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### Introduction

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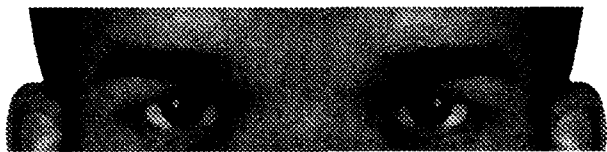
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# “Unlawful Combatants” in the United States

## Drawing the Fine Line Between Law and War

By Daniel Kanstroom

Anything that comes up in the United States tends to be looked at as a law enforcement matter, ‘. . . decide whether or not he’s guilty or innocent and give him due process.’ Of course if . . . you’ve got the risk of terrorists . . . killing thousands or tens of thousands of people, you’re not terribly interested in whether or not the person is potentially a subject for law enforcement.

Donald Rumsfeld, *quoted* in Tom Brune & John Riley, *Taking Liberties; Collateral Damage*, *NEWSDAY*, Sept. 15, 2002, at A3.

May the U.S. government lawfully incarcerate a U.S. citizen on U.S. soil for an indeterminate period in solitary confinement without providing the following rights: legal process, disclosure of evidence, access to counsel, family visitation, and judicial review? Before September 11, 2001, most Americans might have thought the question absurd, but this is the reality faced by Jose Padilla and Yaser Esam Hamdi, due to their having been designated by the executive branch as “unlawful [or “enemy”] combatants.” Like other aspects of enforcement after the September 11 attacks—secret removal proceedings and unprecedented use of material witness warrants, for example—their cases provoke and demand answers to a series of fundamental and unresolved legal questions of U.S. law.

### Background

Jose Padilla, a native-born U.S. citizen, allegedly reentered the United States from Afghanistan pursuant to a plot to detonate a radioactive bomb. A Chicago gang member

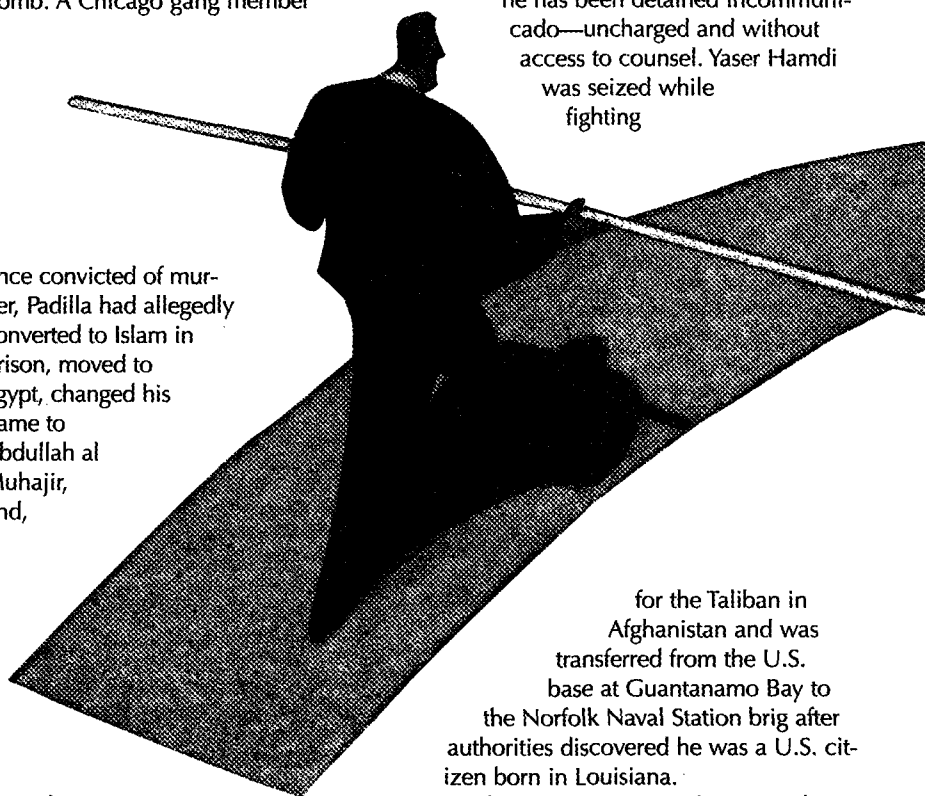
once convicted of murder, Padilla had allegedly converted to Islam in prison, moved to Egypt, changed his name to Abdullah al Muhajir, and,

according to government sources, met with Al Qaeda members. Arrested at O’Hare airport, he was first

detained as a “material witness.” For reasons that remain unclear, on June 9, 2002, he was designated by President Bush as an “enemy combatant” and sent to a naval brig in South Carolina, where he has been detained incommunicado—uncharged and without access to counsel. Yaser Hamdi was seized while fighting

for the Taliban in Afghanistan and was transferred from the U.S. base at Guantanamo Bay to the Norfolk Naval Station brig after authorities discovered he was a U.S. citizen born in Louisiana.

The U.S. government has argued that, as “unlawful combatants,” both men should continue to be detained in accordance with the “laws and customs



of war," which would mean they have no rights as criminal defendants or, for that matter, as civil detainees under the U.S. Constitution. This precludes rights to due process, counsel, bail, or a speedy trial and leaves them caught in a shadowy post-September 11 no-man's land, awaiting resolution of their cases by courts before which they have never appeared, represented by lawyers with whom they have never spoken.

Fortunately, the U.S. rule of law is not so easily evaded as some members of the administration might wish. Both men's cases are currently under consideration by federal courts pursuant to writs of habeas corpus, Hamdi's before the U.S. Court of Appeals for the Fourth Circuit in Virginia and Padilla's before the U.S. District Court for the Southern District of New York. The specific issues in both cases are whether the men are entitled to counsel and what information the government must disclose, to whom, about its determination of each man's status as an unlawful combatant.

by this court." Such statements raise the fundamental question whether, as a citizen, he retains such a right, or his unlawful combatant status—as determined by the government—deprives him of the panoply of constitutional protections available to U.S. citizens (or to any person detained within the United States by the government).

#### What Is an "Unlawful Combatant"?

The general rule of U.S. law has long been that civilian courts have jurisdiction over citizens detained by the military. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (a citizen arrested during Civil War for "holding communication with the enemy," "conspiring to seize munitions . . . [and] liberate prisoners of war," and inciting rebellion could not be tried by military courts, so long as civilian courts were open. This principle was reiterated in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), which involved two trials of ordinary offenses in military courts in Hawaii during World War II, while civilian courts were open. The government sought to distinguish

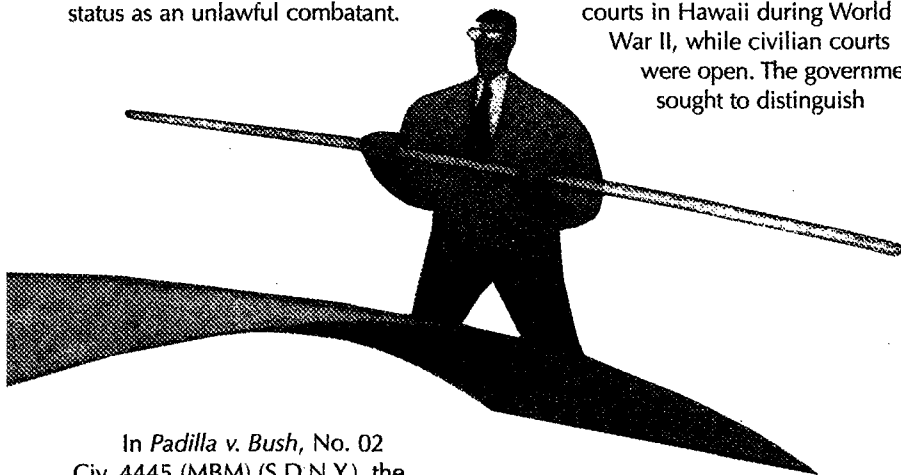
Court held that certain enemy belligerents—specifically those who "without uniform come secretly through the lines for the purpose of waging war"—may be detained without constitutional protections even if they are U.S. citizens:

[T]he law of war draws a distinction between . . . lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

This distinction may also be found within the structures of international law, particularly the 1949 Geneva Conventions. The Geneva Conventions state that members of armed forces (such as Al Qaeda) qualify for prisoner of war status if they meet four criteria: (1) being commanded by a person responsible for subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting operations in accordance with the laws and customs of war. Although it seems likely that Al Qaeda fighters would fail the last three criteria, the question—potentially relevant to Hamdi—whether Taliban fighters should qualify as lawful combatants is a closer one. It should be noted, in any case, that Article 5 of the Third Geneva Convention requires that a tribunal determine whether a person is entitled to POW or even civilian status. Thus, every captured individual should be presumed a prisoner of war until determined otherwise by a competent tribunal.

Any person can theoretically be tried for war crimes, but those given POW status cannot be criminally tried for violent acts committed in battle. Some "unlawful combatants" could face trial by military tribunals, but the Bush Military Order of November 13, 2001, exempts U.S. citizens, which indicates that Padilla and Hamdi would end up in the civilian criminal justice system, as happened with John Walker Lindh.

Other distinctions between POW and unlawful combatant status involve the protections against forced interrogation and harsh detention conditions. Torture is prohibited against anyone under international and U.S. law, but POWs are more specifically protected than unlawful combatants against physical coercion and intensive interrogation.



In *Padilla v. Bush*, No. 02 Civ. 4445 (MBM) (S.D.N.Y.), the government has relied upon a classified document that has not been given to Padilla's lawyers, although it released an unclassified version and apparently has urged the court to review the classified version. Padilla's lawyers have argued that the court should not base a decision on either version of the docu-

*Milligan* because Hawaii was near the active theater of war and under threat of invasion, but the Court reversed both convictions.

The possibility of an exception to *Milligan* for "unlawful combatants"

ment until counsel are allowed to consult with their client and hear his response. As they wrote in their brief, "Jose Padilla should be granted the fundamental right to have his voice heard

derives from *Ex parte Quirin*, 317 U.S. 1 (1942), and the interstices of international law. *Quirin* dealt with a military commission trial of Nazi saboteurs, one of whom was a U.S. citizen. The Supreme

**The general rule of U.S. law has long been that civilian courts have jurisdiction over citizens detained by the military.**

Thus, unlawful combatants could face unmediated and unsupervised interrogation and be denied access to counsel, family, or virtually any nonmilitary personnel (with only the possible exception of the International Committee of the Red Cross). Further, Article 118 of the Convention requires that prisoners of war be “repatriated without delay after the cessation of active hostilities,” but the administration may well believe some of its captives are too dangerous ever to be released. So long as Al Qaeda and its supporters exist, will the U.S. government agree there has been, in the words of the Geneva Conventions, a “cessation of active hostilities”?

### The Role of the Judicial Branch

Textual constitutional authority for a meaningful judicial role begins with the Suspension Clause of the Constitution, which explicitly states that “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Courts have long construed this provision to maintain habeas review, even during times of declared war.

In *Quirin* the defendants had their status as “unlawful combatants” determined by a properly formed military commission expressly authorized by statute. The defendants had access to counsel throughout the proceedings and were ultimately able to seek judicial review of the findings of the commission. *Quirin* thus stands for the proposition that civilian courts should not, at the very least, categorically decline to review habeas cases where the government alleges that a person is an “unlawful” or “enemy” combatant.

The question of the proper scope of judicial review still remains open, however. Shortly after September 11, Congress authorized the president to use all necessary and appropriate force against “nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [or] harbored such organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The Fourth Circuit considered this authorization and the fact that the *Hamdi* case arose



in the context of foreign relations and national security, where a court’s deference to the political branches of our national government is considerable [and the president wields] delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.

The court concluded that the president was acting in this case with statutory authorization from Congress, and that judicial deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle.

In the context of long-term detention of noncitizens, however, the Supreme Court recently stated:

[T]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights. . . . The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

*Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).

Hamdi and Padilla, however, have not yet had the benefit of a status determination by any competent tribunal, military or otherwise.

### Rights of Unlawful Combatants

The fundamental questions at issue in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), could not be more profound. Litigation up to the end of 2002 has centered on the rights of unlawful combatants to counsel and release. The government has stated that “enemy combatants who are captured and detained on the battlefield in a foreign land” have “no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention, much less to meet with counsel in private, without military authorities present.”

On May 10, 2002, the federal public defender for the Eastern District of Virginia filed a habeas corpus petition challenging the government’s detention of Hamdi, naming Hamdi and himself as next friend as petitioners and seeking (1) “private and unmonitored communications” between the detainee and his

counsel; (2) an end to all interrogations; and (3) the release of Hamdi from "Respondents' unlawful custody." The district court held that Hamdi must be allowed to meet with his attorney because of "fundamental justice provided under the Constitution of the United States." (Although there is general agreement that the Sixth Amendment right to counsel would not apply to a formally uncharged "unlawful combatant.") The court specified that this meet-

government, in short, asserted that its determinations "are the first and final word." *Hamdi* at 283. Fortunately, the court declined to embrace so sweeping a proposition that any U.S. citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so, with no meaningful judicial review.

It seems the government has retreated from an extreme position, albeit

tasked with confronting assertions of executive authority within the United States that would have been almost unthinkable a short time ago. Perhaps our courts should recall the admonition in *Milligan*, written in the aftermath of the Civil War: "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

**Our judicial system must confront assertions of executive authority that would have been unthinkable a short time ago.**

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ing was to be private, with only Hamdi, the attorney, and the interpreter present; without military personnel; and free from listening or recording devices of any kind.

The United States quickly filed a motion for stay pending appeal of the district court's unmonitored-access order, and the Fourth Circuit granted the stay. In the meantime, Hamdi's father filed a separate petition for a writ of habeas corpus, although he did not request that counsel be granted unmonitored access to his son. The district court granted the petition in part, and the United States again appealed. At this point, the Fourth Circuit began to consider the hard constitutional questions presented by Hamdi's case and remanded for development of a fuller record.

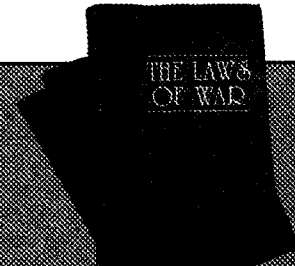
Hamdi's public defender has argued that "no evidence has been submitted to support" Hamdi's status as an enemy combatant and that Hamdi, as a U.S. citizen detained in the United States, is entitled to constitutional protections, including unmonitored access to counsel. The Fourth Circuit, without specifying a precise standard, decided the district court had not adequately addressed these fundamental questions. The court did, however, reject the invitation of the government to dismiss the petition in its entirety based on the argument that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." The

slightly, as the litigation has progressed. The government sought to file an ex parte supplemental declaration that, it said, would discuss "the military's determination to detain petitioner Hamdi as an enemy combatant." The district court, after hearing the government's evidence, found it insufficient to establish such status because it failed to substantiate the primary witness's authority to make such determinations for the executive, to specify the nature of Hamdi's alleged affiliation with the Taliban, or to include almost all of the specific evidence on which its conclusions rested. The district court then ordered the government to produce further information (for review *in camera*) to support the designation of Hamdi as "enemy combatant" and to explain why he must be held incommunicado.

Padilla's case, though not as far along as that of Hamdi, seems likely to raise similar issues. Most recently, on December 4, 2002, U.S. District Judge Michael Mukasey ruled that Padilla has the right to challenge his detention in court and, therefore, to consult with counsel. It appears certain that the government will appeal this ruling, as it did in Hamdi's case. The judge has not yet decided, however, whether there is enough evidence to support the administration's finding that Padilla is an "unlawful combatant."

#### Conclusion

In a recent case brought by the *Detroit Free Press* against John Ashcroft, 303 F.3d 681 (6th Cir. 2002), the court stated, "Democracies die behind closed doors." Our judicial system now seems



**Suggested Reading**

**Laws of War**

- Christine Gray, *International Law and the Use of Force* (2000).
- Michael Howard, George Anderson, and Mark K. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (1994).
- Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (2000).
- Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977).
- Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997).
- Kelly D. Askin and Doreen M. Koenig, eds., *Women and International Human Rights Law* (4 vols., 1999-2003).

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## Introduction

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The United States should adopt a policy of being a friend who shares its legendary resources and wealth with the 800 million persons in the global village who are chronically malnourished. The nation needs a new foreign policy that lives up to the ideals of human rights proclaimed in the United Nations Charter. The United States and all of the 190 nations of the earth pledged in Articles 55 and 56 of the UN Charter that they would help one another attain the newly recognized political and economic rights that now constitute the public morality of the world. This cannot be done so long as the United States relies almost exclusively on its military prowess for its foreign policy. Lawyers of America have to act as moral architects who will restrain the impetuous policies of the government that teach that violence, armed conflict, and military might can solve the moral, spiritual, and human problems that overwhelm much of humanity.

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## Debate over War Powers

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its arguments moved from the idea that Iraq was somehow behind the terrorist attacks; to a declaration that Iraq, Iran, and North Korea constituted an "Axis of Evil"; to a general justification based on Iraq's use of weapons of mass destruction (WMD) and its animosity to the United States; and finally to a moral imperative. Only after the Security Council took up the debate did the administration take a position that Iraq must be disarmed. Despite the shifting rationalizations, the administration's goal has remained the same: the United States will use all means necessary to

depose Saddam Hussein. And yet, despite the obvious lack of an instant and overwhelming threat, the administration claimed for nearly a year that it did not need congressional authorization for such a war. Moreover, even as the president signed the Joint Resolution, his press secretary maintained that the authorization was unnecessary.

Constitutionally, the president has the unilateral authority to commit U.S. troops to Iraq or another rogue state under the newly promulgated preemption policy of the National Security Strategy only if he can show that such an action constitutes response to a sudden or imminent attack. The administration has provided no evidence that Iraq had invaded or intends to invade the United States (i.e., as a sponsor of September 11), let alone that it will do so imminently. Absent such evidence, congressional approval is needed. This conclusion is based upon the following three points:

First, the scale of military action necessary to force a regime change in Iraq (or any relatively stable state) strongly suggests the action would be a "war" as defined by the Constitution. In the most recent judicial opinion on the subject, *Dellums v. Bush*, a federal district court found "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen . . . could be described as a 'war' within the meaning of [the War Powers Clause]." *Dellums v. Bush*, 725 F. Supp. 1141 (D.D.C. 1990). Congress would more likely acquiesce to unilateral executive decisions involving relatively small forces, but it cannot waive its constitutional war powers.

Deployment of 200,000 or more troops (or, even a smaller force deployment in conjunction with a massive aerial assault), as the Pentagon has proposed, is practically and qualitatively different from the scale of other recent U.S. military interventions, except for the Vietnam and Gulf Wars (for which the president specifically sought and received congressional authorization).

Second, invading Iraq to effect a regime change is clearly not an example of repelling a sudden or imminent attack. At least since 1993 when Iraq may have attempted to assassinate former President Bush, Saddam Hussein has neither used force against or direct-

ly threatened the United States or its vital interests (aside from attacks on allied aircraft patrolling the no-fly zones above Iraq). According to National Security Advisor Condoleezza Rice, any threat that Iraq poses is not of an immediate nature; if it were, the president already would have acted. Thus, characterizing an invasion of Iraq as repelling a sudden or imminent attack under these circumstances dangerously distorts the Founders' intent to limit the Executive's authority.

Third, time limitations help to clarify the boundary between executive and legislative war powers with regard to repelling "sudden attack." The president has the authority and obligation to repel sudden attacks because there is no time to deliberate, and an individual can act faster than Congress. A president who feared rejection of war plans might not want them subjected to congressional scrutiny, but that decision does not belong solely to the president.

### National Security Strategy

The administration has made clear that Iraq may not be its only target. On September 20, 2002, the president issued the National Security Strategy, which proclaims that in order to "forestall or prevent . . . hostile acts by our adversaries, the United States will, if necessary act preemptively. . . . [I]n an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle where dangers gather."

Under the doctrine of preemption, the administration claims the right to launch wars to prevent harm to U.S. interests: in essence claiming the United States may decide unilaterally to preemptively invade another country. This policy applies not only to Iraq but also to any state that helps put weapons of mass destruction in the hands of terrorists. Indeed, in light of recent information about North Korea's nuclear weapons program, this could well be the next point on the Axis of Evil to face a preemptive war.

### Conclusion

The issues remain timely and relevant: must the president seek congressional authorization to order preemptive

invasions of rogue states that may deliver weapons and aid to terrorists? What is the correct scope and allocation of war powers for preemptive invasions? House Joint Resolution 114 did not answer or reduce the urgency of these questions. Both history and the Constitution itself show that the president is not free to change the constitutionally mandated allocation of war powers.

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## Omarska Camp, Bosnia

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functioning more efficient or effective, or performing acts that advance the goals of the criminal enterprise.

### Persecution and Sexual Violence

Notably, the Chamber also stressed that any who knowingly participate in a significant way in a criminal enterprise are responsible not only for all crimes committed in furtherance of the enterprise but also for all crimes that were natural or foreseeable consequences of the enterprise, even if these other crimes are incidental or unplanned. Consequently, even though there was not evidence to suggest that most of the accused were aware of the rape crimes committed in Omarska camp, nonetheless these crimes were clearly foreseeable, as the Trial Chamber emphasized: "it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence."

The Trial Chamber recognized that war creates situations where average citizens get caught up in the violence or hatred, and people often commit crimes they would ordinarily never even have dreamed of committing.

Nonetheless, the Chamber emphasized, the presence of war or mass violence cannot shield or excuse perpetrators from prosecution if they knowingly participate in or facilitate criminal activity.

The Trial Chamber heard evidence that each accused was present during specific instances of abuses committed in the camp, and it also heard evidence that some of the accused occasionally attempted to assist a few of the detainees. Ultimately however, the court concluded that each of the accused had participated in a significant way in the joint criminal enterprise that functioned as Omarska camp, a camp where persecution of non-Serbs through various forms of physical, mental, and sexual violence was rampant. The accused who had not physically committed crimes had showed up for work everyday despite the daily murders, tortures, beatings, and other mistreatment and performed the tasks assigned to them efficiently, effectively, and without complaint. They had facilitated the commission of the crimes and allowed them to continue with ease and without disruption. All five accused were convicted of persecution as a crime against humanity for the assortment of evils committed in Omarska camp.

As to the rape crime charges against Radic, the Trial Chamber was convinced that he was involved in "the sexual harassment, humiliation, and violation of women" in Omarska camp. Several witnesses testified to his raping, attempting or threatening to rape, or groping them. The Trial Chamber found that the sexual violence constituted both rape and torture. The women suffered severe pain and suffering constituting torture, in part because the "fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radic." Despite this finding, because the indictment failed to indicate whether the sexual violence committed by Radic was different from the rapes charged as part of the persecution count, they were deemed subsumed by the persecution count; thus he was not convicted of rape and torture for these crimes as crimes against humanity. Radic was however convicted of torture as a war crime for the sexual violence he inflicted upon women in Omarska camp.

### Conclusion

The *Omarska Camp* case can be used to demonstrate that even during armed conflict, one cannot turn a blind eye to blatant criminal activity; if you know crimes are being committed and you perform acts that facilitate the commission of the crimes, you can be held criminally responsible. It can also be used to show that women are particularly vulnerable when detained in facilities guarded by armed men of an opposing side, and that all necessary and reasonable measures must be taken to provide protections against sexual violence to such women. Any planned or foreseeable crimes, including rape crimes, committed during the course of a joint criminal endeavor cause liability to attach to participants in the enterprise.

The degree of culpability, the amount of time spent in the camp, the position of the accused, and whether the men convicted physically perpetrated crimes was taken into account in sentencing. For the roles they played in facilitating or committing the crimes, Kvočka, Prcac, and Kos were given five- to seven-year prison terms; Radic received twenty years, and Zigic was sentenced to twenty-five years' imprisonment. This case is currently on appeal before the ICTY Appeals Chamber.

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**Author's Note:** The joint criminal enterprise theory developed in this case is a major component of the indictment against Slobodan Milošević. His trial is currently underway in The Hague, where the former head of state is charged with genocide, crimes against humanity, and war crimes for a number of crimes, including mass murder, torture, and rape, committed by Serb forces during conflicts in Bosnia, Croatia, and Kosovo. For more information on all cases, see the ICTY website at [www.un.org/icty](http://www.un.org/icty).