outside the context of international armed conflicts can only be seen as figuring prominently in the development of customary international law.[64]

In light of the *Tadic* decision, the nature of U.S. policy on compliance with the law of war, as mere policy or reflective of current customary inter-

61. DOD DIR. 5100.77, *supra* note 6, para. 5.3.1 (emphasis added).

62. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, para. 5a. (27 Aug. 1999) [hereinafter CJCSI 5810.01A] ("The Armed Forces of the United States will comply with the law of war during all armed conflicts [however] such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.").

63. *See supra* note 55.

national law, is unclear. However, the United States faces a choice: either acknowledge the increased role of the principles and rules of the law of war in the context of internal armed conflict, or resist the expansion of customary law by even more strenuously articulating the lack of *opinio juris* in its current policy. The former will place the United States on the vanguard of customary law; the latter, while keeping options open for the time being, may in a future operation lead to allegations of violations of international humanitarian law, and condemnation.

V. Conclusion

In *Prosecutor v. Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia confirmed the resolve of the international community to contend with offenses committed not only during international armed conflicts, but during internal armed conflicts as well. At the same time, the court recognized a significantly expanded role for customary law in the context of internal armed conflict, creating serious implications for the future conduct of U.S. operations. While the United States may continue to characterize compliance with the law of war during all operations, including those that do not occur in the context of an international armed conflict, as a matter of policy rather than legal obligation, such a characterization may now be meaningless in light of the *Tadic* decision. In the future, the United States may no longer have the luxury of selecting those operations in which, because of military necessity or for other reasons, it does not apply the whole law of war. Indeed, doing so could expose decision-makers and service members alike to allegations of

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64. *See, e.g.*, Meron, *supra* note 38, at 249.

> A broader question . . . concerns the weight to be assigned to the practice of various states in the formation of the international customary law of war. I find it difficult to accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and interests, *inter alia*, have an equal role in this regard. . . . I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but *through policies expressed, for example in military manuals*.

Id. (emphasis added). One can only wonder why the Appeals Chamber did not cite previous versions of DOD DIR. 5100-77 and CJCSI 5810.01A containing provisions virtually identical to those in the current documents.

violations of the laws and customs of war and, conceivably, individual criminal responsibility.

DURESS AS A DEFENSE TO WAR CRIMES AND CRIMES AGAINST HUMANITY—

PROSECUTOR V. DRAZEN ERDEMOVIC

MAJOR STEPHEN C. NEWMAN, U. S. MARINE CORPS[1]

I. Introduction

Imagine yourself a young soldier fighting an unpopular and dirty little war. You aren't fighting for your country, as patriotism doesn't much appeal to your character. Neither are you fighting for a cause, since none of the causes associated with this particular conflict are especially appealing to you. You fight for two reasons alone. First, you fight because you have to. You have been impressed into service by forces outside of your control. Second, you fight because it pays the bills. Every penny you earn is quickly dispatched home to support your wife and baby. Now imagine that in the course of this dirty little war, you have been taken prisoner. Over the course of several weeks you are systematically beaten and tortured for no apparent reason. You have also witnessed some of the most horrific scenes of death ever imaginable. Your captors are really quite ruthless, and seem to take pleasure in their work. Today you are once again beaten. Following a brief period of unconsciousness, you awake to see the yellowed teeth of the camp commandant smiling over your face. He pulls you to your feet and drags you out into the courtyard where a young woman stands bound and gagged to a tall pole. You watch as a camp guard beats her with a metal bar until she is on the verge of death. With a single command, the commandant stops the gruesome scene. You

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notice that in one hand he holds a knife, in the other a .45 caliber pistol. He hands you the knife and tells you to kill the woman tied to the pole. If you refuse, he threatens to use that knife to gouge out your eyes. "If you fail to do as I say, you will never see your family again," he chides, "but do not worry, as I will gladly pay them a visit on your behalf when this war is over. Besides, if you don't kill the girl, I certainly will."

Despite pleading guilty to a violation of the laws or customs of war, young Drazen Erdemovic never faced a situation like the one described in the hypothetical above.[2] But the consequences of his behavior led the Presiding Judge in the Appeals Chamber of the 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 (ICTY) to raise concerns similar to those in the hypothetical when making his argument in favor of the defense of duress.[3] As reflected by the graphic at the Appendix to this article, he was not in the majority. Nonetheless, the lesson of this case is that the defense of duress to war crimes and crimes against humanity is far from dead. The majority viewed it as interesting information for consideration on sentencing. A strong minority, however, argued vociferously that it is, in fact, a *bona fide* defense under international law.[4]

II. The Facts

The Erdemovic case results from the continuing strife in the former Republic of Yugoslavia (FRY). The facts reveal a young Croat, twenty-three years of age, who only reluctantly participated in the conflict.[5] He

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2. Prosecutor v. Erdemovic, No. IT-96-22-Y (March 5, 1998) (Sentencing Judgment, Trial Chamber II), *available at* http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj980305e.htm.

3. *Erdemovic*, No. IT-96-22-Y, at 32 (Oct. 7, 1997) (Appeals Chamber, Cassese, J., dissenting in the findings but concurring in the result) [hereinafter Minority Opinion], *available at* http://www.un.org/icty/erdemovic/appeal/judgment/erd-adojcas971007e.htm.

4. All five Judges concurred in refusing to acquit the accused, but their reasons were so divergent that four opinions were issued. These were: (1) the dissenting opinion of Judge Cassese; (2) the joint separate opinion of Judges McDonald and Vohrah; (3) the dissenting opinion of Judge Stephen; and (4) the dissenting opinion of Judge Li. While Judge Li concurred with Judges McDonald and Vohrah that duress should not be a defense, this was not the focus of his opinion. Nonetheless they best reflect the "majority" opinion. The author therefore refers to the McDonald/Vohrah opinion as the majority.

5. *Erdemovic*, No. IT-96-22-Y, at 38 (Nov. 29, 1996) (Sentencing Judgment, Trial Chamber I) [hereinafter Sentencing Judgment I], *available at* http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj961129e.htm.

began his military service in December 1990 as part of the Yugoslav Army. During that time he worked side by side with various soldiers of differing ethnic backgrounds. Following discharge from the army in 1992, he received a summons to join the army of Bosnia and Herzegovina. He had ignored an earlier summons, but this time he reported as ordered. In November 1992, he left the army, but was later mobilized into the police force of the Croatian Defense Council (HVO). His concern for others of different ethnicity resulted in an arrest and severe beating. He had helped some Serbian women and children return home. Following this he left the HVO and sought his own escape. He went to the Republic of Srpska and Serbia in search of travel papers to Switzerland for both he and his wife. When this failed to materialize, he wandered about Serbia for five months, trying his best to stay out of the war. In April 1994, he found himself broke and in need of a job. He decided to join the Bosnian Serb Army for two reasons. First, he wanted to provide for his growing family. Second, he sought some level of status as a Croat among a largely Serbian populace. He specifically joined the 10th Sabotage Unit because of its relative ethnic diversity.[6]

In October 1994, however, the character of the 10th Sabotage Unit changed. A new commander was appointed, and the ranks became filled with soldiers of more nationalist stripe. Erdemovic claimed to have lost rank at this time for refusing to carry out a mission he considered too dangerous to civilians.[7] But he continued to muddle through until 16 July 1995 when he received some mysterious orders. He and seven other members of his unit were directed to prepare for an undisclosed mission. It was only when they arrived at the Branjevo farm at Pilica that the purpose of the mission was revealed—the systematic extermination of Muslim men. Erdemovic balked at the orders, but was threatened with death. "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you." Fearing for his life and for the safety of his wife and new baby, Erdemovic obeyed.[8] Busloads of Muslim men began to arrive shortly thereafter.

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6. *Id.* at 22, 28. The 10th Sabotage Unit was mostly made up of Serbs, but did include some Croats, one Slovene and one Muslim. *Id.*

7. *Id*. at 23. Erdemovic claimed to have the rank of "lieutenant or sergeant," and that he had previously commanded a small group within the 10th Sabotage Unit. Part of his claim of duress is related to this loss, in that he claimed to no longer have the authority to refuse the orders of his superiors. *Id.*

8. *Id*.

At the same time an even more dramatic scene unfolded around Srebrenica. After the fall of the United Nations (U.N.) safe haven, hundreds of unarmed civilians surrendered to the Bosnian Serb army. The men were segregated from the women. All males between the ages of seventeen and sixty were placed on busses and taken to the farm at Pilica. Upon arrival, these civilians were divided into groups of ten and escorted to a field next to the farm buildings. At that point, Drazen Erdemovic and seven other members of his unit shot them in the back with automatic weapons. By his own account, Erdemovic killed somewhere between ten and one hundred Muslim men that day.[9] But the day was not yet over. Once these men had been exterminated, Erdemovic's squad received orders to report to the Pilica public building where five hundred more Muslim men stood captive. Once again he refused the order to kill. This time, however, three other members of his squad agreed with him, and the order was rescinded.[10] With the scene thus set, the ICTY was faced with the challenge of deciding Erdemovic's fate. In the course of doing so they addressed one of the most interesting, yet questionable, defenses available—that of duress.

III. The "Majority" Opinion - Judge McDonald and Judge Vohrah

On 29 May 1996, Erdemovic was indicted on two counts, one for crimes against humanity and a second alternative count for violations of the laws or customs of war. In November 1996, he plead guilty before the trial court to one count of a crime against humanity. Taking note of the "[e]xtreme necessity arising from duress and other orders from a superior" as one of many mitigating circumstances, the court accepted his plea and sentenced him to ten years imprisonment.[11] Immediately lodging an appeal against the sentencing judgement, the Appellate Chamber took the matter under consideration. On 7 October 1997 they issued their decision. The court identified five major issues presented by Erdemovic's appeal.

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9. *Id*. In total, approximately 1200 men were killed. *Id.* at 21.

10. *Id*. Other soldiers did massacre these men. *Id.* at 27. Shortly after these events, another member of the 10th Sabotage Unit tried to kill Erdemovic and two of his friends. Severely wounded, he ended up in a Belgrade military hospital where he met and confided in a member of the press. Two days later he was arrested by the State Security Services of the Republic of Serbia. Arriving in The Hague on 30 March 1996, he immediately confessed to the murders and provided key evidence against other war criminals. *Id*. at 24.

11. Sentencing Judgement I, *supra* note 5, at 25, 29.

The most critical of the five, and the one that caused the greatest split in the court, was the issue of duress as a defense.[12]

The majority found the nature of Erdemovic's plea intimately tied to the possibility that statements he made in the course of his testimony raised the defense of duress. This required the court to examine whether or not duress, thus raised, presents an absolute defense to charges like those presented against the accused. The court first determined that the portion of the Statute of the International Tribunal related to guilty pleas was vague and imprecise. They could not make a decision based on the statute alone. This being the case, they turned to the international law arena for some on-point guidance. Finding no compelling precedent amongst the entire body of international law, the majority then began an extensive examination of precedent from different authorities, including the domestic legislation of

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12. *Erdemovic*, No. IT-96-22-Y, at 10 (Oct. 7, 1997) (Appeals Chamber Judgment), *available at* http://www.un.org/icty/erdemovic/appeal/judgment/erd-aj971007e.htm. Five issues were identified by the court: (1) acquittal; (2) sentence revision; (3) an inquiry to determine if Erdemovic made an informed, unequivocal plea; (4) whether duress should be considered a complete defense to such crimes, or only a factor considered in mitigation; and (5) whether the matter should be remitted to the trial court for rehearing. The court unanimously rejected Erdemovic's appeal for acquittal, and by a vote of 4 to 1 denied his request for sentence revision. The court also determined that Erdemovic's plea was not informed by a vote of 4 to 1. The issue of duress as a defense split the court. Three judges viewed duress as purely a matter for mitigation while two opined that it might be a complete defense. The vote in favor of a rehearing was 4 to 1. *Id.*; *see also infra* Table 1.

13. *Erdemovic*, No. IT-96-22-Y, at 25-37 (Oct. 7, 1997) (Appeals Chamber, Joint Separate Opinion of McDonald, J. and Vohrah, J.) [hereinafter Majority Opinion]. They did so by examining their own rules in the light of the Vienna Convention on the Law of Treaties. Article 32 of that Convention provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id. at 2 (quoting Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331). Consequently, the Appeals Court examined a variety of sources in their quest to determine if duress is an absolute defense to crimes such as the one charged in the present

various states across the globe.[13] After an exhaustive description of the various statutes and holdings throughout the world, they concluded that:

> After the above survey of authorities in the different systems of law and exploration of the various policy considerations which we must bear in mind, we take the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. . . . In the result, we do not consider the plea of the Appellant [as equivocal because] duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.[14]

A closer reading of this opinion reveals the policy behind this decision. The majority clearly stated that they were concerned about "the message" this decision would send to commanders in the field. Viewing the role of international humanitarian law as guidance for the conduct of combatants and commanders on the ground, they stated:

> There must be legal limits as to the conduct of combatants and their commanders in armed conflict. In accordance with the spirit of international humanitarian law, we deny the availability of duress as a complete defence to combatants who have killed innocent persons. In so doing, we give notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives.[15]

It therefore appears that, regardless of the legal foundations of their decision, they had their goal in mind long before issuing their opinion. It was merely a matter of finding the correct legal avenue of approach to reach their conclusion. By doing so, the court avoided the rather unpleasant prospect that other, more culpable, suspects may receive the benefit of a

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13. (continued) case. These sources included British military manuals, the Manual for Courts-Martial, domestic case law of the United States and other nations, and the domestic legislation of both civil and common law states. *Id.*

14. *Id*. at 45.

15. *Id.* at 42. In reaching their decision, the majority rejected out of hand significant case law to the contrary on which Presiding Judge Cassese relied heavily. They rejected this case law because of its relative value as precedent. *Id.* at 19. Judge Cassese takes this issue head on in his opinion, which is discussed *infra* at Part IV.

duress defense in the future. Instead the court chose the easy way out, ignoring the issue of duress until sentencing.[16] Analysis of duress in mitigation is much less difficult to swallow than possibly acquitting an individual accused of crimes against humanity. By putting the issue off until sentencing, they removed a significant burden from the trial court, and avoided having to decide sticky issues related to the relative value of lives. Presiding Judge Cassese, however, was not afraid of that challenge.

IV. The "Minority" Opinion (Judge Cassese, Judge Stephen)[17]

The minority opinion provides strong argument for those sympathetic to duress as a complete defense. Judge Cassese begins by attacking the majority's reliance on national law concepts, strongly objecting to their automatic incorporation into the body of international law. In penning his opinion, Judge Cassese cited three "fundamental considerations" supportive of his objection. "First, the traditional attitude of international courts to national law notions suggest that one should explore all the means available at the international level before turning to national law."[18] In other words, the approach of the majority failed to abide by the traditional approach followed by most international jurists. Instead of exhausting all means available at the international law level, in the opinion of Judge Cassese, the majority unnecessarily ignored significant international deci-

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16. *Id*. In confronting the difficult issue of proportionality (in the majority's opinion, a balancing of harms weighing the potential wrong in the killing of innocents against the possibility that both the perpetrator and the innocents may both be killed) they stated:

> These difficulties are clear where the court must decide whether or not duress is a defence by a straight answer, 'yes' or 'no'. Yet, the difficulties are avoided somewhat when the court is instead asked not to decide whether or not the accused should have a complete defense but to take account of the circumstances in the flexible but effective facility provided by mitigation of punishment.

Id.

17. While Judge Stephen did, indeed, draft his own separate and dissenting opinion, it tracks with that of Presiding Judge Cassese, which is slightly more thorough. Therefore, while citation to the "minority opinion" refers to the opinion written by Judge Cassese, the "minority opinion" is, in fact, that of both Judges Cassese and Stephen.

18. Minority Opinion, *supra* note 3, at 3.

sions on the issue of duress.[19] But other aspects of the majority opinion also concerned him.

In his second challenge to the majority, Judge Cassese, pointed out that the "consideration militating in favour of using great circumspection before transposing national law notions into international law is inextricably bound up with the very subject matter under discussion."[20] Put plainly, this means that international law is an amalgamation of the laws from various jurisdictions. At the same time, however, international law takes great pains to ensure that this body of law does not favor the laws of one system over another. The clear implication is that the opinion of the majority violates this principle. Placing favor of one system over another led to his third challenge to the majority.

His third reason for discouraging the mechanical integration of domestic legislation into the international arena is the danger this poses to the specificity of the proceedings at bar. He pointed out that, while international judicial proceedings are easily distinguishable from their intrastate counterparts, they are also extremely dependent on the cooperation of the states under their jurisdiction. The blind integration of one states' system over that of its neighbor is likely to cause confusion and consternation among those groups upon which the international judicial system is dependent for support. The states, after all, have "sway and control" over those subject to international proceedings. The result is significant misapprehension and confusion within the international jurisdiction of the court.[21] Judge Cassese concluded his analysis with the following proposition:

> Any time international provisions include notions and terms of art originating in national criminal law, the interpreter must first determine whether these notions or terms are given a *totally autonomous* significance in the international context, [that is]

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19. *Id*. at 3, 11-28. He later pointed out exactly what the majority ignored—significant and persuasive international court decisions supportive of duress as a complete defense. Judge Cassese began by identifying cases directly addressing duress as a defense. In particular he relied on the *Einsatzgruppen* case, also known as the *Trial of Otto Ohlendorf et al*., *reprinted in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950). The majority rejected this case, and many similar cases, out of hand as having little value as precedent. They questioned the source of authority for this court, determining that it was not the equivalent of an international tribunal. Majority Opinion, *supra* note 13, at 19. Judge Cassese reached a different conclusion. Minority Opinion, *supra* note 3, at 17.

20. Minority Opinion, *supra* note 3, at 4.

21. *Id*. at 5.

> whether, once transposed onto the international level, they have acquired a new lease of life, absolutely independent of their original meaning. If the result of this enquiry is in the negative, the international judge must satisfy himself whether the transplant onto the international procedure entails for the notion or term an *adaptation* or *adjustment* to the characteristic features of international proceedings. This exploration should be undertaken by examining whether the general context of international proceedings and the object of the provisions regulating them delineate with sufficient precision the scope and purpose of the notion and its role in the international setting. Only if this enquiry leads to negative conclusions is one warranted to draw upon national legislation and case-law and apply the national legal construct or terms as they are conceived and interpreted in the national context.[22]

Having thus taken issue with the fundamental process adopted by the majority in reaching their decision, Judge Cassese then discussed the specific issues raised by the *Erdemovic* appeal. While agreeing with the majority that Erdemovic's plea was not informed, he based his decision on evidence indicating that the defense of duress had been raised by comments of the accused. Based on his study of international law, he found that no specific rule on duress as a complete defense had yet emerged. He therefore relied on the general rule of duress, stating that: "In logic, if no exception to a general rule be proved, then the general rule prevails."[23] He identified the general rule as having four strict conditions, each of which must be met before the defense may be satisfied.[24]

The first of these conditions requires that the act charged be done under an immediate threat of severe and irreparable harm to life or limb. The threat must be immediate, real, and perceivable. It cannot be speculative or trivial. Second, there must be no other adequate means of averting the evil conduct. If the accused has some other means at his disposal to avoid taking the action, he must do so. Judge Cassese's third condition requires a proportionality analysis. This is a balancing test, weighing the evil associated with committing the crime against the evil associated with not committing the crime. In other words, the remedy should not be disproportionate to the evil, or the lesser of two evils should be chosen.

22. *Id*. (emphasis in original text).
23. *Id.* at 7.
24. *Id.* at 8, 9.

Finally, the situation leading to duress must not have been voluntarily brought about by the person coerced; the accused must take no action indicating support for the coerced activity. Of the four conditions, clearly the minority opinion placed the most weight on the proportionality analysis, since that is the heart of the duress issue.[25]

Judge Cassese pointed out that, where the underlying offense involves the killing of innocents, the most difficult to satisfy of these four criteria is proportionality.[26] He envisioned a situation not unlike that proposed by the hypothetical at the beginning of this note.[27] Recall that the prisoner in the hypothetical had been directed to kill an innocent woman. As motivation, the lives of his family were placed in jeopardy. Were he to commit the crime and later be charged, the issue of duress would no doubt arise. Based on their integration of certain national legal principles into the body of international law, the majority would be interested in the facts and circumstances surrounding the actions of the accused only in relation to determining an appropriate sentence. Under the minority view, however, merely raising these facts in the course of a guilty plea would be sufficient to require inquiry into duress as a complete defense. The question is not so much whether the defense will work. That is a matter for the trial court to decide. Rather the question is whether, as

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25. *Id.* at 9.

26. *Id*. at 29. Judge Cassese stated that:

> Perhaps—although that will be a matter for the Trial Chamber or a Judge to decide—it will *never* be satisfied where the accused is saving his own life *at the expense of* his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others . . . .

Id.

27. *Id.* at 32. Judge Cassese asked the reader to consider the following:

> An inmate of a concentration camp, starved and beaten for months, is then told after a savage beating, that if he does not kill another inmate, who has already been beaten with metal bars and will certainly be beaten to death before long, then his eyes will, then and there, be gouged out. He kills the other inmate as a result. Perhaps a hero could accept a swift bullet in his skull to avoid having to kill, but it would require an extraordinary—and perhaps impossible—act of courage to accept one's eyes being plucked out. Can one truly say that the man in this example *should have allowed his eyes to be gouged out* and that he is a *criminal* for not having done so? *Id.* (emphasis in original text).

a matter of fundamental fairness, the accused should be allowed to offer a plea that, by its very nature, raises the possibility that his behavior is legally excusable. In application to the hypothetical situation described above, duress may or may not relieve the accused of criminal responsibility for his conduct.[28] Judge Cassese would likely say that, even if the defense fails to result in acquittal, the trial court is better off. The judge now has all the necessary information on the record for consideration on sentence.

The primary difference between these two opinions is that the majority based its decision on policy concerns. The minority, however, based its determination on precedent of international law. If one appreciates the concept of an "activist" court, he may well find the majority opinion more persuasive. A strict interpretationist, however, may find the policy-driven decision-making of the court a bit disturbing.

V. The Wildcard – Judge Li

It appears that Judge Li was the swing vote in this case. Had circumstances been only slightly different, this note would discuss why duress is now a complete defense to war crimes or crimes against humanity. But Judge Li based his decision on one factor, and one factor alone—judicial economy.[29]

Judge Li got around the whole issue of duress by accepting the plea of Erdemovic as both equivocal and informed. Judge Li freely admitted that the criteria for duress might be present in Erdemovic's testimony, but the entire purpose behind providing information regarding duress was mitigation. Erdemovic's motivation in raising such matters was not for defense, but only to try and get a more lenient punishment. Judge Li placed greater emphasis on the motivation of the defendant, and therefore

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28. Judge Cassese would place significant weight on the inevitability of the circumstances. In this hypothetical, if the death of the woman is inevitable, regardless of the actions of the accused, then it is more likely that the actions meet the proportionality test. In application to Erdemovic, the men he killed would have died anyway. Additionally, he would have died with them. Instead of having 1200 dead, the result would be 1201 dead. In balancing the two evils, the lesser evil seems to be that which results in the least amount of death. *Id.*

29. *Erdemovic*, No. IT-96-22-Y, at 8 (Oct. 7, 1997) (Appeals Chamber, Separate and Dissenting Opinion of Li, J.), *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojli971007e.htm.

ignored the larger issue of whether duress can be a complete defense. He opined that, merely as a matter of judicial economy, the Appellate Chamber should have reassessed Erdemovic's sentence. He pointed out the illogic of sending the matter back to the trial court for subsequent rehearing on sentence when the Appellate Chamber had all the information necessary to make the sentencing decision.[30]

Judge Li makes good sense from the perspective of judicial economy. But at the same time his opinion dedicates nearly five pages to a discussion of duress as a complete defense. While he clearly states his support for the majority opinion, he then goes out of his way to dismiss the entire issue as being moot. Like the majority, Judge Li took the easy way out. Since the accused raised duress only as a matter of mitigation, he was not forced to establish precedent one way or the other. While agreeing that duress cannot be a complete defense, this is *dicta* when viewed in the light of Judge Li's decision regarding the manner in which the defendant raised the issue. Judge Li therefore avoided making the difficult choice between approving or dismissing the concept of duress as a defense.

VI. Conclusion

The question remains whether our hypothetical prisoner should be given the opportunity to present duress as a complete defense. In the eyes of the majority, the answer is clearly no. They base this on important policy considerations, including the fear that allowing such a defense may encourage heinous conduct committed by radical elements in the world. So long as an individual soldier or commander can point up the chain of command, he has a valid defense to the most distasteful of crimes. The minority, however, would permit him to raise the defense at trial. They would, in fact, *sua sponte* withdraw his plea of guilty and enter a plea of not guilty on his behalf. Judge Li, on the other hand, would look to see how the defendant raised the matter of duress. If he raised it solely as a matter of mitigation, he would limit his consideration of such evidence thereto. While indicating his inclination to agree with the majority, however, his answer to the ultimate question of duress as a complete defense is less than compelling.

At least for the moment, the issue of duress as a defense is settled. But one may justifiably inquire into its future, since the decision clearly leaves

30. *Id.*

room for the possibility that it may be seen again, at least in the context of sentencing. More significantly, however, the result in this case was decided by one vote. A different panel may place more emphasis on prior decisions by other international tribunals. The language of the minority opinion certainly provides hope for others in Erdemovic's shoes. But the impact of the decision is greater than that.

The most important and lasting impact of the majority decision is its foundation in policy. This is also the point of greatest concern for the future. The courts' apparent willingness to search through voluminous reams of state legislation and practice in order to find a legal basis for their decision is significant. Such a pursuit degrades the value of decisions by other international tribunals. But the more grave concern is the source of state legislation and practice. These are rules and regulations that are not written with the international defendant in mind. Applying them to situations like that of Drazen Erdemovic is not unlike forcing the cliché square peg in the equally hackneyed round hole. Furthermore, the range of sources consulted by the court in reaching its decision included the U.S. *Manual for Courts-Martial* and British military regulations. The courts' willingness to examine such a divers range of publications means that virtually any regulation, order, or directive, published by military sources may become part of the body of international law.

This trend is not likely to end here. It therefore becomes critical that everything the U.S. military writes, every order it publishes, and every manual it issues, be scrutinized for consistency with U.S. policy in the area of international and operational law. No longer will it be sufficient to ask "is this consistent with the Constitution of the United States." It now must be determined what impact military rules and regulations may have when considered by international tribunals. Authors of such documents should be aware of the possible impact of their penmanship. In sum, the matter of duress as a defense to crimes like those committed by Drazen Erdemovic is far from dead. But the lasting impact of the decision is much greater. It reaches as far as the pen on your desk.

Appendix

Erdemovic Appellate Court Decision

	Cassese, J. (presiding)	Stephen, J.	Vohrah, J.	McDonald, J.	Li, J.
Acquittal of Accused	II. No	No	No	No	No
Revise Sentence?	No	No	No	No	Yes
Was Plea Informed?	No	No	No	No	Yes
Duress as a Defense	Yes	Yes	A. No	No	No
Remit for Rehearing?	Yes	Yes	Yes	Yes	No
Type of Opinion?	Separate & Dissenting	Separate & Dissenting	Joint Separate with McDonald	Joint Separate with Vohrah	Separate & Dissenting

PROSECUTOR V. ZEJNIL DELALIC (THE CELEBICI CASE)

JENNIFER M. ROCKOFF[1]

This note summarizes the International Criminal Tribunal for the Former Yugoslavia (ICTY) decision, *Prosecutor v. Zejnil Delalic, et al.* (The Celebici case).[2] The case concerns the prosecution of four individuals alleged to have worked as guards or as supervisors in the Celebici prison-camp. The ICTY held these individuals liable either in their individual capacity or under the theory of superior responsibility for many, although not all, of the allegations charged.

I. Introduction

The indictment concerned horrific events alleged to have occurred during 1992 at Celebici prison-camp, a detention facility in the village of Celebici located in the Konjic municipality in central Bosnia and Herzegovina.[3] It charged the four accused with grave breaches of the Geneva Conventions of 1949 under Article 2 of the governing statute of the ICTY (Statute), and with violations of the laws or customs of war under Article 3 of the Statute.[4]

Two of the defendants, Esad Landzo and Hazim Delic, were charged primarily with individual criminal responsibility pursuant to Article 7(1) of the Statute.[5] Landzo, also known as "Zenga," allegedly worked as a guard at the Celebici prison-camp from May to December 1992.[6] The indictment charged him as a direct participant with the following crimes under international humanitarian law: willful killing and murder; torture

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1. Law Clerk, The Honorable Albert V. Bryan, Jr., Federal District Judge for the Eastern District of Virginia; J.D., 2000, University of Virginia School of Law; B.A., 1995, Princeton University. The author would like to thank Major Geoffrey S. Corn, Major Michael L. Smidt and Mrs. Ann Rockoff for their encouragement and assistance.

2. Prosecutor v. Delalic, No. IT-96-21-T (Nov. 16, 1998) (Celebici case), *available at* http://www.un.org/icty/ (Tribunal Cases, Judgment).

3. *Id.* ¶ 3.

4. *Id.*

5. *Id.* ¶ 5.

6. *Id.* ¶ 6.

and cruel treatment; and causing great suffering or serious injury and cruel treatment.[7] Hazim Delic was alleged to have been the deputy commander of the camp from May to November 1992 and commander from November to December 1992.[8] He was charged both as a direct participant and as a superior with command responsibility.[9] In particular, Delic was charged with the following crimes under international humanitarian law: willful killing and murder; torture and cruel treatment; inhuman treatment and cruel treatment; causing great suffering or serious injury; and cruel treatment, unlawful confinement of civilians; and plunder of private property.[10]

The other defendants, Zdravko Mucic and Zejnil Delalic, were charged primarily as superiors with responsibility for crimes committed by their subordinates pursuant to Article 7(3) of the Statute.[11] Delalic was purported to have had authority over the Celebici prison-camp and its personnel.[12] He allegedly coordinated the activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from April to September 1992; from June to November 1992, he also served as Commander of the First Tactical Group of the Bosnian Army.[13] Mucic, also known as "Pavo," was presumed to have been the commander of the Celebici prison-camp from May to November 1992.[14] In light of their positions of superior authority, Delalic and Mucic were charged with having known or having had reason to know that their subordinates were mistreating the detainees in the prison-camp.[15] Further, Delalic and Mucic were charged with failing to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.[16] In their capacities as superiors at the prison-camp, Delalic and Mucic were charged with the following crimes under international humanitarian law: willful killing and murder; torture and cruel treatment; causing great suffering or serious injury and cruel treatment; inhuman and cruel treatment; unlawful confinement of civilians; and plunder of private property.[17]

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7. *Id.* ¶¶ 6-10.
8. *Id.* ¶ 11.
9. *Id.* ¶ 12.
10. *Id.* ¶¶ 12-18.
11. *Id.* ¶ 5.
12. *Id.* ¶ 19.
13. *Id.*
14. *Id.* ¶ 20.
15. *Id.* ¶ 21.
16. *Id.*
17. *Id.* ¶¶ 21-28.

The Trial Chamber initially dealt with several "procedural issues," such as the disclosure of the witnesses' identities and the admissibility of certain evidence, including: statements made by the accused prior to trial; videotapes seized by the Austrian police; a letter purportedly written by Mr. Mucic; and evidence of the prior sexual conduct of the victims of sexual assault.[18] After resolving these and other issues relating to the regulation of the proceedings, the Tribunal found that the Prosecution had presented sufficient evidence to allow a reasonable tribunal to convict,[19] and thus denied the Defense's requests for dismissal of all counts of the Indictment.[20]

II. Background and Preliminary Factual Findings

Historical and Geographical Background of the Socialist Federal Republic of Yugoslavia (SFRY)

The Tribunal began its judgment with a detailed description of events as they existed in 1992. In assessing the background situation, the Tribunal afforded substantial weight to several government-produced documents, including: resolutions of the United Nations Security Council and General Assembly; the Final Report of the United Nations Commission of Experts; reports of the United Nations Secretary-General; and declarations and statements from the European Community and the Conference on Security and Cooperation in Europe.[21]

According to the Tribunal description, Tito's attempts to unify the many nationalities living in the SFRY began to unravel on Tito's death in 1980.[22] Shortly after he died, distinct Serbian and Croatian governments developed.[23] By 1990, subsequent to a referendum by the Krajina Serbs on self-autonomy, clashes rapidly arose between the Krajina Serbs and the Croatian authorities.[24] At this time, Croatia included territory with historical links to Serbia and contained a significant population of Serbs. By late 1990 and into 1991, further moves towards independence were made in Croatia, and ethnic conflicts intensified.[25] By the end of 1991, the United

18. *Id.* ¶¶ 52, 63, 70.
19. *Id.* ¶ 82.
20. *Id.* ¶¶ 81-82.
21. *Id.* ¶ 90.
22. *Id.* ¶ 91, 96.
23. *Id.*
24. *Id.* ¶ 98.

Nations became involved.[26] In February 1992, the Security Council established the United Nations Protection Force to monitor the cease-fire which was signed in late 1991.[27] Within the following year, the SFRY was dissolved into its respective ethnic parts.[28]

According to the Tribunal, the armed conflict in Bosnia and Herzegovina, characterized by "ethnic cleansing" and massive displacements of local populations, was the most protracted of all the conflicts taking place during this period.[29] The Konjic municipality, in particular, "was of strategic importance as it housed lines of communication from Sarajevo to many other parts of the State [and] constitut[ed] a supply line for the Bosnian troops."[30] For these and other reasons, including its perceived importance to the Bosnian Croats and the existence of various military facilities manned by the opposition, Konjic found itself in the midst of increasing armed conflict. By mid-April 1992, Konjic had been effectively surrounded and cut-off by armed Serb forces.[31] Croat and Muslim soldiers fought to provide access routes to Sarajevo and drive the Serbs out of the Konjic municipality. As part of these military operations, many members of the Serb population were arrested and housed in the newly-created Celebici prison facility.[32]

The Celebici prison-camp first received inmates in the latter part of April 1992.[33] Detainees were mainly men, transferred from various locations.[34] The Tribunal described the environment at the camp:

> It is clear that an atmosphere of fear and intimidation prevailed at the prison-camp, inspired by the beatings meted out indiscriminately upon the prisoners' arrest, [their] transfer to the camp and their arrival. Each of the former detainees who testified before the Trial Chamber described acts of violence and cruelty which they themselves suffered or witnessed and many continue today

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25. *Id.* ¶ 100.
26. *Id.* ¶ 103.
27. *Id.*
28. *Id.* ¶¶ 105-06.
29. *Id.* ¶ 107.
30. *Id.* ¶ 123.
31. *Id.* ¶ 133.
32. *Id.* ¶ 141.
33. *Id.* ¶ 146.
34. *Id.* ¶ 147.

> to sustain the physical and psychological consequences of these experiences.[35]

The last prisoners left the Celebici prison-camp on 9 December 1992.[36]

III. Applicable Law

A. General Principles of Interpretation

In order to resolve disputes regarding the interpretation of its Statute and Rules, the Court discussed at length the various methods traditionally used to interpret international treaties and conventions.[37] It then concluded that it would interpret its Statute by focusing on the goals of the Statute and the social and political considerations that gave rise to its creation.[38] In this respect, the Tribunal noted it was established in response to the "kinds of grave violations of humanitarian law . . . [that] continue to occur in many other parts of the world, and continue to exhibit new forms and permutations."[39]

B. Applicable Provisions of the Statute

The Tribunal then explored the meaning of Articles 1-7 of its Statute.[40] Article 1 confines the Tribunal to "concerning itself with 'serious violations of international humanitarian law' committed within a specific location and time-period."[41] The Tribunal found these temporal and geographical requirements to have been met in this case. The Defense, however, argued that the crimes charged were not "serious" violations of international humanitarian law.[42] Instead, the Defense argued that the crimes were mere "lessor violations" more appropriately subject to prosecution by national courts.[43] Further, Mr. Landzo presented a selective

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35. *Id.* ¶ 150.
36. *Id.* ¶ 157.
37. *Id.* ¶¶ 160-69.
38. *Id.* ¶ 170.
39. *Id.*
40. U.N. Doc. S/25704, annex, arts. 1-9 (1993), *available at* http://www.un.org/icty/basic/statut/ statute.htm.
41. *Delalic*, No. IT-96-21-T, ¶ 173.
42. *Id.* ¶ 175.
43. *Id.*

prosecution claim arguing that he was but one of thousands of individuals who might have been prosecuted for similar offences committed in the former Yugoslavia.[44]

The Tribunal responded to these arguments raised by the Defense. First, the Tribunal found that it was not intended to concern itself with persons in positions of military or political authority.[45] Then, the Tribunal held that Article 9 granted the Tribunal concurrent jurisdiction with national courts.[46] In answer to the Defense's argument that the crimes charged were not "serious" violations of international humanitarian law, the Tribunal declared that: "to argue that these are not crimes of the most serious nature strains the bounds of credibility."[47] Lastly, the Tribunal found that Mr. Landzo was not a singular indicted individual, but rather that the Prosecutor had issued indictments against numerous others.[48]

C. General Requirements for the Application of Articles 2 and 3 of the Statute

Next, the Tribunal tackled the general prerequisites for the application of the international laws of war. First, there must be an "armed conflict".[49] The Tribunal adopted the test formulated in the case of *The Prosecutor v. Dusko Tadic* (*Tadic Jurisdiction Decision*): there must be protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[50] The Tribunal found this test satisfied.[51] Additionally, for purposes of finding "armed conflict," the Tribunal noted it was not required to find such conflict in the Konjic municipality itself, but rather need only look to the larger territory of which

44. *Id.*
45. *Id.* ¶ 176.
46. *Id.* ¶ 177.
47. *Id.* ¶ 178.
48. *Id.* ¶ 179.
49. *Id.* ¶ 182.
50. *Id.* ¶ 183 (quoting Prosecutor v. Tadic, No. IT-94-1-AR72 (Oct. 2, 1995) (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)).
51. *Id.* ¶ 192.

Konjic formed a part.[52] The Tribunal further found a clear nexus between the armed conflict and the crimes allegedly committed by the accused.[53]

The Tribunal next addressed the two conditions required by Article 2 of its Statute: "the alleged offences [must be] committed in the context of an *international* armed conflict [and] the alleged victims [must be] '*persons protected*' by the Geneva Conventions."[54] In principal, the Tribunal agreed with the *Tadic* decision that customary law has extended the "grave breaches" provisions of the Geneva Conventions to internal armed conflicts.[55] However, the Tribunal made no actual finding on whether Article 2 of the Statute can be applied only in instances of international armed conflict, or whether this provision is also applicable to internal armed conflicts.[56] Rather, the Tribunal easily concluded that the armed conflict occurring in Bosnia and Herzegovina was international as of the date of its recognition as an independent state, 6 April 1992.[57] The Tribunal explored whether the conflict became internal upon the withdrawal of the external forces,[58] but ultimately determined that the international armed conflict continued throughout the whole of 1992.[59]

Having concluded that the armed conflict was international in nature, the Tribunal then tackled whether the victims were "protected persons" as defined by the Fourth Geneva Convention on Civilians[60] or the Third Geneva Convention on Prisoners of War.[61] The Fourth Geneva Convention defines "protected" persons as: persons "in the hands of a party to the conflict or occupying power of which they are not nationals."[62] Here, the issue was whether the victims were of the same nationality as their captors such that they would then necessarily fall outside the protections of the Fourth Geneva Convention.[63] For purposes of its discussion, the Tribunal

52. *Id.* ¶ 185.
53. *Id.* ¶ 197.
54. *Id.* ¶ 201 (emphasis added).
55. *Id.* ¶ 202.
56. *Id.* ¶ 235.
57. *Id.* ¶ 214.
58. *Id.* ¶ 215.
59. *Id.* ¶ 234.
60. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 72 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
61. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 72 U.N.T.S. 135.
62. *Delalic*, No. IT-96-21-T ¶ 236 (citing Fourth Geneva Convention, *supra* note 60).

explained that, even if the State of Bosnia and Herzegovina had granted nationality to the Bosnian Serbs, Croats, and Muslims in 1992, there would still be an insufficient link between the Bosnian Serbs and the State to consider them Bosnian nationals in the present case.[64] Rather, the Bosnian Serbs had clearly expressed their wish to be a part of the Federal Republic of Yugoslavia (FRY) and engaged in armed conflict on behalf of the FRY forces.[65] Thus, the Tribunal concluded that Bosnian Serb civilians were "protected" under the Fourth Geneva Convention when detained by Bosnian government forces.[66]

> [I]t is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been "protected persons" within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.[67]

The Tribunal further rationalized that, in accordance with the development of human rights as applied to modern conflicts, "it would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4. . . . "[68] Having thus found that the victims were "persons protected" under the Fourth Geneva Convention and having determined that individuals protected by the Fourth Convention necessarily fell within the protections of the Third, the Tribunal did not consider it necessary to discuss whether the victims were "prisoners of war" under the Third Geneva Convention.[69]

D. Article 3 of the Statute

Next, the Tribunal addressed the nature of the prohibitions of Common Article 3 of the Geneva Conventions and their incorporation into Arti-

63. *Id.* ¶ 241.
64. *Id.* ¶ 259.
65. *Id.*
66. *Id.* ¶ 261.
67. *Id.* ¶ 265.
68. *Id.* ¶ 266.
69. *Id.* ¶ 276.

cle 3 of the Statute. The Tribunal limited its discussion on the expansion of the laws of war by essentially agreeing with the conclusion of the *Tadic* tribunal: Article 3 of the Statute guarantees that the Tribunal's jurisdiction is broad enough to cover violations of Common Article 3 whether or not they occur within an international or an internal armed conflict.[70]

> This Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal . . . . While 'grave breaches' *must* be prosecuted and punished by all States, 'other' breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[71]

Furthermore, the Tribunal denied that applying individual criminal responsibility to violations of Common Article 3 would amount to the creation of ex post facto law.[72] As support, the Tribunal cited the provisions of the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina in April 1992, under which the accused would have been held individually criminally responsible under their own national laws.[73] Thus, having concluded that an international armed conflict existed in Bosnia and Herzegovina during the relevant time period and that the victims of the alleged offenses were "protected persons," the Tribunal further found Article 3 of the Statute applicable to each of the crimes charged on the basis that those crimes also constituted violations of the laws or customs of war that are substantively prohibited by Common Article 3 of the Geneva Conventions.[74]

E. Individual Criminal Responsibility Under Articles 7(1) and 7(3) of the Statute

The Tribunal next explained the principle of individual criminal responsibility under Article 7(1) of the Statute. The principle, commonly known as the command responsibility doctrine, extends responsibility

70. *Id.* ¶ 300.
71. *Id.* ¶¶ 306, 308.
72. *Id.* ¶ 312.
73. *Id.*
74. *Id.* ¶ 317.

beyond those who directly commit the crimes. The tribunal quoted the Report of the Secretary-General: "All persons who participate in the planning, preparation, or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible."[75] The Tribunal concluded that such a principle, holding military commanders and other persons occupying positions of superior authority criminally responsible for the unlawful conduct of their subordinates, is a well-established norm of international customary law.[76]

The Tribunal outlined the degree of participation necessary to be considered criminally responsible. As an initial matter, individual responsibility results regardless of whether the commander undertook positive acts or omissions.[77] "Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates."[78] The Tribunal cited Article 87 of Additional Protocol I as imposing this affirmative duty on superiors.[79]

In setting out the requirements to establish individual responsibility for acts that do not constitute a direct performance of the criminal violation, the Tribunal held:

> [The] *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the commission of the illegal act." The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering committing, or otherwise aiding and abetting in the commission of a crime."[80]

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75. *Id.* ¶ 319 (quoting Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), Feb. 13, 1995, U.N. Doc. S/1995/134, para. 54).

76. *Id.* ¶ 333.

77. *Id.*

78. *Id.*

79. *Id.* ¶ 334 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 87, 1125 U.N.T.S. 3).

Further, the Tribunal defined "aiding and abetting" to include "all acts of assistance that lend encouragement or support to the perpetration of an offense and which are accompanied by the requisite *mens rea*."[81] Such assistance need not occur at the same time and place as the actual commission of the offense, nor must it be physical; it may include merely psychological support.[82] Additionally, a pre-existing plan to engage in criminal conduct is unnecessary.[83]

As to the superior responsibility for failure to act, the Tribunal found three prerequisites for the application of Article 7(3) of the Statute:

> (1) the existence of a superior-subordinate relationship;
>
> (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[84]

The Tribunal tackled these elements individually. It noted that the requirement of a superior-subordinate relationship becomes more problematic in situations such as that of the former Yugoslavia, where the formal command structure had broken down and the interim structure was ambiguous and ill-defined.[85] Despite this lack of clarity, the Tribunal stressed that commanders within the informal structures may be held criminally liable for their failure to prevent and punish the crimes of persons who are in fact under their control.[86] "The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[87]

Rejecting any formal designation as a prerequisite to command responsibility, the Tribunal held that "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-pos-

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80. *Id.* ¶ 326.
81. *Id.* ¶ 327.
82. *Id.*
83. *Id.* ¶ 328.
84. *Id.* ¶ 346.
85. *Id.* ¶ 354.
86. *Id.*
87. *Id.*

session, of powers of control over the actions of subordinates."[88] Such responsibility may arise through *de facto* as well as *de jure* powers of control.[89] Thus, superiors may be held liable "for their failure to prevent or punish criminal acts committed by persons not formally under their authority in the chain of command,"[90] including "persons over whom their formal authority under national law is limited or non-existent."[91] The Tribunal emphasized that, in accordance with the customary law doctrine of command responsibility,[92] Article 7(3) applies not only to military but also to civilian leaders, political leaders and other civilian superiors in positions of authority.[93] In conclusion, the Tribunal summarized:

> [I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, . . . the doctrine extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[94]

Article 7(3) establishes liability only where the superior knew or had reason to know that his subordinates were about to or had committed

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88. *Id.* ¶ 370.

89. *Id.*

90. *Id.* ¶¶ 372-76 (citing United States v. Wilhelm List, *reprinted in* XI TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (1950) [hereinafter TWC]; United States v. Wilhelm von Leeb, *reprinted in* XI TWC 462; United States v. Oswald, *reprinted in* V TWC 258; United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5012).

91. *Id.* ¶ 376.

92. *Id.* ¶¶ 359-62. Here the Tribunal outlined previous Tribunal decisions including the International Military Tribunal for the Far East (Tokyo Tribunal) as well as the decision by the Superior Military Government Court of the French Occupation Zone in Germany (citing THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, *reprinted in* 20 The Tokyo War Crimes Trial (R. John Pritchard & S. Zaide eds., 1981); The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others (Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany), *reprinted in* XIV TWC, *supra note* 90, app. B).

93. *Id.* ¶ 356.

94. *Id.* ¶ 378.

crimes under the Statute. The Tribunal interpreted this provision to encompass situations where the superior either:

> (1) had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute; or
>
> (2) had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[95]

The Tribunal then listed a number of factors to consider in determining whether the commander had actual knowledge, and noted that such knowledge may not be presumed but must be established through circumstantial evidence.[96] Where the superior did not have actual knowledge but "had reason to know," the Tribunal dictated the principle that "a superior is not permitted to remain willfully blind to the acts of his subordinates."[97]

> There can be no doubt that a superior who simply ignored information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.[98]

The standard for liability in the latter situation arises where specific information was available to the superior that would have put him on notice of the offenses committed by his subordinates. "It is sufficient that the supe-

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95. *Id.* ¶ 383. The Tribunal determined that this Article 7(3) provision ought to be interpreted in accordance with the *mens rea* standard established by Article 86 of Additional Protocol I. The Tribunal concluded that the Article 86 provision required that a superior may be held responsible only if information was in fact available which would have put that superior on notice. *Id.* at ¶ 393.

96. *Id.* ¶ 386.

97. *Id.* ¶ 387.

98. *Id.*

rior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."[99] The Tribunal noted that a commander should not be asked to do the impossible, and thus superior responsibility should only apply to situations in which the commander failed to take measures that were within his powers, that is, "within his material possibility."[100] The Tribunal ended by briefly discussing the issue of causation, but concluded that there is no requirement for proof of causation as a separate element of superior responsibility.[101]

F. Elements of the Offenses

After a discussion on the construction and interpretation of criminal statutes, the Tribunal proceeded to examine the specific elements of the offences alleged in the indictment.

1. Willful Killing and Murder

First, the Tribunal addressed the charges of "willful killing" and "murder". As an initial matter, the Tribunal found those terms to be qualitatively the same.[102] The Tribunal then quickly defined the *actus reus:* "the death of the victim as a result of the actions of the accused."[103] The *mens rea* garnered a more lengthy discussion. Ultimately, the Tribunal concluded that the *mens rea* for willful killing and murder is satisfied when the accused demonstrates an intention to kill, or inflict serious injury in reckless disregard of human life.[104]

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99. *Id.* ¶ 393. The Tribunal noted the standard thus applied is the standard that existed in 1992. The Tribunal recognized that the provision on the responsibility of military commanders in the Rome Statute of the International Criminal Court differs by holding commanders criminally responsible "for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control." *Id.*

100. *Id.* ¶ 395.

101. *Id.* ¶ 398.

102. *Id.* ¶ 422.

103. *Id.* ¶ 424.

104. *Id.* ¶ 439.

2. Offenses of Mistreatment

The Indictment alleged the following various forms of mistreatment, not resulting in death:

> (1) *torture*: a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognized by Article 3(1)(a) of the Geneva Conventions;
>
> (2) *rape as torture*: a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognized by Article 3(1)(a) of the Geneva Conventions;
>
> (3) *willfully causing great suffering or serious injury*: a grave breach of the Geneva Conventions punishable under Article 2(c) of the Statute;
>
> (4) *inhuman and cruel treatment*: a violation of the laws or customs of war punishable under Article 3 of the Statute and recognized by Article 3(1)(a) of the Geneva Conventions.[105]

The Tribunal recognized that none of these offences was defined in the Geneva Conventions and therefore looked to the relevant customary international law to decipher their elements.[106]

a. Torture

For both internal and international armed conflicts, the Geneva Conventions prohibit the torture of persons not taking an active part in the hostilities.[107] Referring to the numerous conventions and declarations against torture, the Tribunal easily found the prohibition on torture to be a norm of customary international law.[108] After accepting the definition of torture contained in the Torture Convention of 1984, the Tribunal considered the

105. *Id.* ¶ 440.
106. *Id.* ¶ 441.
107. *Id.* ¶ 446.
108. *Id.* ¶ 452.

"requisite level of severity of pain or suffering, the existence of a prohibited purpose, and the extent of the official involvement that are required in order for the offence of torture to be proven."[109] The Tribunal began by noting the inherent difficulty in determining a threshold level of severity beyond which inhuman treatment becomes torture. After detailing various European Court and European Commission of Human Rights decisions along with Human Rights Committee findings, the Tribunal found that most cases of torture involve positive acts although omissions may also constitute torture.[110] Beyond this conclusion, the Tribunal failed to find an exact level of severity to which the pain and suffering must rise.[111]

In its summary, the Tribunal listed the elements of torture to include:

> (1) An act or omission that causes severe pain or suffering, whether mental or physical,
>
> (2) Which is inflicted intentionally,
>
> (3) And for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
>
> (4) And such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[112]

This last requirement "extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law."[113]

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109. *Id.* ¶ 460.
110. *Id.* ¶ 468.
111. *Id.* ¶ 469.
112. *Id.* ¶ 494.
113. *Id.* ¶ 474.

b. Rape

After defining rape and discussing its express prohibition in international law, the Tribunal focused on whether rape, a form of sexual assault, could be considered torture. The Tribunal defined rape to "constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive."[114] In determining whether rape could be deemed torture, the Tribunal examined the findings of other international judicial and quasi-judicial bodies as well as relevant United Nations reports. Ultimately, the Tribunal held that whenever rape or other forms of sexual violence meets the above listed elements of torture, then such sexual violence shall constitute torture, in the same way as any other acts meeting the torture criteria.[115] The Tribunal issued a strong pronouncement on the despicable nature of rape which "strikes at the very core of human dignity and physical integrity."[116]

c. Willfully Causing Great Suffering or Serious Injury to Body or Health

The Tribunal analyzed the circumstances in which actions cause great suffering or serious injury to body or health. After discussing the Commentary to the Fourth Geneva Convention, the Tribunal found that causing such suffering or injury

> constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.[117]

d. Inhuman Treatment

After concluding that the prohibition on inhuman (or inhumane) treatment is a norm of customary international law, the Tribunal explored how

114. *Id.* ¶ 479.
115. *Id.* ¶ 496.
116. *Id.* ¶ 495.
117. *Id.* ¶ 511.

the Geneva Conventions, the Hague Conventions and the Additional Protocols, their Commentaries and other adjudicative bodies treat this prohibition.[118] Based on this analysis, the Tribunal found:

> [I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. . . . Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Conventions fall.[119]

Ultimately, the Tribunal determined that whether an act "constitutes inhuman(e) treatment is a question of fact" to be judged in light of the entirety of the particular case.[120]

e. Cruel Treatment

After considering Common Article 3, Article 4 of Additional Protocol II, and various human rights instruments, the Tribunal defined cruel treatment to be "treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions."[121] The Tribunal further required that such treatment be an intentional act or omission which, judged objectively, is deliberate and not accidental.[122]

f. Inhumane Conditions

Lastly, the Tribunal addressed the alleged existence of inhumane conditions in the Celebici prison-camp and whether such a concept could be considered as being incorporated into the offences of willfully causing great suffering or serious injury to body or health or cruel treatment.[123]

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118. *Id.* ¶ 517.
119. *Id.* ¶ 543.
120. *Id.* ¶ 544.
121. *Id.* ¶ 551.
122. *Id.* ¶ 552.
123. *Id.* ¶ 554.

The Tribunal first defined "inhumane conditions" as a factual description of the general environment of the detention premises and the treatment meted out to the prisoners.[124] The Tribunal then quickly disposed of the issue by qualifying "inhumane conditions" as a factual determination to which the legal standards found for the above listed offences must be applied.[125]

3. Unlawful Confinement of Civilians

Article 2(g) of the ICTY Statute punishes the unlawful confinement of civilians as a grave breach of the Geneva Conventions, recognized in Article 147 of the Fourth Geneva Convention.[126] The Tribunal first addressed when civilians could be lawfully confined and what requirements need be fulfilled for such confinement to be considered lawful. Parties to a conflict may lawfully confine civilians under Article 27 of the Fourth Geneva Convention as "measures of control and security."[127] However, resort to this measure is restricted to "absolute necessity, based on the requirements of State security, . . . and only then if security cannot be safeguarded by other, less severe means."[128] Thus, internment of civilians is permissible only in limited cases and subject to the strict procedural rules contained primarily in Articles 42 and 43 of the Fourth Geneva Convention.[129] Examples of instances when the confinement of civilians may be deemed absolutely necessary include subversive activity carried on inside the territory of a party to the conflict, or actions of direct assistance to an opposing party that may threaten the security of the former. In such a case, a nation may intern people or place them in assigned residences if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.[130]

The Tribunal qualified this latter statement by clarifying that the mere fact that a person is a national of, or aligned with, the opposition does not automatically authorize interning that individual or placing him or her in assigned residence.[131] Rather, there must be good reason to think that the

124. *Id.* ¶ 556.
125. *Id.*
126. *Id.* ¶ 563.
127. *Id.* ¶ 574.
128. *Id.* ¶ 571.
129. *Id.* ¶ 574.
130. *Id.* ¶ 576.
131. *Id.* ¶ 577.

person concerned, by his or her activities, knowledge or qualifications, poses a real threat to the security of the nation.[132] Such determinations must be contained on a case-by-case rather than a collective basis.[133]

4. Plunder

In the final pages of this part of the decision, the Tribunal examined the accusation against two of the Defendants alleging the plunder of money, watches, and other valuable property belonging to persons detained in the Celebici prison-camp.[134] The Tribunal began by noting that current international law protects not only civilians but civilian property rights as well.[135] Article 47 of the Hague Regulations formally forbids pillage.[136] The Tribunal found that this prohibition "is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory."[137] Rather than considering the offence of plunder in the abstract, the Tribunal left further analysis of the issue to the particular charges contained in the indictment.[138]

IV. Factual and Legal Findings

The Tribunal offered a brief explanation of the nature of the evidence offered and the burdens of proof required. It then went through an individual accounting of crimes charged against each of the Defendants.

A. Superior Responsibility of Zejnil Delalic

To begin with, the Tribunal addressed whether Zejnil Delalic was in a position of superior authority sufficient to meet the conditions for the imposition of criminal responsibility pursuant to Article 7(3) of the

132. *Id.*
133. *Id.* ¶ 578.
134. *Id.* ¶ 584.
135. *Id.* ¶ 587.
136. *Id.*
137. *Id.* ¶ 590.
138. *Id.* ¶ 592.

Statute.[139] The Tribunal disagreed with the Prosecution's argument that a chain of command is not a necessary element for superior authority.[140] Rather, the Tribunal found actual control of the subordinate to be the necessary link in the superior-subordinate relationship.[141]

Ultimately, the Court found that prior to 18 May 1992, during which time Delalic was employed in a ministerial capacity responsible for the transportation of weapons and was not a member of the unit that took over the facility in Celebici, there was no evidence to assume that Delalic operated as a person of superior authority.[142] Delalic had no political or military authority vested upon him at that time.[143] From 18 May to 30 July 1992, Delalic served as "coordinator of the Konjic Municipality Defense Forces" and was empowered to "directly co-ordinate the work of the defense forces of the Konjic Municipality and the War Presidency."[144] In relation to this position, the Tribunal held: "The meaning of the word 'co-ordination' implies mediation and conciliation. The expression does not connote, and cannot reasonably be construed to mean, command authority or superior authority over the parties between which he mediates."[145] The Tribunal determined that there was no evidence that Zejnil Delalic, as co-ordinator, had responsibility for the operations of the Celebici prison-camp and its personnel or that he was in a position of superior authority to the camp personnel.[146] Even after his appointment on 27 July 1992, as commander of "all formations" of the armed forces of Bosnia and Herzegovina in the area including Konjic, the Tribunal maintained that Delalic did not acquire any command authority or responsibility over the Celebici prison-camp and its staff.[147] As such, Delalic was without the ability to issue orders, including orders appointing individuals to the Celebici prison-camp staff and relating to the strengthening of intelligence (orders relied upon by the Prosecution to establish Delalic's command authority).[148]

The Tribunal then discussed the validity and probative value of the letters and videos seized at the premises of the Inda-Bau company in

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139. *Id.* ¶ 605.
140. *Id.* ¶ 647.
141. *Id.*
142. *Id.* ¶¶ 649, 657.
143. *Id.*
144. *Id.* ¶ 659.
145. *Id.* ¶ 660.
146. *Id.* ¶ 686.
147. *Id.* ¶ 697.
148. *Id.* ¶ 700.

Vienna, a firm with which Delalic was alleged to have had close links.[149] After studying these "Vienna Documents," the Tribunal concluded that these exhibits failed to provide reliable evidence of the command authority that Delalic alledgedly had over the prison-camp at Celebici and its personnel.[150]

B. Superior Responsibility of Zdravko Mucic

Because of his asserted position as commander of the Celebici prison-camp, the Indictment charged Zdravko Mucic with responsibility as a superior for all of the offences alleged.[151] The indictment alleged that, since Mucic had responsibility for the operation of the camp, he was in a position of superior authority to all camp guards and to those other persons who entered the camp and mistreated detainees.[152] Because of his failure to take the necessary and reasonable measures to prevent the alleged violations of the Statute, Mucic was responsible for all the crimes set out in the indictment, pursuant to Article 7(3) of the Statute.[153]

The Tribunal began by addressing Mucic's main defense: the absence of a written and formal appointment for the exercise of his superior authority.[154] The Tribunal rejected this argument as an absolute defense by noting that a formal appointment of authority is unnecessary to establish a superior-subordinate relationship.[155] Rather, "the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."[156] The Tribunal then found that Mucic was the *de facto* commander exercising actual authority over the Celebici prison-camp, its personnel and its detainees during the relevant time periods.[157] Further, the Tribunal held that the evidence supported a finding that Mucic had actual knowledge that the guards under his command were committing crimes.[158] In fact, Mucic testified

149. *Id.* ¶ 704.
150. *Id.* ¶ 718.
151. *Id.* ¶ 722.
152. *Id.* ¶ 724.
153. *Id.*
154. *Id.* ¶ 733.
155. *Id.* ¶ 736.
156. *Id.*
157. *Id.* ¶ 752.
158. *Id.* ¶ 769.

that he had personally witnessed the abuse of detainees.[159] The Tribunal further noted that:

> [C]rimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him, notwithstanding his knowledge that Hazim Delic, his deputy, had a penchant and proclivity for mistreating detainees. There is no doubt that Mr. Mucic was fully aware of the fact that the guards at the Celebici prison camp were engaged in violations of international humanitarian law.[160]

After finding that Mucic had the requisite knowledge, the Tribunal determined that he had failed to "take reasonable or appropriate action to prevent crimes committed within the Celebici prison-camp or punish the perpetrators thereof."[161] In conclusion, on the basis of the principle of superior responsibility, the Tribunal found Mucic criminally responsible for the acts of the Celebici prison-camp personnel.[162]

C. Superior Responsibility of Hazim Delic

Along with Mucic, Delic was charged with being in a position of superior authority to all camp guards and to those who entered the camp and mistreated the detainees.[163] The Prosecution alleged that Delic had knowledge of the violations committed by his subordinates but failed to take reasonable and necessary measures to prevent such acts or to punish the perpetrators.[164]

The Tribunal began by addressing whether a superior-subordinate relationship existed: "whether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command."[165] Despite witness

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159. *Id.*
160. *Id.* ¶ 770.
161. *Id.* ¶ 772.
162. *Id.* ¶ 776.
163. *Id.* ¶ 777.
164. *Id.*
165. *Id.* ¶ 800.

testimony that Delic ordered guards to mistreat the prisoners, the Tribunal found that the Prosecution failed to establish, beyond a reasonable doubt, that Delic had the power to issue orders or to punish the criminal acts of his subordinates.[166] Rather, the Tribunal found that the evidence merely indicated a degree of influence possessed by Delic but determined that such "influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and is not, on the facts before the Trial Chamber, of itself indicative of the superior authority of Mr. Delic sufficient to attribute superior responsibility to him."[167]

D. Factual and Legal Findings Relating to Specific Events Charged in the Indictment

After reviewing the superior-responsibility position of the Defendants, the Tribunal then conducted a case-by-case examination of each of the acts alleged. The Tribunal addressed the sufficiency of the evidence provided, and when applicable, whether superior responsibility existed. In some of the cases, the Tribunal accorded individual criminal responsibility even where the accused himself was not the actor. The Tribunal stated: "Individual criminal responsibility arises where the acts of the accused contribute to, or have an effect on, the commission of the crime and these acts are performed in the knowledge that they will assist the principal in the commission of the criminal act."[168]

For some charges, the Tribunal found indirect evidence sufficient to establish guilt. For example, even though the witnesses to the murder of Scepo Gotovac could not see the person or persons actually beating him, the Tribunal accepted evidence of what was heard and what was believed to be happening inside.[169] On the other hand, when discussing the murder of Simo Jovanovic, the Tribunal refused to ascribe guilt on the basis of mere voice recognition by the single witness.[170] Where the witness testi-

166. *Id.* ¶ 810.
167. *Id.* ¶ 806.
168. *Id.* ¶ 842.
169. *Id.* ¶¶ 820-21.
170. *Id.* ¶ 844.

monies conflicted on fundamental aspects of the alleged events, the Tribunal would also deny guilt.[171]

For the majority of the alleged murder charges, the Tribunal found at least one of the accused guilty. In surmising the beating of sixty-year old Bosko Samoukovic, which resulted in his death half an hour after the cessation of the beatings, the Tribunal commented: "Such a brutal beating, inflicted on an old man and resulting in his death, clearly exhibits the kind of reckless behavior illustrative of a complete disregard for the consequences which this Trial Chamber considers to amount to willful killing and murder."[172]

As concerned the rape charges, the Tribunal noted that according to sub-Rule 96(i) of the Rules, no corroboration of the testimony of a victim of sexual assault is required as long as the victim's testimony is credible and compelling.[173] Highlighting the devastating psychological effects of repeated rapes, the Tribunal quoted rape victim, Ms. Cecez, as testifying that: "psychologically and physically I was completely worn out. They kill you psychologically."[174] The purpose of such rapes, according to the Tribunal, was to "intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."[175] Additionally, the Tribunal held that rape inflicted because of an individual's gender represented a form a discrimination which constituted a prohibited purpose for the offense of torture.[176]

The Tribunal continued to analyze the long list of horrid violations of customary international law. The list included not only torture and rape but also such inhumane acts as those involving the use of electrical devices, forcing persons to commit fellatio with each other, and forcing a father and son to beat each other repeatedly.[177] In a subsection entitled "atmosphere of terror," the Tribunal summarized:

> [I]t is already clear that the detainees in the Celebici prison-camp were continuously witnessing the most severe physical abuse being inflicted on defenseless victims. . . . It is clear that, by their

171. *Id.* ¶ 872.
172. *Id.* ¶ 855.
173. *Id.* ¶ 936.
174. *Id.* ¶ 938.
175. *Id.* ¶ 941.
176. *Id*.
177. *Id.* ¶¶ 1049-70.

> exposure to these conditions, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse. This psychological terror was compounded by the fact that many of the detainees were selected for mistreatment in an apparently arbitrary manner, thereby creating an atmosphere of constant uncertainty.[178]

The Tribunal then addressed the inadequate living conditions and found that the detainees in the Celebici prison-camp were deprived of adequate food and water, medical care, as well as sleeping and toilet facilities.[179] The Tribunal refused to accept the Defense's assertions that these conditions resulted from lack of available resources.[180] Instead, the Tribunal found the inadequate provisions combined with the atmosphere of terror to constitute the offence of cruel treatment under Article 3 of the Statute and willfully causing great suffering or serious injury to body or health under Article 2.[181]

Lastly, the Tribunal addressed the charge of unlawful confinement of civilians. Although the Tribunal recognized that some of the detainees may have possessed weapons which could have been used, or were in fact used, against the forces of Bosnia and Herzegovina, other detainees were entirely innocent and their confinement could not have been "justified by any means."[182] Furthermore, the Tribunal found the continued confinement of even lawful detainees to have violated Article 43 of the Fourth Geneva Convention by failing to abide by the procedural requirements outlined therein.[183] The Tribunal dismissed the charges of plunder as specified in the indictment for failing to rise to the level of a "serious" violation of international humanitarian law sufficient to satisfy the meaning within the Statute.[184]

E. Diminished Responsibility

In its concluding section, the Tribunal addressed the defense of diminished responsibility raised by Esad Landzo.[185] The Tribunal noted

178. *Id.* ¶¶ 1086-87.
179. *Id.* ¶¶ 1096, 1100, 1105, 1108, 1111.
180. *Id.* ¶ 1118.
181. *Id.* ¶ 1121.
182. *Id.* ¶¶ 1131-32.
183. *Id.* ¶ 1135.
184. *Id.* ¶ 1154.

that such a defense is more likely to be accepted when there is evidence of a mental abnormality.[186] The Tribunal attacked the evidence presented, Landzo's testimony in particular, and ultimately denied him this defense.[187]

V. Sentencing

In the penultimate section of the decision, the Tribunal addressed factors relevant to the sentencing of the Defendants. The Tribunal detailed the applicable provisions of the Statute and Rules and then explored general theories on sentencing, including issues of retribution, protection of society, rehabilitation, and deterrence. The Tribunal concluded by examining, on a case-by-case basis, the factors relevant to the sentencing of each of the individual Defendants. Zejnil Delalic was found not guilty of all counts, but the other Defendants were found guilty of multiple counts. Zdravko Mucic, Esad Landzo, and Hazim Delic were sentenced respectively to seven, fifteen, and twenty years confinement.[188]

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185. *Id.* ¶ 1156.
186. *Id.* ¶ 1170.
187. *Id.* ¶ 1186.
188. *Id.* ¶ 1285.