AFTER THE DUSKO TADIC WAR CRIMES TRIAL: A COMMENTARY ON THE APPLICABILITY OF THE GRAVE BREACHES PROVISIONS OF THE 1949 GENEVA CONVENTIONS[*]

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I. INTRODUCTION

This Essay will examine issues surrounding the acquittal by the Ad-Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) on various counts related to the war crimes of Dusko Tadic.[1] The ICTY is the first war crimes tribunal since the Nuremberg Military trials and Tokyo Major War Criminals trials conducted after World War II.[2] In Tadic's case, the ICTY stated that counts related to the grave breaches provision of Article 2 of the Statute of the Tribunal[3] were inapplicable because the Prosecution failed to prove beyond reasonable doubt that the conflict was international in character.[4] The reasons against a narrow interpretation of what constitutes international aggression will be explored in light of Judge Gabrielle Kirk-McDonald's dissenting opinion. Judge Kirk-McDonald is currently a Trial Chamber and Appellate Chamber Justice for the ICTY.

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1. For an overview of the international law issues and concerns of new trial procedures, see Dorothea Beane & Liz Heffernan, *The International Tribunal for the Former Yugoslavia: A Progress Report: Part II*, 14 IRISH L. TIMES 250, 250 (1996). Throughout this Essay, abbreviations will be used. Appendix B contains a glossary of the abbreviations to assist readers.

2. *See History from Nuremberg to the Hague* (visited Aug. 2, 1996) <http://www.un.org/icty/5L/05art5e.htm>. There are several major differences between the ICTY and the International Military Tribunal. *See id*. First, the ICTY Statute of the Tribunal criminalizes sexual offenses, something that was not included in the Nuremberg Charter. *See id*. Second, unlike the Nuremberg or Tokyo trials, the ICTY Statute contains no provision for the death penalty. *See id*. Third, no trials before the ICTY can occur in absentia. *See id*. Fourth, there is a right to appeal under the ICTY Statute of the Tribunal. *See id*. Fifth, the ICTY is more likely to rely on witness testimony and forensic evidence than Nuremberg, which benefitted mostly from documentary evidence collected as a result of the Third Reich's meticulous record keeping. *See id*.

3. *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [hereinafter Secretary-General's Report], Annex (Statute of the International Tribunal], arts. 2–5, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1163, 1192–94 (1993).

4. *See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991* (visited June 19, 1997) <http://www.un.org/icty/970507jt.htm> [hereinafter Majority Opinion]. The Majority Opinion is referred to throughout this Essay. At this time, the full-text version of the Majority Opinion is available only on the Internet. Therefore, future references do not contain pinpoint citations.

Tadic, a former restaurant owner, was responsible for allegedly rounding up Muslims and bringing them to three separate internment camps, including one notorious camp at Omarska in the strategically vital northwest corridor of Bosnia that lays within the county of Prijedor.[5] Prijedor was, in essence, a land-bridge between the Socialist Federal Republic of Yugoslavia (SFRY)[6] and Serbian-held territory in Bosnia adjacent to the Serbian-controlled Krajina region in Croatia.[7] It has been well documented that summary execution, rape, and torture occurred frequently at the Omarska camp.[8] Indeed, many witnesses, some of them testifying *in camera* at Tadic's trial, spoke of unimaginable horrors suffered at the hands of their captors while interned at Omarska. These issues involve important questions about how the global community will define international aggression, as well as what kind of legacy the ICTY's decisions will leave, especially as the U.N. considers a draft statute establishing a permanent court for both war crimes and crimes against humanity.

In his opening statement for the Tadic trial, Prosecutor Grant Niemann began by saying that "what man has done to man in the former Yugoslavia strains the most agile capacities of human reason."[9] Indeed, the crimes of Dusko Tadic painted a picture of unspeakable terror according to over 100 witnesses examined at trial.[10] Tadic was accused of the slashing deaths of two Muslim policemen, rape, and other, numerous instances of torture.[11] On February 13, 1995, "Judge Karibi-White . . . confirmed the indictment against Dusko Tadic."[12] The indictment charged him with six incidents occurring at the Omarska prison camp where he was stationed between June and August 1992, as well as a series of charges involving

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5. *See id*. A map of the areas discussed is located at Appendix C.

6. *See id*.

7. *See id*.

8. *See* Christopher Lockwood, *Trial Begins of Serb Charged with Crimes Against Humanity*, THE DAILY TELEGRAPH, May 7, 1996, at 12.

9. *Court TV Casefiles* (visited Aug. 2, 1996) <http://www.//state/casefiles/warcrimes/reports/week1.html>.

10. *See id*. The Author observed the proceedings of the Trial Chamber at the Hague during the Summers of 1995–97.

11. *See* Beane & Heffernan, *supra* note 1, at 250; *see also* Mike Corder, *Bosnian Serb Is Found Guilty of War Crimes by U.N. Court*, SEATTLE TIMES, May 7, 1997, at A3.

12. *Id*.

incidents in the villages of Jaskici and Sivci in June 1992.[13] In the first instance of its use in a war crimes trial, the indictment also charged him with rape as a crime against humanity.[14] In addition, Tadic was the first Serbian tried by the ICTY, notwithstanding the guilty plea of Croat war criminal Drazen Erdemovic (who took part in a July 1995 massacre of unarmed Bosnian-Muslims).[15] The Trial Chamber ordered Tadic to serve a twenty-year sentence on August 13, 1997 for eleven separate convictions, ten of them running concurrently.[16] If run consecutively, Tadic would have served ninety-seven years.[17] He will most likely serve his sentence in an Italian or Finnish jail since these are the only nations that have made express commitments to house criminals sentenced by the ICTY.[18] On eight out of thirty-four charges related to grave breaches of the Geneva Conventions, including three alternative charges, Tadic was acquitted.[19] Additionally, the Trial Chamber unanimously found Tadic not guilty on seven other counts related to the laws and customs of war under Articles 3 and 7 of the Statute and Common Convention Article 3(1)(a) that relates to cruel treatment.[20]

A. Historical Summary

With the passing of the Cold War, the unifying force of communism also passed from among states formerly within its orbit. From the Balkans to the Caucuses, ethnically disparate nations, cobbled together at the end of both world wars, fissured as central governments either weakened, or in the case of Yugoslavia, became increasingly authoritarian. As a result, the period following the end of communism has seen the inability of various nations around the globe to transcend ethnic fault lines. Nowhere has this been played out with greater drama than in Bosnia-Herzegovina. The war in Bosnia was unique because it involved the systematic expulsion and elimination of an entire nation of people from certain areas within

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13. *See id*.
14. *See id*.
15. *See* Mike Corder, *Bosnian Serb Sentenced to 20 Years for War Crimes*, PLAIN DEALER, July 15, 1997, at 4A.
16. *See id*.
17. *See id*.
18. *See id*.
19. *See* Majority Opinion, *supra* note 4.
20. *See id*.

its territory, a practice not seen in Europe since World War II. It is this practice that is commonly described as ethnic cleansing.

The roots of the atrocities committed within the Omarska camp, which lies in Opstina Prijedor, go as far back as the Muslim-Ottoman invasion in the Fourteenth Century, when the heroic resistance of Christian-Serbians was crushed at the battle of Kososvo.[21] This history could explain, in part, why more atrocities were allegedly committed in the areas that fell to the occupying power of VRS in Bosnia, in contrast to areas under Serbian control in Croatia.

Religious fervor played as much a role in the atrocities among the Balkan states during World War II as it has in the present conflict. The 1941–1945 period saw the emergence of both civil war and armed resistance against the Axis powers.[22] The Ustashas, Croatian nationalists, received their support from the Axis powers and fought against the Chetniks, a Serb monarchist and nationalist group, as well as the Partisans led by Marshall Tito, a communist Serb group that ultimately led the post-war Federation until the second generation communist regime led by Milosevic came to power.[23] While all three eventually fought each other, the latter two forces also fought against the Axis as well.[24] Croatia threatened to kill a third of the Serbs living within its territory, deport one-third, and force the remainder to convert from Orthodox Christianity to Catholicism.[25] It is estimated that 250,000 Serbs may have died within the first six months of this campaign by the Ustashas.[26] "In Prijedor, the Partisans [killed] many prominent Muslims and Croats in 1942 [and 1945] in nearby Kozorac."[27] When Tito assumed power in 1945, an Ustasha army of up to 100,000 soldiers was summarily executed.[28]

The adoption of a new constitution in 1974 prepared the ground for devolution of authority to the provinces in the 1980s.[29] This limited exercise in regional autonomy is important, for it rekindled each group's nationalist desires for a separate state, a movement previ-

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21. *See id*.
22. *See id*.
23. *See id*.
24. *See id*.
25. *See* Majority Opinion, *supra* note 4.
26. *See id*.
27. *Id*.
28. *See id*.
29. *See id*. This new constitution was much more "federal" in structure. *See id*.

ously unseen except during the tutelage of the Ottomans.[30] In 1990, the first multi-party elections were permitted, resulting in the election of mostly regional nationalist parties.[31] In Bosnia, the SDA garnered a plurality of votes, creating fear among Orthodox-Christian Serbians that Bosnian culture and politics would become reordered around Islam.[32]

When Mikhail Gorbachev repudiated the "Brezhnev Doctrine" in 1989 following the liberalization of Poland, the consequent collapse of communism in Eastern Europe was widely viewed to have unleashed repressed nationalist desires.[33] There is considerable evidence that anti-Soviet nationalism emerged as one of the driving forces behind the collapse of communism, leading to the collapse of the Warsaw Pact shortly thereafter. Anti-Soviet nationalism then turned inward as internecine ethnic conflict spread throughout the Balkans and the Caucuses. The peaceful division of Czechoslovakia into the separate Czech and Slovak Republics in 1990 stands in stark contrast to the violent separation along ethnic lines of the Yugoslav Federation's constituent parts after Slovenia declared its independence in 1990.[34] As every other Eastern European government within the communist orbit failed to make the transition to the post-Soviet era following the fall of the Berlin Wall, Yugoslav President Slobodan Milosevic effectively prevented the erosion of his power by exploiting pent-up Serbian nationalism, formerly held in check by his predecessor Marshall Tito under the banner of socialist

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30. *See id*.

31. *See* Majority Opinion, *supra* note 4.

32. *See id*. The Orthodox-Christian Serbians represented the largest minority group. *See id*.

33. *See* JOHN SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II, at 353 (12th ed. 1992). The expression "Brezhnev Doctrine" was coined following the suppression by Soviet force of the 1968 "Prague Spring" in Czechoslovakia. *See id*. at 165. It simply states that any communist state may intervene in the affairs of another fellow communist state to prevent its "subversion" by the West. *See id*. at 215. The brutal tactics of the suppression were thus justified under this pretext. In 1989, several Eastern European governments asked Moscow about whether it intended to use force to prevent the end of communist party monopolies in their countries. *See id*. at 353. General Secretary Gorbachev stated he had no intention of intervening, in effect recognizing the full sovereignty of the East bloc satellites for the first time since the end of the Axis occupation in WWII, thus ending the Brezhnev Doctrine era. *See id*.

34. *See History of the Balkan Conflict, Court TV Casefiles* (visited Nov. 10, 1997) <http://www.courttv.com/casefiles/warcrimes/reports/history.html>.

unity.[35]

Milosevic also effectively exploited religious heterogeneity within the Federation, preserving Serbia's Orthodox-Christian cultural life against Croatian Catholicism, and, primarily later, against the ongoing Islamic revivalism taking place in Bosnia.[36] By commingling religious sentiments with the memory of repression by the Ustashas, Milosevic consolidated his power in the court of public opinion among Serbians.[37] He thus became a savior in the eyes of those who saw the continuance of his regime as necessary to preserve the Serbian way of life.[38] The gestalt from 1989 to 1991 was the polarization of the major populations within the SFRY.

Overwhelming referendums favoring separation from the Federation led to the June 25, 1991 declaration of independence for Slovenia and Croatia. As a result, Bosnia's Muslim government felt it had no counterweight to the continuing hegemony of Belgrade.[39] On October 24, 1991, Bosnia followed suit and declared independence.[40] The European community and the United States recognized Bosnia's independence in April 1992.[41] Meanwhile, an autonomous Serbian republic within Bosnia was declared on January 9, 1992, and was later renamed Republika Srpska.[42]

B. Creation of the Tribunal

Pursuant to the October 6, 1993 U.N. Security Council Resolution 780, and prompted by the mass killings and widespread reports of humanitarian outrages in the former Yugoslavia as well as public pressure in the West, a panel was convened to investigate the extent of these acts, particularly as the war shifted to Bosnia.[43] Within four months, the Final Report by the Commission of Experts, convened to assimilate evidence of war crimes in the former Yugoslavia, concluded that grave breaches and other violations of humanitarian law

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35. *See* Majority Opinion, *supra* note 4.
36. *See id*.
37. *See id*.
38. *See id*.
39. *See id*.
40. *See id*.
41. *See* Majority Opinion, *supra* note 4.
42. *See id*.
43. *See id*.

did indeed occur.[44] The result was the creation and adoption by Resolution 827 of the Statute of the Tribunal within only three weeks after a preliminary draft of the Statute.[45] The competence of the Tribunal consists of those acts constituting war crimes in the former Yugoslavia after 1991 under the 1949 Geneva Conventions, as well as those proscribed against generally by customary law, according to Resolution 827.[46] Therefore, from this condensed history leading up to the ICTY, it can be assumed that the existence of grave breaches of the Geneva Conventions were a major force behind the initiative to undertake the creation of such a Tribunal in the first place. Furthermore, since the Security Council was operating from the premise that such breaches constituted a threat to international peace and security, as expressed in Resolution 764, it can be surmised that the Statute was intended to be informed by previous Resolutions.[47]

II. ANALYSIS

A. The Dissenting Opinion of Judge McDonald

Dusko Tadic was acquitted on nine formal counts of murder by the Tribunal's Majority, which stated in its Opinion that the grave breaches regime of Article 2 of the Statute of the Tribunal for War Crimes Committed in Bosnia-Herzegovina (BiH) was inapplicable to the case.[48] The Majority narrowly interpreted the empowering language granting subject matter jurisdiction over protected persons, defined generally as those who are "in the hands of a party to the conflict of which they were not nationals."[49] The grave breaches re-

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44. *See Final Report of the Commission of Experts* (visited Aug. 2, 1997) <http://-www.cij.org/cij/commission.html>. "[A]s indicated in para. 45 of its first interim report, the Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia." *Id*.

45. *See id*.

46. *See* U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

47. *See* Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, 35 I.L.M. 32 para. 51 (1997) [hereinafter Separate Opinion of Judge Li].

48. *See* Majority Opinion, *supra* note 4. Article 2 and Article 3 of the Statute of the Tribunal are included in Appendix A.

49. *See* International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion, 36 I.L.M. 908, 971

gime is actually embodied in the 1949 Geneva Red Cross Convention relating to the Protection of Civilians in Time of War (Convention IV), adopted in Article 2 of the Statute (see Appendix A).[50] Article 3 of the Statute, however, is a more general provision that invokes the protections of the "laws or customs of war" as to humanitarian behavior by combatants, and applies to the other counts on which Tadic was found guilty.[51] Article 2 is customarily believed to apply to traditional assumptions of warfare that clearly do not involve civil conflict, wherein two nation-states party to the Convention are in a state of hostilities.[52] It is this Author's belief that the more general prohibitions against non-humanitarian conduct in war contained in Article 3 are believed to customarily apply mainly to civil conflicts.

Therefore, the question is not whether Tadic's behavior constituted a grave breach of the Convention in just an evidentiary sense, but what standard should have been applied in determining whether the conflict in question was an internal or an international one. Did the Prosecution fail to prove, as the Majority found, that the VRS in Opstina Prijedor sufficiently distanced itself from the alleged principle party to the conflict, the JNA? In other words, was the VRS in Opstina Prijedor acting as an agent of the JNA, or was it a "mere ally" coordinating activities in the pursuit of advancing common interests, as the Majority believed?[53]

B. The *Nicaragua* Precedent

In her dissent, Judge McDonald argued that the conflict in Bosnia as a whole was sufficiently international in character to trigger Article 2.[54] The test encountered previously on this issue is found in *Nicaragua v. United States*,[55] heard by the International

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(1997) [hereinafter McDonald's Dissent]. McDonald's Dissent is referred to throughout this Essay. At this time, McDonald's Dissent is only available in a full-text version on the Internet. Therefore, future references do not contain pinpoint citations.

50. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6. U.S.T. 3516.

51. *See Statute of the Tribunal* (visited Aug. 2, 1997) <http://www.un.org/icty>.

52. *See Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, 1993 A.B.A. SEC. INT'L L. & PRAC. 11 [hereinafter ABA Report].

53. *See* McDonald's Dissent, *supra* note 49.

54. *See id*.

55. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. REP. 14 (Judgment on June 27).

Court of Justice (ICJ) in 1986.[56] The ICJ based its conclusions on an *effective control* analysis of the proxy armed force, in that case the Contra rebellion.[57] However, McDonald's dissent noted that this creates a much higher, but unnecessary, threshold of agency control compared to the standard of *dependency and control*.[58] Only if one of these two standards can be proven beyond reasonable doubt can the acts of the proxy be considered attributable to the principle.[59] Since the Convention is not clear about which test is preferred, interpretive confusion arises due to the phrase in the Convention's language that the victims shall not be "nationals . . . of the occupying power" for Article 2 to apply. In Prijedor, it was not clear exactly when the occupation effectively began, and if the VRS was sufficiently independent from the JNA when atrocities began.[60] Leaving aside the issue of Tadic's alibi defense, if the question of control were to be settled in favor of the Defence's argument for the independent nature of the VRS, then the question of its nationality is settled because it is deemed not to be an agent of an international actor.

Judge McDonald's dissent attacked the Majority's finding that there was no effective control by the JNA over the VRS and then she attacked the use of the standard itself.[61] Since this standard requires command and control over the VRS forces during the Tribunal's temporal jurisdiction, the Majority concluded that absence of proof beyond reasonable doubt that the conflict was sufficiently international in character rendered the victims in question not protected persons within the meaning of Article 2.[62] The dissent argued that the Appeal Chamber's decision did not impose a rule of effective control, but something similar to the *Nicaragua* court's rule of dependency and control, characterized as substantial external support and involvement, but not command and control, over the proxy armed forces.[63] The dissent found the purported withdrawal of the JNA from BiH to be a much more serious problem than the

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56. *See* David Bernstein, *International Court of Justice — Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 28 HARV. INT'L L.J. 146 (1987) [hereinafter *Nicaragua*].

57. *See* McDonald's Dissent, *supra* note 49.

58. *See id*.

59. *See id*.

60. *See id*.

61. *See id*.

62. *See id*.

63. *See* McDonald's Dissent, *supra* note 49.

Majority.[64] Resolution 771 of May 15, 1992 demanded that the Federation cease all activities within BiH, providing the impetus for the JNA operating in BiH to transfer much of its non-Bosnian officer staff and a great deal of arms to the VRS.[65] The majority found that the Yugoslav Federation's fraudulent intention toward compliance with the Resolution was not "the most reasonable conclusion open on the evidence presented."[66] However, Judge McDonald disagreed for the reasons below.

The cumulative evidence below supported a finding of effective control. The basing of troops remained on former JNA facilities.[67] Most of its officers' salaries came from Belgrade.[68] In fact, the only change that could be noted after the JNA "withdrawal" was the change in insignia and names of military units.[69] Hence, Judge McDonald regarded the Majority's conclusion that the Prosecutor presented insufficient evidence of effective command and control emanating from Belgrade to Pale with complete skepticism.[70] Judge McDonald found that the case turned on a reasonable inference of command and control by the JNA over the VRS, rather than formal proof of control.[71]

Although Judge McDonald found that the effective control requirement had been met, she argued further against its necessity. The interpretive confusion over common Article 2 is compounded by confusion over which standard was imposed in *Nicaragua*. Judge McDonald stated that if the effective control standard is the rule in *Nicaragua*, it should be limited to that case since the *Tadic* case was almost completely distinguishable on the facts.[72] Specifically, the United States neither created the Contra Army by transferring arms nor gave direct orders or staffed the rebellion.[73] Judge McDonald argued that the facts of the *Tadic* case, as distinguished from *Nicaragua*, required the lower threshold of dependency and control for agency determination, which is automatically satisfied by proof of

64. *See id*.
65. *See id*.
66. *See id*.
67. *See id*.
68. *See id*.
69. *See* McDonald's Dissent, *supra* note 49.
70. *See id*.
71. *See id*.
72. *See id*.
73. *See id*.

effective control.[74] Thus, the *Nicaragua* court stands for the idea that the effective control standard is sufficient but not necessary in certain cases.

The chief difficulty faced by the Prosecution involved proving beyond reasonable doubt that the conflict in Opstina Prijedor was international in character, as the previous section discussed. Professor L.C. Green of the U.S. Naval War College opines that

> [w]here war crimes are concerned, in a mixed situation involving both international and non-international conflicts, it may well be advisable to ignore these completely and lodge charges in accordance with the law concerning crimes against humanity [e.g., Article 3 of the Statute of the Tribunal], into which category at least the more serious war crimes [against humanity] would fall, and, if desired, to charge with genocide as well. In this way, any dispute concerning the applicability of the law of war with regard to any aspect of the conflict would be avoided, while at the same time ensuring that any crimes which might in the course of the international conflict amount to war crimes or grave breaches will in relation to the non-international conflict be equally subject to trial.[75]

If we were to apply this reasoning to the Prosecution's case, it would seem unnecessarily risky to convince the Tribunal that Article 2 of the Statute applied, since it requires proof of an international conflict beyond reasonable doubt, with the attendant problem of attribution discussed in Section III(A). Article 3 covers much the same ground that Article 2 does essentially; therefore, the question remains, why did the Prosecution argue the applicability of Article 2 in the first place? It would seem the court, if justified, has a reasonable excuse to evolve interpretation of the international conflict clause by requiring a more strict standard of effective control since it is within the Tribunal's purview to do so. Judge McDonald did not dispute this.[76] Also, the Tribunal may be justified in requiring a stricter standard because it is anticipating the creation of a permanent war crimes court by the U.N., much like its cousin, the ICJ. If the U.N. creates such a court, it could be overwhelmed by the num-

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74. *See id*.

75. *See* L.C. Green, *Low-Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L., 493, 517–18 (1997).

76. *See* McDonald's Dissent, *supra* note 49.

ber of grave breaches war crimes alleged by prosecutors if the international conflict clause were interpreted broadly. However, the Prosecution could have equally argued that the magnitude of Tadic's crimes did not deserve the generality of Article 3, but the infamy associated with an indictment of grave breaches of certain international norms.

The answer to the problem clearly lay in the hands of the draftsmen of the 1949 Geneva Conventions. However, in that era, low-intensity conflicts were just an emerging Cold War phenomenon: quasi-international conflicts such as Bosnia were not fully envisioned by the Conventions at the time of its creation. Indeed, a common definition of aggression in the bipolar world was not reached until the United Nations formulated it in 1974.[77] By then, the issue of reinvigorating efforts to create an International Criminal Court (ICC) became politicized in an era reminiscent of the excesses following My Lai and Afghanistan, forestalling any attempt to create a permanent war crimes tribunal.[78] As with the 1977 Additional Protocols to the 1949 Conventions, an amending of the Conventions to rectify their deficiencies of the Protocols is required, particularly Protocol II, which does not affect the applicability of either aforementioned Article, but rather amounts to "little more than a reaffirmation of the basic principles of humanitarian law binding on all states, military authorities, and civilian populations . . . ."[79] The problem thus lies squarely in the hands of the U.N., which has the authority to commence another body, such as the 1977 commission that proposed Protocols I and II, to draft language that would more clearly delineate the differences between international and non-international conflict.

Protocol I offers more guidance, stating, "[S]o long as an internal conflict is directed towards self-government," it is an interna-

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77. *See* Definition of Aggression, 29 U.N. GAOR, Supp. 31 (Agenda Item 86) at art. 3(g), U.N. Doc. A/RES/3314(XXIX) (1975) [hereinafter Definition of Aggression]; *see also Question of Defining Aggression*, *in* ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 1974 319, 320 (Joseph T. Vambery ed., 1976).

78. *See* Green, *supra* note 75, at 509. It is also worth mentioning that Green assumed, without much discussion of McDonald's argument, that the conflict in Bosnia was internal. *See id*. He concluded that Article 3 of the Convention, which corresponds to Article 3 of the Statute of the Tribunal, applied. However, he omitted any discussion of Article 2, implying that it's non-applicability was not in doubt.

79. *See id*. at 507.

tional one.[80] However, a conflict must be one "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ."[81] The Prosecution would have been required to prove the Bosnian armed forces were fighting in the name of self-determination, and were recognized by a regional organization in the area in which the conflict occurred. As to the former requirement, Bosnia directed its forces in the Opstina Prijedor in a resistance fashion since the JNA had secured it for the VRS in the early days of the war. However, the issue of recognition is not easily answered since the U.N., which granted Bosnia member status in 1991, did not initially recognize Bosnia's armed forces as a liberation movement. As a result, Bosnia enjoyed the extra protection the umbrella of Protocol I was intended to provide.[82] In fact, no other entity or state has done so either. This returns the discussion to its original dilemma. Since no other state had recognized Bosnia's armed forces as a liberation movement, the international community simply may have viewed the conflict as purely internal. Thus, Belgrade's support, if any, was not sufficient at the time to constitute an international conflict, according to this view of Protocol I.

Professor Jordan J. Paust of the University of Houston College of Law and former Advocate and Counsel for Bosnia-Herzegovina, in a separate case before the ICJ, disagreed with this view.[83] Paust did not distinguish the unusually complex nature of the combatant's nationality in this case from other cases where there might have been two distinct national armed forces.[84] Paust, writing before the Tadic decision was rendered, did not find lack of direct evidence of command and control over armed forces that are in breach of humanitarian custom or agreement to be a significant obstacle to Article 2's applicability.[85]

A general state of command and control over the armed forces in most of the territory in which it operates, regardless of degree,

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80. Green, *supra* note 75, at 503.

81. *Id*.

82. *See id*. at 509.

83. *See* Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994).

84. *See id*.

85. *See id*.

leads to an international conflict *per se*.[86] Indeed, the thrust behind Resolution 808 is that the actions by the JNA constituted a threat to international peace and security, after the recognition of Bosnia's independence.[87] The implication language of Resolution 808 indicates that the Security Councel believed that the JNA must be reigned in before it spawned secondary and tertiary conflicts in other sovereign nations.[88] The language of the U.N. resolutions comports with Paust's broad approach in attributing state responsibility to Serbia.[89]

As discussed in Judge McDonald's dissent, some degree of imputation remained with Belgrade after its supposed compliance with Resolution 808.[90] According to Paust, this is enough to trigger Article 2.[91] It was the likelihood of grave breaches, contained within the language of Resolution 771, that created the need for the Commission of Experts to devise the Tribunal in the first place. The Commission concluded that the conflict still remained internationalized after January 1, 1991, the period that began the Tribunal's jurisdiction.[92] Paust further stated: "[I]t would not be policy-serving to apply unrealistic standards of `national' nexus which function in such a way as to deny humanitarian protection. The provisions of Part II find greater application by covering the entire population of each country involved . . . ."[93] According to Paust, there does not seem to be strong precedent, if any, for some populations within a certain conflict to retain the status of protected persons while others do not.[94] On the Defence's motion to dismiss, Appellate Chamber Judge Li commented on Tadic's appeal on the jurisdiction and competency of the tribunal, stating:

> [T]he conflict is clearly international: three nations have fought in the territory of two of them . . . with a number of fronts and partisans or proxy groups participating on behalf of each. Once this determination is made, it should not matter that some combatants

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86. *See id*.
87. *See id*.
88. *See id*.
89. *See* Paust, *supra* note 83, at 513.
90. *See* McDonald's Dissent, *supra* note 49.
91. *See* Paust, *supra* note 83, at 506–13.
92. *See* Majority Opinion, *supra* note 4.
93. Paust, *supra* note 83, at 513.
94. *See* Paust, *supra* note 83, at 511–13.

are citizens of the same nation-state.[95]

In fact, the definitional threshold of an international armed conflict appears to have actually been lowered by the 1974 U.N. Definition of Aggression.[96] The *Nicaragua* court considered this particular definition crucial in finding the United States not liable for damages in connection with its support of the Contra rebellion.[97] The Definition of Aggression states: "[S]ending by or on behalf of a state of armed bands, groups, [or] irregulars . . . which carry out acts of armed force against another State," constitutes a state of international conflict.[98] Therefore, the agent may only be nebulously sent on behalf of the principle to conduct armed operations. In addition, the aggressor need only be "substantial[ly] involve[d]" in the operations of such groups.[99] This appears to at least supersede the concerns of the majority opinion, which perhaps mistakenly relied on the Definition of Aggression to support effective control as the standard to be met in this case.[100] It also reaches the heart of McDonald's dissent, in that there appears to be a serious misreading of *Nicaragua*. A close reading of the Definition of Aggression reveals that it can equally support dependency and control as the standard.[101] The Tribunal may have also mistakenly relied on *Nicaragua* in its search for an effective control precedent.

C. Expert Testimony of Professor James Gow

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95. Separate Opinion of Judge Li, *supra* note 47 (quoting James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 647 (1993)).

96. *See Question of Defining Aggression*, *supra* note 77, at 320; *see also* Draft Code of Crimes Against the Peace and Security of Mankind, 30 I.L.M. 1554, 1561 (1991); G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc A/9631 (1975).

97. *See Nicaragua*, *supra* note 56, at 151. The ICJ used the 1974 Definition of Aggression as evidence of customary law. The definition of aggression uses customary law principles to include the sending of armed bands into the territory of another state as an armed attack upon another state. *See* Definition of Aggression, *supra* note 77.

98. Definition of Aggression, *supra* note 77.

99. *Id*.

100. *See* Majority Opinion, *supra* note 4.

101. *See* Definition of Aggression, *supra* note 77; *Question of Defining Aggression, supra* note 77, at 320.

The testimony of James Gow, Professor of History at London University and co-producer of an acclaimed European documentary entitled "Death of Yugoslavia,"[102] illuminated the characterization of the conflict within Prijedor.[103] Paust did not divorce the local conflict from the necessity of viewing it in the larger context of the war after the JNA withdrawal.[104] His testimony will be examined from the perspective of Judge McDonald's dissent.

Professor Gow provided his BBC documentary, "Death of Yugoslavia," for the Tribunal's viewing. The documentary contains a crucial piece of evidence in that Serbian paramilitary leader Vojislav Seselj claimed that SFRY President Slobodan Milosevic was "in absolute control" of the Serbian militias in Croatia and Bosnia.[105] As to Prijedor itself, however, there is no evidence that suggests anyone other than General Mladic held authority over the VRS forces that shelled Kozorac. If Mladic did not sign off on the shelling, he was certainly aware of its imminence, which ensured that the command lines from Prijedor ran to Pale. Pale, in turn, received orders from Belgrade, according to Judge McDonald, despite the absence of a great deal of direct evidence.[106] Gow testified that the previous JNA war plan and the plan actually executed after the feigned withdrawal were synchronous.[107] From this it can be inferred that Mladic was merely acting upon the orders of his commanders in Belgrade. Gow stated that when the JNA was operating in Bosnia-Herzegovina, before the formation of the VRS, it had allied itself with local Serb militias.[108] If the JNA did in fact transform part of itself into the VRS, it can logically be expected this successor to the JNA would continue its relationship with these militias. On the side

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102. *See Developments in the War Crimes Trial of Bosnian Serb Dusko Tadic from May 7–10, 1996* (visited Sept. 27, 1997) <http://www.courttv.com/casefiles/warcrimes/reports/week1.html> [hereinafter *War Crimes Trial of Bosnia*].

103. *See id*.; *see, e.g.*, Separate Opinion of Judge Li, *supra* note 47. The Appeals Chamber decision on the Defence's motion challenging jurisdiction and competency contains the following comment in part C(3): "The statement submitted by Mr. Andrew J.W. Gow, dated 30 January 1995, corroborates in detail the above-mentioned statements of the Reports of the United Nations Commission of Experts . . . ." *Id*.

104. *See War Crimes Trial of Bosnia*, *supra* note 102.

105. Kitty McKinsey, *War Crimes Tribunal Looks at Serbia's Role in War* (visited Oct. 1, 1997) <http://www.rferl.org/nca/features/1996/05/F.RU.96050914593753.html> [hereinafter *Serbia's Role*].

106. *See* McDonald's Dissent, *supra* note 49.

107. *See War Crimes Trial of Bosnia*, *supra* note 102.

108. *See id*.

of dependency, Judge McDonald reiterated what the Majority conceded, that the genesis of the VRS was the result of the JNA depleting its own war stocks and transferring them to the VRS forces.[109] Major quantities of arms stored in reserves were also transferred to the militias as well.[110]

Gow also stated that when it appeared that Bosnia was about to secede, the JNA refocused its efforts to secure Serbian populated areas within Bosnia-Herzegovina into a Greater Serbia that would connect the Krajina with Serbia proper via the Republika Srpska in Bosnia-Herzegovina.[111] It reinforced its officer staff and other personnel in Bosnia with Serbs born in Bosnia.[112] When the JNA withdrawal commenced, it allowed Bosnian-Serbs to remain in Bosnia-Herzegovina to prepare for the creation of the VRS and other militias. This corresponds to the Defence's assertion that Belgrade retained no control after this point.[113] To the extent that the VRS acted independently, it was because it no longer needed to be micromanaged by a non-present JNA.[114] However, the test for effective control does not require the specificity of management, only a substantial amount of management of one form or another.[115] SDS President Simo Miskovic told witness Kemal Susic that the shelling of Kozorac was inevitable, despite the plans to withdraw the JNA before the date when the shelling of that city was to have taken place.[116] The attack on Kozarac followed from a plan that made for a seamless transition from the JNA to the VRS.[117]

The testimony of Colonel Selak, who served as a VRS commander in Banja Luka, which also lays in northwest Bosnia, supports the control side of Judge McDonald's argument.[118] He stated that officers had access to Pale and Belgrade via telephone lines, since there was a need for "*direct communication* between the [VRS] and the [VJ]."[119] This would be the clearest evidence yet that VRS forces in

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109. *See* McDonald's Dissent, *supra* note 49.
110. *See id*.
111. *See War Crimes Trial of Bosnia*, *supra* note 102.
112. *See id*.
113. *See id*.
114. *See id*.
115. *See id*.
116. *See id*.
117. *See War Crimes Trial of Bosnia, supra* note 102.
118. *See id*.
119. *Id*. (emphasis added).

the area of the Prijedor Opstina were effectively controlled by Belgrade, thus satisfying the dependency and control test that the dissent vigorously asserted was the standard. It would be appropriate to quote Judge McDonald: "Rather than being cynical, it would perhaps be naive not to recognize that the creation of the VRS, which coincided with the announced withdrawal by the JNA, was in fact nothing more than a ruse."[120]

III. CONCLUSIONS

A. Articulating a Standard for International Conflict

The main problem with the Majority's opinion concerns the narrow nature of the requirement of proof of command and control for agency determination. The only evidence not proffered at trial was direct orders between Belgrade and the VJ in the Prijedor region.[121] It can be surmised that the Majority would have concluded that the reasonable doubt standard for agency would have been met if such unequivocal evidence were unearthed. However, the likelihood that any future conflict would yield such readily obtainable evidence, unless provided by an intelligence agency to the ICRC, for example, is extremely low given that most records of such communications have a tendency to disappear. If so, then perhaps the effective control standard is merely impractical as applied in this case. However, Judge McDonald argued cogently in favor of the idea that effective control, as the only standard emerging from *Nicaragua*, is facially mistaken as well.

Absent a clear definition of what constitutes attribution of behavior to an international actor in Article 2 of the Convention, the *Nicaragua* court's analysis is the best approximation of a definition of agency. If *Nicaragua* controls, then it seems Judge McDonald was correct in stating that the JNA did not transfer authority when it was in a race against time to comply with Resolution 764 without leaving its successor with an offensive capability. However, if *Nicaragua* does not control strictly, but exists merely as a guide or source of rules from which one or more can be chosen, then the Majority has a free hand to remake the definition of agency as it proba-

120. McDonald's Dissent, *supra* note 49.
121. *See* Majority Opinion, *supra* note 4.

bly did when it imposed the effective control standard.

Indicative of the present difficulties in applying a definitional test of what constitutes international conflict, the Special Task Force of the ABA Section of International Law and Practice proposed to remedy the difficulty in applying the grave breaches regime by modifying Article 3 of the Statute, which was not intended to be an exhaustive recital of possible war crimes.[122] The proposed modifications would have covered precisely the kinds of humanitarian violations that occurred in Bosnia-Herzegovina. Then-U.N. Ambassador Albright and other members of the Security Council agreed that the customary law provisions included in Article 3 extend its meaning beyond the scope of the crimes contained within its language.[123] However, the established principle of *nullum crimen lege*, or "no crime without law," basically limits Article 3's applicability to the acts described by its language.[124] Since the Tadic prosecution felt compelled to base some of Tadic's most heinous counts on the grave breaches provisions, the panel recommends including Article 2's language in Article 3's customary law provisions, but leaving aside the problematic international conflict requirement.[125] Article 3 would effectively mirror Article 2, and perhaps supersede it in practice.

Indeed, the Task Force report goes even further, suggesting modifications to Article 5's civilian protection provisions, extending them beyond genocide.[126] As with modified Article 3, it would not require Article 2's international conflict requirement, but add the following kinds of gross humanitarian violations to provisions (a) through (e):

> torture and mutilation; rape, including enforced prostitution and enforced pregnancy, and other forms of sexual assault; persecution on political, racial, and religious grounds; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentence and the carrying out of executions without previous judgement by a regularly constituted

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122. *See* ABA Report, *supra* note 52, at 13.
123. *See id*.
124. *See id*.
125. *See* Majority Opinion, *supra* note 4.
126. *See* ABA Report, *supra* note 52, at 15.

court . . . .[127]

These broad modifications would essentially cover all of the humanitarian violations that occurred within the Omarska camp as well. Thus, viewed from both perspectives, modified Articles 3 and 5 eliminate the difficulties of applicability of law associated with common Article 2. Assuming arguendo the Majority's opinion, Tadic's crimes would have been covered by such provisions if they existed at the time of his indictment even if Article 2 did not apply to his crimes.

B. The False Dichotomy of an Internal/International Conflict Standard[128]

The distinctions between international and internal armed conflict tend to blur in conflicts such as Bosnia-Herzogovina. The civil strife in post-Gulf War Iraq is a classic example of the difficulty involved in distinguishing conflicts, for example.[129] Several arguments against the necessity for having a dichotomy at all have arisen and need to be explored. In our previous discussion,[130] we examined why the conflict in Bosnia was mischaracterized by the Tribunal Majority. This section will analyze the reasons why the tests for attribution may no longer be necessary.

Michael Reisman stated that "the internal/international [conflict] distinction is a serious policy error that should be rectified."[131] He also discussed how the 1949 negotiations at the U.N. reflected a political compromise that permitted states to be insulated from the higher scrutiny of a grave breaches regime.[132] Therefore, the humanitarian violations within the vast majority of conflicts, appearing ostensibly as "internal" ones, go unchecked. The post-war international climate perhaps was not conducive for the level of derogated sovereignty required to enable the universal application of Article 2.

Protocol I sufficiently narrowed the definition of internal con-

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127. *See id*. at 15–16.

128. *See* W. Michael Reisman, *Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman*, 85 AM. SOC'Y INT'L L. PROC. 83, 88 (1991).

129. *See infra* Part C.

130. *See supra* Part IIA.

131. *See* Reisman, *supra* note 128, at 90.

132. *See id*.

flict such that its application remains questionable today. As a result, international conflict consists of those situations arising under Article 2, including "wars of national liberation," defined customarily as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[133] The expert testimony of James Gow supports the view that Bosnia's Muslims were engaged in a war of national liberation because Karadzic and the SDS, on behalf of the SFRY, created a political climate rife with racism.[134] Additionally, while much of the VRS may not be considered alien in the strict sense of nationality, much of the officer staff of the VRS, according to Gow, were not Bosnian nationals; thus, Tadic's victims would be protected persons since they were indeed in the hands of those who were not nationals.[135]

Reismann stated that given the reality of modern conflict, "the purported `distinction' between international wars and noninternational conflicts is not only not compatible with the thrust of contemporary law of armed conflict; it is no longer factually tenable."[136] Thus, common Article 2 would apply in almost every conflict where non-combatants' humanitarian rights have been seriously violated by an occupying power. However, overcoming the reluctance of the vast majority of states to embrace such a sweeping view of Article 2's applicability to conflicts that frequently arise "internally" is an enormous obstacle confronting its acceptance.

C. Outlook for the International Criminal Court

Perhaps the Majority in the Trial Chamber felt it had come as far as it would in terms of the evolution of the standard for international conflict since Nuremberg. The Appellate Chamber denied the defense's motion to dismiss, which stated, inter alia, that such crimes, if they were committed by the defendant, did not constitute a threat to peace in an international sense, thereby triggering Article 2.[137] In its ruling, the Appellate Chamber found that "the nexus

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133. *Id*. at 87.

134. *See* Author's Notes of Trial (on file with Author at Stetson University College of Law).

135. *See War Crimes Trial of Bosnia*, *supra* note 102.

136. Reisman, *supra* note 128, at 87.

137. *See* Majority Opinion, *supra* note 4.

required at Nuremberg between crimes against peace and crimes against humanity" was no longer required.[138] The Majority at the Trial Chamber may have felt that abandoning the nexus' precedential value might undermine the ICTY's ability to limit itself to adjudication of individuals who cannot be tried by the national courts for political or procedural reasons. It should also be said that the ICTY had its eye on the future, e.g., a permanent successor such as the proposed International Criminal Court (ICC).[139] Adoption of the effective control standard thus might allay the unspoken concerns of the Majority that a broad interpretation of agency might render almost every civil war an international war, a situation for which the ICC will not be equipped to deal with. However, Judge McDonald's argument that effective control should not be the standard by which conflict is judged to be international still remains persuasive for the foregoing as well as the following reasons.

The Appellate Chamber opinion of Judge Sidhwa also stated that the Chamber's affirmance of the Trial Chamber's denial of the motion is reinforced by the historical treatment of the conflict as one in which grave breaches of Convention IV occurred.[140] Resolution 764, paragraph 10 cast no doubt that the Security Council was in agreement with the Commission of Experts' report that the grave breaches regime of Convention IV had already occurred in Bosnia.[141] Furthermore, Resolution 771, passed after Bosnia's independence was recognized by the E.C. and the U.S., demanded that all parties, including the SFRY, cease all humanitarian violations within the former Yugoslavia.[142] This is of course after the U.N. demanded that the JNA withdraw from Bosnia-Herzegovina. Resolution 771 could only mean that the Security Council was not satisfied that SFRY had ended its interference, particularly with respect to humanitarian violations such as those in Prijedor. Economic sanctions on Belgrade were still in effect up until the signing of the Dayton Accords

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138. Jose E. Alvarez, *The Likely Legacies of Tadic*, 3 ILSA J. INT'L & COMP. L. 613, 618 (1997).

139. *International Law Commission Draft Statute for an International Criminal Court* 33 I.L.M. 253 (1996); U.N. GAOR, 48th Sess., Supp. No. 10, p. 255–335. This draft statute was the result of the Commission's Working Group study on the issue of the creation of a permanent successor to the ICTY/ICTR *Ad-Hoc* tribunals.

140. *See Interlocutory Appeal under "Separate Opinion of Jo Sidhwa."*

141. *See* U.N. SCOR, 47th Sess., 3093d mtg., U.N. Doc. S/RES/764 (1992).

142. *See* U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992).

in order to punish the SFRY's non-compliance with previous Resolutions.[143] It can be inferred from this brief history of the Security Council's efforts to reign in the SFRY that Belgrade still substantially supported the VRS. The Appellate Chamber thus took careful notice of the premise underlying the creation of the ICTY itself. If Paust and O'Brien were correct, therefore, the dilemma of the proper characterization of the conflict as a mixed question of fact in law is a non sequitur, for this is in essence a question not within the ICTY's purview.

The conflict within Bosnia was not the first instance where the U.N. took the initiative in characterizing a conflict as an international one. To most observers, the twin Kurdish and Shiite rebellions following Iraq's defeat in the 1991 Gulf War followed the traditional pattern of civil war. However, Resolution 688 of April 5, 1991 determined that the conflict within Iraq threatened international peace and security in the region, stating that humanitarian violations against these respective civilian populations by the Iraqi military must cease.[144] The resulting stream of refugees coming across the Iranian and Turkish borders created an international humanitarian disaster in the wake of the defeat of both rebellions, as well as the forced evacuation of much of the non-combatant population in the Kurdish and Shiite areas in Iraq. Chapter VII and Articles 2(7) and 25 of the U.N. Charter permit the Security Council to condemn such actions and apply appropriate sanctions to punish countries charged with the conduct.[145]

A separate but related motive for the Majority's adoption of the effective control standard is best expressed by the remarks of President of the Tribunal, Judge Antonio Cassese at a meeting commemorating the Nuremberg trials: "[If] the major powers of the world are not consistent and don't make arrests in the next ten months, we are prepared to pack up and go home. We think our job is to try leaders, not small fry."[146] Could the motivation, at least in part, behind the switch to the effective control standard lay in Judge

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143. *See* McDonald's Dissent, *supra* note 49.

144. *See* U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991).

145. *See* U.N. CHARTER art. 2, para. 7; *id*. art. 25.

146. Raymond M. Brown, *Trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia: A Fronte Praecipitium A Tergo Lupi: Towards An Assessment of the Trial of Dusko Tadic Before the ICTY*, 3 ILSA J. INT'L & COMP. L. 597, 599 (1997).

Cassese's remarks? Equally fascinating is the fact that these remarks were made before IFOR's July 10, 1997 apprehension of additional war criminals, over the objections of some American military staff and some quarters within the U.S. Congress that charged the administration with "mission-creep."[147] Though one died in a shoot-out with British troops, indicted war criminal Milan Kovacevic was taken immediately to the Hague for pre-trial detention.[148] This has caused great consternation among Bosnian-Serbians because there are warrants out for the arrests of the popular ex-Serbian President Radovan Karadzic and VRS General Ratko Mladic. Judge Cassese's remarks, as well as much of the literature surrounding this topic, seem to suggest there should be some effort made to prod NATO to apprehend the "big fry." Tadic's case was clearly the only case on the horizon at the time much of this discussion took place. Maybe the adoption of the more narrow international conflict standard was a reminder to the Security Council that it had better convince NATO to serve "big fry" if it wants significant results, despite the likelihood that it will trigger a mostly Bosnian-Serbian reaction against the vulnerable IFOR mission.

The importance of a well-functioning International Criminal Court (ICC) is perhaps best underscored by Judge McDonald's reflections on the *Tadic* trial in an interview with CourtTV, the only network carrying full-time coverage of the trial: "[I]t seems to me that to the extent that we in America have not come to grips with our kind of aspirational assertions of equality . . . and with the reality of discrimination that there are some parallels [to the trial] . . . ."[149] Judge McDonald seems to be saying that the importance of the *Tadic* trial lay in the macrocosm of seemingly omnipresent ethnic conflict around the globe and whether the present pursuit to mitigate the resulting post-conflict internal tension through the system of international law will lead to a successful permanent system of adjudicating war criminals.

As further prosecutions of alleged war criminals unfold before the ICTY, the jurisprudential foundation for the ICC is being creat-

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147. *See The World Cries for Justice: The International Criminal Tribunals for the Former Yugoslavia and Rwanda Hold the Key to the Next Advance in International Law. But Their Own Futures Are Far from Guaranteed*, 82 A.B.A. J., Apr. 1996, at 52, 61.

148. *See NATO Roundup Signals Tougher Stand on Bosnian War Criminals* (visited Aug. 13, 1997) <http://cnn.com/world/9707/10/bosnia/index.html>.

149. Brown, *supra* note 146, at 612.

ed. The lack of high level international dialogue and critique of the ICTY's grappling with the issue of conflict characterization suggests a reticence among the major powers to enhance the primacy of the future ICC. Primacy would necessarily derogate the national sovereignty of every state that passed legislation enabling deferrals of national war crimes trials to the ICC.[150] If a rational balance consisting of a more broadly construed international conflict standard that also limits the ICC's jurisdiction to crimes of only a substantial international nature is not found, then the ICC will not be able to live up to the kinds of promises made in Resolutions 808 and 827 that grave breaches of human rights will be punished. The ICC will not attain the credibility it needs to effect deferrals of prosecution by national courts if it finds every internal matter to be internationally related. However, such a balance should be consistent with the wishes of the ICRC, if possible, so as to not prevent the ICC from considering war crimes related to internal armed conflicts under common Article 3 of the Geneva Conventions as well.[151] Preferably, the U.N. Security Council could exercise its authority to designate a protecting power, such as the ICRC, to make a special determination of whether an ascribed internal war is in fact international. Accordingly, the ICRC's investigation would be admitted into evidence in order to aid the ICC in its fact-finding role. Notwithstanding these improvements, if the Tribunal or the ICC does not adopt a more realistic interpretation of what constitutes internal/international conflict (i.e., something akin to the dependency and control standard, or abandon distinguishing conflicts altogether) we cannot expect the ICC to have the ability to significantly deter gross humanitarian violations through the application of justice in future conflicts like Bosnia.

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150. *See* Richard Goldstone, *Symposium: Prosecuting International Crimes: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 4 (1997).

151. *See* Jean-Phillippe Lavoyer, *International Humanitarian Law After Bosnia*, 3 ILSA J. INT'L & COMP. L. 583, 585 (1997) (remarks by the ICRC legal advisor).

APPENDIX A

STATUTE OF THE TRIBUNAL

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute per-

sons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

RESOLUTION 771 (1992)

Adopted by the Security Council at its 3106th meeting, on 13 August 1992

The Security Council,

Reaffirming its resolutions 713 (1991) of 25 September 1991, 721 (1991) of 27 November 1991, 724 (1991) of 15 December 1991, 727 (1992) of 8 January 1992, 740 (1992) of 7 February 1992, 743 (1992) of 21 February 1992, 749 (1992) of 7 April 1992, 752 (1992) of 15 May 1992, 757 (1992) of 30 May 1992, 758 (1992) of 8 June 1992, 760 (1992) of 18 June 1992, 761 (1992) of 29 June 1992, 762 (1992) of 30 June 1992, 764 (1992) of 13 July 1992, 769 (1992) of 7 August 1992 and 770 (1992) of 13 August 1992,

Noting the letter dated 10 August 1992 from the Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations (S/24401),

Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property,

Recalling the statement of the President of the Council of 4 Au-

gust 1992 (S/24378),

1. Reaffirms that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches;

2. Strongly condemns any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing";

3. Demands that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above;

4. Further demands that relevant international humanitarian organizations, and in particular the International Committee of the Red Cross, be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory of the former Yugoslavia and calls upon all parties to do all in their power to facilitate such access;

5. Calls upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations or humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council;

6. Requests the Secretary-General to collate the information submitted to the Council under paragraph 5 and to submit a report to the Council summarizing the information and recommending additional measures that might be appropriate in response to the information;

7. Decides, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of the present resolution, failing which

the Council will need to take further measures under the Charter;

8. Decides to remain actively seized of the matter.

RESOLUTION 780 (1992)

Adopted by the Security Council at its 3119th meeting, on 6 October 1992

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

Recalling also its resolution 771 (1992) of 13 August 1992, in which, inter alia, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law,

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of mass killings and the continuance of the practice of "ethnic cleansing",

1. Reaffirms its call, in paragraph 5 of resolution 771 (1992), upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former Yugoslavia, and requests States, relevant United Nations bodies, and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter, and to provide

other appropriate assistance to the Commission of Experts referred to in paragraph 2 below;

2. Request the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia;

3. Also requests the Secretary-General to report to the Council on the establishment of the Commission of Experts;

4. Further request the Secretary-General to report to the Council on the conclusions of the Commission of Experts and to take account of these conclusions in any recommendatins for further appropriate steps called for by resolution 771 (1992);

5. Decides to remain actively seized of the matter.

RESOLUTION 808 (1993)

Adopted by the Security Council at its 3175th meeting,
on 22 February 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

Recalling also its resolution 771 (1992) of 13 August 1992, in which, inter alia, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and

Herzegovina, immediately cease and desist from all breaches of international humanitarian law,

Recalling further its resolution 780 (1992) of 6 October 1992, in which it requested the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolutions 771 (1992) and 780 (1992), together with such further information as the Commission of Experts may obtain, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia,

Having considered the interim report of the Commission of Experts established by resolution 780 (1992) (S/25274), in which the Commission observed that a decision to establish an ad hoc international tribunal in relation to events in the territory of the former Yugoslavia would be consistent with the direction of its work,

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of "ethnic cleansing",

Determining that this situation constitutes a threat to international peaceand security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Noting also with grave concern the "report of the European

Community investigative mission into the treatment of Muslim women in the former Yugoslavia" (S/25240, annex I),

Noting further the report of the committee of jurists submitted by France (S/25266), the report the commission of jurists submitted by Italy (S/25300), and the report transmitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307),

1. Decides 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;

2. Requests the Secretary-General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;

3. Decides to remain actively seized of the matter.

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of terri-

tory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) 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,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish 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 by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

APPENDIX B

GLOSSARY

BiH: Bosnia-Herzegovina.

SFRY: Federal Republic of Yugoslavia (now only Serbia and Montenegro).

ICC: The International Criminal Court, proposed in a draft paper submitted to the Security Council as a permanent court, unlike the ad-hoc, regionally focused ICTY and ICTR (International Criminal Tribunal for Rwanda).

ICJ: The International Court of Justice. The ICJ hears only civil claims for breaches of international covenants, agreements, treaties, and conventions. (The ICJ and the ICTY are separate organizations.)

ICRC: International Committee of the Red Cross.

ICTR: The International Criminal Tribunal for Rwanda.

ICTY: The International Criminal Tribunal for the Former Yugoslavia. Alternatively, the "Tribunal."

JNA: The Yugoslav national army for the pre-1991 Federation.

SDA: The Muslim Democratic Party of Action. The SDA gained a narrow margin over the SDS in the Opstina Prijedor elections of 1990. "The outcome of the elections was, in effect, little more than a reflection of an ethnic census of the population, each ethnic group voting for its own nationalist party." (*See* Tadic, Majority Opinion at 22.)

SDS: The Serb Democratic Party for BiH.

IFOR: U.N. Stabilization Force, the much-reduced in size follow-on force to the Implementation Force (IFOR) that was created to enforce the Dayton Accords immediately after they were signed. *See Appendix-B for maps of the IFOR deployment.*

SFRY: Socialist Federal Republic of Yugoslavia (commonly referred to as the former Yugoslavia of pre-1990).

VJ: National army of the SFRY, successor to the JNA.

VRS: The Serbian militia umbrella organization within BiH.

APPENDIX C

Regional Map of the Former Yugoslavia