

B. INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

MARTHA MINOW, BETWEEN VENGEANCE
AND FORGIVENESS

(1998), at 25

To respond to mass atrocity with legal prosecutions is to embrace the rule of law. This common phrase combines several elements. First, there is a commitment to redress harms with the application of general, preexisting norms. Second, the rule of law calls for administration by a formal system itself committed to fairness and opportunities for individuals to be heard both in accusation and in defense. Further, a government proceeding under the rule of law aims to treat each individual person in light of particular, demonstrated evidence. In the Western liberal legal tradition, the rule of law also entails the presumption of innocence, litigation under the adversary system, and the ideal of a government by laws, rather than by persons. No one is above or outside the law, and no one should be legally condemned or sanctioned outside legal procedures. . . .

A trial in the aftermath of mass atrocity, then, should mark an effort between vengeance and forgiveness. It transfers the individuals' desires for revenge to the state or official bodies. The transfer cools vengeance into retribution, slows judgment with procedure, and interrupts, with documents, cross-examination, and the presumption of innocence, the vicious cycle of blame and feud. The trial itself steers clear of forgiveness, however. It announces a demand not only for accountability and acknowledgment of harms done, but also for unflinching punishment. At the end of the trial process, after facts are found and convictions are secured, there might be forgiveness of a legal sort: a suspended sentence, or executive pardon, or clemency in light of humanitarian concerns. Even then, the process has exacted time and agony from, and rendered a kind of punishment for defendants, while also accomplishing change in their relationships to prosecutors, witnesses, and viewing public. Reconciliation is not the goal of criminal trials except in the most abstract sense. We reconcile with the murderer by imagining he or she is responsible to the same rules and commands that govern all of us; we agree to sit in the same room and accord the defendant a chance to speak, and a chance to fight for his or her life. But reconstruction of a relationship, seeking to heal the accused, or indeed, healing the rest of the community, are not the goals in any direct sense. . . .

Justice Jackson's own defense of the prosecutorial effort at Nuremberg was more modest than the assertion of deterrence offered by others since. He called for modest aspirations especially because wars are usually started only in the confidence that they can be won. Therefore, he acknowledged, '[p]ersonal punishment, to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible'. Does the risk of punishment for human rights violations

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make the leaders of authoritarian regimes reluctant to surrender power in the first place? Individuals who commit atrocities on the scale of genocide are unlikely to behave as 'rational actors', deterred by the risk of punishment. Even if they were, it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far. A tribunal can be but one step in a process seeking to ensure peace, to make those in power responsible to law, and to condemn aggression.

THEODOR MERON, THE CASE FOR WAR CRIMES TRIALS IN YUGOSLAVIA

72 Foreign Affairs 122 (No. 3, 1993), at 123

... Except in the case of a total defeat or subjugation—for example, Germany after World War II—prosecutions of enemy personnel accused of war crimes have been both rare and difficult. National prosecutions have also been rare because of nationalistic, patriotic or propagandistic considerations.

The Versailles Treaty after World War I illustrates the case of a defeated but not wholly occupied state. Germany was obligated to hand over to the allies for trial about 900 persons accused of violating the laws of war. But even a weak and defeated country such as Germany was able to effectively resist compliance. The allies eventually agreed to trials by German national courts of a significantly reduced number of Germans. The sentences were both few and clement. The Versailles model proved to be clearly disappointing.

On the other hand, after the four principal victorious and occupying powers established an international military tribunal (IMT) following World War II, several thousand Nazi war criminals were tried either by national courts under Allied Control Council Law No. 10 or by various states under national decrees. Nuremberg's IMT, before which about 20 major offenders were tried, and the national courts functioned reasonably well; the Allies had supreme authority over Germany and thus could often find and arrest the accused, obtain evidence and make arrangements for extradition.

Despite the revolutionary development of human rights in the U.N. era, no attempts have been made to bring to justice such gross perpetrators of crimes against humanity or genocide as Pol Pot, Idi Amin or Saddam Hussein, perhaps because the atrocities in Cambodia, Uganda and Iraq (against the Kurds) did not occur in the context of international wars. Internal strife and even civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions.

The Persian Gulf War, as an international war, provided a classic environment for the vindication of the laws of war so grossly violated by Iraq by its plunder of Kuwait, its barbaric treatment of Kuwait's civilian population, its mistreatment of Kuwaiti and allied prisoners of war and during the sad chapter of the U.S. and other hostages. Although the Security Council had invoked the threat of prosecu-

tions of Iraqi violators of international humanitarian law, the ceasefire resolution did not contain a single word regarding criminal responsibility. Instead, the U.N. resolution promulgated a system of war reparations and established numerous obligations for Iraq in areas ranging from disarmament to boundary demarcation.

This result is not surprising, for the U.N. coalition's war objectives were limited, and there was an obvious tension between negotiating a ceasefire with Saddam Hussein and demanding his arrest and trial as a war criminal. A historic opportunity was missed to breathe new life into the critically important concept of individual criminal responsibility for the laws of war violations. At the very least, the Security Council should have issued a warning that Saddam and other responsible Iraqis would be subject to arrest and prosecution under the grave breaches provisions of the Geneva conventions whenever they set foot abroad.

...
Warnings of war crimes trials have been unsuccessful deterrents in past wars and may prove no more effective in the case of the former Yugoslavia. The precedent and moral considerations for the establishment of the tribunal require action in any event. Furthermore, several factors may yet strengthen deterrence. First, modern media ensures that all actors in the former Yugoslavia know of the steps being taken to establish the tribunal. Second, the tribunal will probably be established while the war is still being waged. Even the worst war criminals involved in the present conflict know that their countries will eventually want to emerge from isolation and be reintegrated into the international community. Moreover, they themselves will want to travel abroad. Normalization of relations and travel would depend on compliance with warrants of arrest. A successful tribunal for Yugoslavia will enhance deterrence in future cases; failure may doom it.

...
The establishment of an ad hoc tribunal should not stand alone, however, as a sole or adequate solution. The world has failed to prosecute those responsible for egregious violations of international humanitarian law and human rights in Uganda, Iraq and Cambodia. To avoid charges of Eurocentrism this ad hoc tribunal for the former Yugoslavia should be a step toward the creation of a permanent criminal tribunal with general jurisdiction. The drafting of a treaty on a permanent tribunal, on which work has begun by the U.N. International Law Commission, should be expedited, providing an opportunity to supplement the substantive development of international law by an institutional process.

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SECURITY COUNCIL RESOLUTIONS ON ESTABLISHMENT
OF AN INTERNATIONAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA

reprinted in 14 Hum. Rts. L. J. 197 (1993)

Resolution 808, 22 February 1993

...
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,

...
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 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 of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.

...
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 ... 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;

...
Resolution 827, 25 May 1993

...
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;

...

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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;

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;

REPORT OF THE SECRETARY-GENERAL UNDER SECURITY COUNCIL RESOLUTION 808

Doc. S/2504, 3 May 1993, reprinted in 14 Hum. Rts. L. J. 198 (1993)

I. The Legal Basis for the Establishment of the International Tribunal

18. Security Council resolution 808 . . . [does not] indicate how such an international tribunal is to be established or on what legal basis.

19. The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification. Such an approach . . . would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.

20. . . . [T]he treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.

21. . . . The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). The Secretary-General believes that there are other ways of involving the authority and prestige of the General Assembly in the establishment of the International Tribunal.

22. In the light of the disadvantages of the treaty approach in this particular case . . . the Secretary-General believes that the International Tribunal should be

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established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

25. . . . [T]he Security Council has already determined that the situation posed by continuing reports of widespread violations of international humanitarian law occurring in the former Yugoslavia constitutes a threat to international peace and security. The Council has also decided under Chapter VII of the Charter that all parties and others, concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provision of resolution 771 (1992), failing which it would need to take further measures under the Charter. Furthermore, the Council has repeatedly reaffirmed that all parties in the former Yugoslavia are bound to comply with the obligations under international humanitarian law. . . .

26. Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.

27. The Security Council has on various occasions adopted decisions under Chapter VII aimed at restoring and maintaining international peace and security, which have involved the establishment of subsidiary organs for a variety of purposes. Reference may be made in this regard to Security Council resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait.

28. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

29. It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

30. On the basis of the foregoing considerations, the Secretary-General proposes that the Security Council, acting under Chapter VII of the Charter establish the International Tribunal. . . .

II. Competence of the International Tribunal

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. . . .

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.

40. The corresponding article of the statute would read: [see Article 2 of the Statute, *infra*.]

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Law and Customs of War on Land and the Regulations annexed thereto comprise a second important area of

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conventional humanitarian international law which has become part of the body of international customary law.

44. These rules of customary law, as interpreted and applied by the Nürnberg Tribunal, provide the basis for the corresponding article of the statute which would read as follows: [see Article 3 of the Statute, *infra*.]

Genocide

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide . . . is today considered part of international customary law. . . .

46. The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute, which would read as follows: [see Article 4 of the Statute, *infra*.]

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

48. . . . In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

49. The corresponding article of the statute would read as follows: [see Article 5 of the Statute, *infra*.]

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

reprinted in 14 Hum. Rts. L. J. 211 (1993)

Article 1—Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provision of the present Statute.

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;

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- (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 persons 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.

Article 4—Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Article 5—Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible

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for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

...
Article 7—Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

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

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

...
Article 9—Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10—Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

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2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Article 18—Investigation and preparation of indictment

- 1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source . . .
- 2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigation . . .
- 3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
- 4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19—Review of the indictment

- 1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
- 2. Upon confirmation of an indictment, the judge may, at the request of the prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any orders as may be required for the conduct of the trial.

Article 20—Commencement and conduct of trial proceedings

- 1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21—Rights of the accused

All persons shall be equal before the International Tribunal.
In the determination of charges against him, the accused shall be entitled to a fair and public hearing. . . .

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3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [provisions for a fair trial omitted]

Article 22—Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 23—Judgement

1. The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgment shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24—Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

...

Article 25—Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

...

Article 27—Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned; subject to the supervision of the International Tribunal.

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Article 29—Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Article 32—Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

NOTE

The establishment of the International Criminal Tribunal for the Former Yugoslavia—the first such tribunal since the International Military Tribunal at Nuremberg, whose membership was indeed limited to the four major victorious powers—was an historic event holding considerable promise and inescapable risk. This Comment notes several aspects of the ICT and its work.

1. Observers have read different motivations into the Security Council's decision to establish the Tribunal. Some understand the ICT to be an essential response by the Council to the public outcry after exposure by the media of the outrages in the conflict—a minimum response, an effort to do 'something' that could prove to be significant and that was politically manageable (unlike the failures in efforts at negotiation or in discussions of types of intervention). Others understand the Tribunal to be a slave to conscience for the West, a way of responding to ethnic cleansing and the accompanying brutality without taking effective action. Whatever the motivations—and they were surely complex—the fact remains that a tribunal has been created, and the arguments for or against its establishment are now irrelevant.

2. The ICT is in a radically different situation from a court in a state observing fundamental principles of the Rule of Law in the sense that the state's executive and legislative branches comply with and execute court judgments. The Security Council has created an independent organ, as must be the case. Nonetheless, the ICT remains dependent on an uncertain and changing political context; it lacks the relative autonomy of a court in a state with a strong tradition of an independent judiciary. The Tribunal depends for funds on a UN General Assembly whose

members hold different views about it and who may judge its work differently. It must receive support from states and from the Security Council with respect to such basic matters as putting pressure on states to comply with its orders. There is no equivalent to a 'national tradition' for the Tribunal to draw on.

3. Beyond its fundamental mission of bringing a sense of justice and reconciliation to the combatants and civilians in the area, the ICTY (and the ICT for Rwanda, *infra*) possess an exceptional opportunity to develop international law in the field of individual criminal responsibility in an authoritative way. The Prosecutor and judges have confronted and will continue to confront numerous vexing issues, some of ancient lineage and some bred by the developments over the last half century in international humanitarian law including the crimes defined at Nuremberg.

QUESTIONS

1. In what respects does the Statute on its face reveal changes in the definitions of war crimes and crimes against humanity from the Nuremberg Charter? What is the direction of those changes?
2. Why do you suppose the Statute lacks a provision for crimes against peace similar to that at Nuremberg?

COMMENT ON BACKGROUND TO THE TADIC LITIGATION BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

The Broad Context:

The 1997 opinion of a Trial Chamber of the ICTY in *Prosecutor v. Tadic*, *infra*, was the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by this tribunal. This Comment sketches the context in which this and similar cases arose. For this sketch, it draws on the opinion of the Trial Chamber, which relied on expert witnesses called by the Prosecution and Defence. Where conflict emerged between witnesses, the Trial Chamber sought to resolve it 'by adopting appropriately neutral language.' It did not turn to any other sources. The area stressed by the opinion was northwestern Bosnia and Herzegovina (hereafter Bosnia), particularly Prijedor Opstina (the Prijedor district).

For centuries the population of Bosnia, more than any other republic of the former Yugoslavia, had been multi-ethnic: Serbs (Eastern Orthodox), Bosnian Muslims, and Croats (Roman Catholic), all indeed Slav peoples within a broader conception of ethnicity. In the nineteenth century, a concept of a state of the south

Slavs, with a common language and ethnic origin, had developed, together with the growth among Serbs of the concept of a Greater Serbia including within its borders all ethnic Serbs. The collapse of the Ottoman Empire (it withdrew from the former Yugoslavia by 1912) and the Austro-Hungarian Empire after the First World War led to the creation of such a state of the south Slavs, Yugoslavia. The Axis occupation of Yugoslavia during the Second World War left bitter memories: Croatia's status as a puppet state of the Axis powers, the massacres it committed against Serbs and others, the fighting that occurred between the various Serb factions including the partisans under Marshal Tito (as he became later known), the retaliations after the war ended. Much of the fighting and many atrocities against civilians took place in Bosnia.

Nonetheless until about 1991, the different ethnic groups in Bosnia lived 'happily enough together,' though particularly in rural areas such as those in the outlying parts of the Prijedor district the three populations tended to live separately. As the opinion stated:

Many witnesses speak of good inter-communal relations, of friendships across ethnic and coincident religious divides, of intermarriages and of generally harmonious relations. It is only subsequent events that may suggest that beneath that apparent harmony always lay buried bitter discord, which skilful propaganda readily brought to the surface, with terrible results.

Tito and his Communist regime acted sternly to suppress nationalist tendencies. The country consisted of six republics: Serbia (with its autonomous regions, Vojvodina and Kosovo), Slovenia, Croatia, Bosnia, Macedonia and Montenegro. Bosnia alone had no single majority ethnic grouping. During the latter part of Tito's rule from the mid-1960s on, there was a trend toward devolution of power to the republics, a trend which after Tito's death became useful to the overt resurgence of nationalist sentiment.

Economic and political crises developed simultaneously in the late 1980s. Slowly Yugoslavia fell apart as secessionist sentiment grew. A 1990 plebiscite in Slovenia voted overwhelmingly for independence from Yugoslavia, as did one in 1991 in Croatia. Slovenia effectively withdrew from Yugoslavia after brief fighting, but fierce hostilities broke out in Croatia. Both declared their independence, which was ultimately recognized by the European Union. The Bosnian Parliament declared Bosnia sovereign in 1991, and following a 1992 referendum, Bosnia declared itself independent. The United States and European Union states recognized the independence of the three new states in 1992.

With the encouragement and direction of Slobodan Milosevic, the Serbian president, the Serbian media stirred up nationalist feelings. With the break-up of Yugoslavia, the objectives of Serbia, including the Serbian-controlled JNA (Yugoslav People's Army) became the creation of a Serb-dominated western extension of Serbia to include Serb-dominated portions of Croatia and Bosnia, so as to form a new Yugoslavia with a substantially Serb population. But the large Muslim and Croat populations of Bosnia stood in the way. Hence it was necessary to adopt the practice of ethnic cleansing. The media propaganda intensified and began to accuse non-Serbs of plotting genocide against Serbs. Serbs were told that they had

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to protect themselves against a fundamentalist Muslim threat. The message from the government of Serbia was, as the tribunal's opinion put it, 'relentless,' 'cogent and potent.'

By the end of 1991, Serb autonomous regions in Bosnia had been formed. Serb leadership, the JNA and paramilitary organizations, and special police units began to establish physical and political control over municipalities, sometimes by rigged plebiscites. In March 1992, a Serb Republic of Bosnia (*Republika Srpska*) was formed as a distinct republic. The JNA, once a multi-ethnic national army although with a disproportionately Serb officer corps, became the instrument of policy of the new rump Federal Republic of Yugoslavia (consisting of Serbia and Montenegro). Gradually only ethnic Serbs were recruited into the armed forces. In late 1991, military units were formed in Serb-populated villages in Bosnia and supplied with weapons. Bosnian Serbs joined such distinct units as well as the JNA. More reliance came to be put on Serb paramilitary forces recruited in Serbia and Montenegro, and used to control non-Serb communities in Bosnia. Such forces acted in conjunction with the JNA.

By mid-1992 there were substantial international demands, including a Security Council resolution, that the JNA quit Bosnia. Serbia responded by ordering all non-Bosnian Serbs in the JNA to serve elsewhere, and by directing to Bosnia all Bosnian Serbs who served in the JNA elsewhere. The eventual new army of *Republika Srpska* retained close contacts with and received weapons and funding from the JNA and its successor in the Former Yugoslavia, the VJ (*Vojaska Jugoslavije*, Armed Forces of Yugoslavia).

As the Serb take-over of Serb-dominated areas continued, shelling and round-ups of non-Serbs intensified, leading to many civilian deaths and the flight of non-Serbs, who were forced to meet in stated assembly areas for expulsion from the area. The Prijedor district was important because of its location as part of a land corridor between Serb-dominated areas. Before the fighting and expulsions, Bosnia Muslims were a slight majority in the area. Careful Serbian planning preceded the take-over of the town of Prijedor, and the joining of Prijedor to an autonomous Serb region that was part of *Republika Srpska*. An attack on the nearby town of Kozarac, also in Prijedor municipality and with a concentrated Muslim population, led to great destruction and many deaths. The non-Serb population was effectively expelled. Severe restrictions were imposed on the movement of non-Serbs throughout the region, and forms of economic discrimination were instituted. Massive destruction of Muslim religious and cultural sites began. The population of Bosnian Muslims in the Prijedor district fell from about 50,000 to 6,000.

Thousands of Muslim and Croat civilians were confined to camps in Omarska and other locations, and were subjected to severe mistreatment. The Trial Chamber heard testimony from about 30 witnesses who survived the brutality, and who reported the frequent killings and torture. Up to 3,000 prisoners were at Omarska at any one time. They were held in very confined space, and forced to live in filth and stifling heat. They received one inadequate meal a day, if that. There was rampant sickness. Frequent interrogations included severe beatings and injuries. Prisoners were summoned to be attacked with sticks and iron bars with nails.

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Bodies were slashed with knives. Many prisoners who were summoned never returned. Women were routinely summoned at night and raped. Dead bodies were a not infrequent sight. Prisoners heard bursts of machine gun fire in one situation, and were called the next morning to load over 150 bodies on a truck.

Tadic

Tadic was born in 1955 in Kozarac, to a prominent Serb family. He joined the Serb nationalist party in 1990. After the ethnic cleansing of Kozarac was completed, he became a political leader of the town. The military tried several times to enlist him, and he was indeed arrested or threatened with arrest several times by the military police. In June 1993 he was mobilized and posted to the war zone. He managed to escape several times, and ultimately fled to Germany, where he was arrested by German authorities in 1994 on suspicion of having committed offences at the Omarska camp that constituted crimes under German law. The ICT then issued a formal request to Germany (as contemplated by the Statute and Rules of the ICT) for deferral of its intended prosecution and surrender of Tadic to the tribunal. Germany enacted the necessary legislation for his surrender (distinct from normal extradition to another state), and Tadic was transferred in 1995 to a UN detention unit in the Hague.

The indictment by the Prosecutor against Tadic and a co-accused charged them with 132 counts involving grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity. The defence filed a motion challenging the jurisdiction of the ICT. It disputed the legality of the establishment of the ICT by the Security Council, and challenged the tribunal's subject matter jurisdiction. The Trial Chamber dismissed the motion. An interlocutory appeal was brought. The opinion in that appeal follows.

PROSECUTOR V. TADIC

Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia,
1995 Case No. IT-94-I-AR72, 2 October 1995,
<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>

[At the outset of his criminal prosecution in the Trial Chamber, Tadic moved to dismiss the case on three grounds, including unlawful establishment of the ICT, and lack of jurisdiction *ratione materiae*. The Trial Chamber denied the motion, and defendant-appellant brought this interlocutory appeal on jurisdiction. The following excerpts from the opinion of the Appeals Chamber (Presiding Judge Cassese, and Judges Li, Deschênes, Abi-Saab, and Sidhwa) examine a few of Tadic's arguments.]

II. Unlawful Establishment of the International Tribunal

11. . . . International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour

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among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its 'judicial character'.

12. . . . The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. . . . This issue is preliminary to and conditions all other aspects of jurisdiction.

[In the Trial Chamber, the Prosecutor had argued that the ICT lacked authority to review its establishment by the Security Council, and that in any event the question whether the Council complied with the UN Charter when it created the ICT raised a non-justiciable 'political question'. The Trial Chamber agreed with this argument. The Appeals Chamber disagreed. It drew on the precedent of the UN Administrative Tribunal (UNAT) established by the General Assembly, whose governing Statute provided that, in event of a dispute as to whether the Tribunal had competence to decide in a given case, the Tribunal would decide the matter. This power of 'jurisdiction to determine its own jurisdiction' was part of the inherent jurisdiction of any judicial tribunal, and no text limiting this principle appears in the Statute of the ICT. Hence the ICT could examine the legality of its establishment by the Council solely for the purpose of determining its jurisdiction over the case before it. In so doing, it was not acting as a constitutional tribunal reviewing the acts of the Council against the Charter. The opinion continued:]

24. The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

. . . On this question, the International Court of Justice declared in its advisory opinion on Certain Expenses of the United Nations:

[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision (1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July)).

This dictum applies almost literally to the present case.

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[The opinion then quoted from the Trial Chamber's summary of Tadic's claims and arguments with respect to the the constitutionality of the establishment of the ICT.]

27. . . . These arguments . . . turn on the limits of the power of the Security Council under Chapter VII of the Charter. . . . [T]hey can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

28. Article 39 opens Chapter VII of the Charter . . . :

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. . . .

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security' . . . provides, more importantly, in paragraph 2, that:

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination that there exists one of the situations justifying the use of the 'exceptional powers' of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (i.e., opts not to use the exceptional powers but to

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continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security. The situations justifying resort to the powers provided for in Chapter VII are a 'threat to the peace', a 'breach of the peace' or an 'act of aggression.' While the 'act of aggression' is more amenable to a legal determination, the 'threat to the peace' is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a 'threat to the peace'. . . . [A]n armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words 'breach of the peace'. . . .

But even if it were considered merely as an 'internal armed conflict', it would still constitute a 'threat to the peace' according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts.

31. . . . A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion. . . . [Articles 41 and 42] leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

32. . . . Appellant has attacked the legality of this decision . . . on at least three grounds:

- (a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; . . .

- (b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
- (c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

33. ... Obviously, the establishment of the International Tribunal is not a measure under Article 42. ... Nor can it be considered a 'provisional measure' under Article 40. ...

34. Prima facie, the International Tribunal matches perfectly the description in Article 41 of 'measures not involving the use of force.' Appellant, however, has argued ... : before both the Trial Chamber and this Appeals Chamber, that:

... [I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures.

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. ... It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.' It is a negative definition.

[N]othing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. ...

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security. ...

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ('UNEF') in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish the ICTY. ...

... [The] Tribunal argued that human rights treaties require that a court be 'established by law', and that no 'law' established the ICTY.]

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43. ... It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the 'principal judicial organ' (see United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

... [T]he separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the 'representative' organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions.

IV. Lack of Subject-Matter Jurisdiction

[This third ground of appeal argued that Articles 2, 3 and 5 of the ICT's Statute, on which the charges against Tadic rested, were limited to crimes 'committed in the context of an international armed conflict', whereas even if proven, Tadic argued, the crimes were committed in the context of *internal* armed conflict. The Prosecutor argued in the alternative that the conflicts in the former Yugoslavia should be characterized as an international armed conflict, and that even if internal, Articles 3 and 5 of the Statute gave the Tribunal jurisdiction to adjudicate. He further argued that the Security Council, by adopting the Statute, had determined that the conflicts were international and thereby gave the ICT jurisdiction.]

...
77. On the basis of the foregoing [description of the development of the conflicts in the Former Yugoslavia over several years], we conclude that [they] have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime. ... Since customary international law no longer requires any

nexus between crimes against humanity and armed conflict, Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. . . . [A]lthough Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions [of the Geneva Conventions of 1949] suggest that it is limited to international armed conflicts. . . . It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. . . .

82. The above interpretation [of Article 2 of the ICT's Statute] is borne out by . . . the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the 'grave breaches' system of the Geneva Conventions, reference is made to 'international armed conflicts'.

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights which tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the amicus curiae brief submitted by the Government of the United States, where it is contended that 'the "grave breaches" provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character'.

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in opinio juris of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize. Other elements pointing in the same direction can be found in [citations to a national military manual, a national court decision, and an agreement among conflicting parties in Bosnia are omitted.]

[The Appeals Chamber specified four requirements for the application of Article 3, including that the violation must infringe 'a rule of international humanitarian law' and that the violation must be 'serious'. The opinion examined more closely the two remaining requirements: that the Prosecution show that customary international rules exist governing internal strife, and that violation of such rules may entail individual criminal responsibility.]

97. Since the 1930s, however, the [distinction between international and

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internal conflict] has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936–39, of the civil war in the Congo, in 1960–68, the Biafran conflict in Nigeria, 1967–70, the civil strife in Nicaragua, in 1981–1990 or El Salvador, 1980–1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. . . .

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions. . . .

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. . . . [T]he general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. . . .

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

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Individual criminal responsibility in internal armed conflict

128. ... [C]ommon Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. ...

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

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

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held 'individually responsible' for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).) ...

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. ...

Article 5

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require

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a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, . . . we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

[Either unanimously or by votes of 4-1, the Appeals Chamber rejected each of the three grounds on which the appeal was based and dismissed the appeal. The separate opinions are omitted.]

COMMENT ON THE TADIC CASE BEFORE THE TRIAL CHAMBER

After dismissal of the interlocutory appeal, the case continued in the Trial Chamber: *Prosecutor v. Tadic*, No. IT-94-1-T, Opinion and Judgment of 7 May 1997.⁴

Findings of Fact

The Trial Chamber considered separately each count of the indictment. It discussed the events alleged, the role of Tadic in those events, and the case for the defence. It then made findings of fact, leaving legal issues such as interpretation of the relevant articles of the Tribunal's Statute for the end of the opinion.

Paragraph 7 of the indictment, for example, concerned events in Omarska prison camp. The cruel conduct alleged in some of the many counts in this paragraph included:

A prisoner was frequently summoned for severe beatings. On one occasion, he was made to go on a hangar floor 'and there for up to half an hour was kicked and beaten by a group of soldiers armed with metal rods and metal cables. Then he was suspended upside down from an overhead gantry for some minutes.' As a result he suffered head fractures, a wasted hand, an injured spine and damage to his kidneys.

A prisoner was struck as he entered the hangar floor. Another prisoner saw him being slashed with a knife and having black liquid poured over him. A third witness saw him being beaten with an iron bar and falling to the floor. This prisoner was never seen again.

Two prisoners were forced to jump into an inspection pit with a third prisoner

⁴ <http://www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm>

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who was naked and bloody from beatings. One prisoner was ordered 'to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder'. One prisoner was made to bite the other's testicles until he bit one testicle off and spat it out. He was then told that he was free to leave.

The opinion reviewed in detail the testimony of each of the witnesses. The defence of the accused to these counts was principally by way of alibi. Tadic said that he never visited the Omarska camp and on the day in question was living in Prijedor and working as a traffic policeman.

In its findings of fact, the tribunal considered all elements of the defence position, and pointed out where prosecution witnesses were vague or seriously inconsistent with each other. Nevertheless, there was 'much evidence from many witnesses' that Tadic was indeed in the Omarska camp on the relevant day. The Trial Chamber was 'satisfied beyond reasonable doubt' that Tadic was among the group beating several of the named prisoners, and that he attacked another prisoner with a knife; and that Tadic was present on the hangar floor on the occasion of the sexual assault on and mutilation of a prisoner. But it 'is not satisfied that [Tadic] took any active part' in that assault and mutilation. Moreover, the Prosecution had 'failed to elicit clear and definitive evidence from witnesses' about the condition of four prisoners after they were assaulted, 'let alone that they died or that death resulted from the assault upon them. . . . There must be evidence to link injuries received to a resulting death'.

Paragraph 4 of the indictment covered events at different locations in the Prijedor district. Several counts alleged that Serb forces including Tadic destroyed and plundered Muslim and Croat residential areas, imprisoned thousands under brutal conditions, and deported or expelled the majority of Muslim and Croat residents of the district. Muslims and Croats inside and outside the camp were subjected to a 'campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse'. There was abundant testimony of systematic rape, often repetitive rape of the same victim, attended by great humiliation and cruelty, and sometimes followed by killing.

The Trial Chamber found beyond reasonable doubt that Tadic had participated in many of these events, and that he killed two Muslim policemen in Kozarac. All these events occurred 'within the context of an armed conflict'. Again the legal issues were reserved.

The Trial Chamber described the policy of discrimination instituted against non-Serbs, of which the camps were the most striking illustration. Those remaining were often required to wear white armbands and were continuously subject to beatings and terror tactics. Derogatory, denigrating curse words were common, and non-Serbs were forced to sing Serb nationalist songs. On various counts, the Trial Chamber found beyond a reasonable doubt that Tadic committed acts falling within this pattern of discrimination on religious and political grounds.

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Legal Issues Relating to the Offences Charged

Armed conflict. The Trial Chamber examined Articles 2, 3 and 5 of the Statute. It stressed that each of these articles, 'either by its terms or by virtue of the customary rules which it imports, proscribes certain acts when committed "within the context of" an "armed conflict"'. Article 2 (grave breaches) applied only to armed conflicts of an international character. Article 3 absorbed violations of rules contained in Article 3 common to the Geneva Conventions, applicable to armed conflicts in general, while Article 5 (crimes against humanity proscribed by customary law) required a context of armed conflict whether national or international in character. Hence it was necessary to show that an armed conflict existed at all relevant time in Bosnia and that Tadic's acts were committed within such a context. In the case of Article 2, it was necessary to find both an international conflict and that offences were committed against 'protected persons.'

The Trial Chamber drew on the test stated by the Appeals Chamber for 'armed conflict'—namely, a resort to armed force between states or protracted armed violence between a government and organized armed groups or between such groups. It observed that Tadic's acts were connected to the armed conflict in two ways: (1) acts during the take-over of Kozarac and other villages that took place within 'an ethnic war and the strategic aim of the *Republika Srpska* to create a purely Serbian State,' and (2) acts within the camps as part of an accepted policy toward prisoners that furthered the objective of ethnic cleansing by means of terror and killings.

Article 2. The opinion referred to the view of the Appeals Chamber that the Statute restricted prosecution of grave breaches to those committed against 'persons . . . protected under the provisions of the relevant Geneva Conventions.' The Fourth Geneva Convention dealing with civilian populations was specifically in point. Protected persons are those who find themselves in the hands of a party to the conflict or of an occupying power of which they are not nationals. That requirement led the Trial Chamber to inquire whether, and to what degree, the armed Serbian groups in Bosnia were under such control from the Federal Republic of Yugoslavia that acts of such groups could be imputed to Yugoslavia's government. That the JNA played a role of 'vital importance' in establishing, supplying, maintaining and staffing local Serbian military groups was in itself 'not enough'. It was necessary to show that the Yugoslavian government continued to exercise effective control over the operations of such groups.

The Trial Chamber concluded that there was 'no evidence' on which it could state that the armed forces of the *Republika Srpska* 'were anything more than mere allies, albeit highly dependent allies', of the Yugoslavian Government. Hence the non-Serb civilian population of Bosnia, although it enjoyed the protection of prohibitions contained in Common Article 3 of the Geneva Conventions which were applicable to all armed conflict, did not benefit from the grave breaches regime of Article 2. It could not be said that the civilian victims 'were at any relevant time in the hands of a party to the conflict of which they were not nationals.' Hence the Trial Chamber found Tadic not guilty with respect to all charges based on Article 2.

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Article 3. With respect to application of the rules of customary international humanitarian law expressed in Article 3, the Trial Chamber found that an armed conflict existed at all relevant times, that the victims were persons protected by that article, and that the offences charged were committed within that armed conflict.

Article 5. The opinion traced the development of the concept of crimes against humanity from Nuremberg to the present, and underscored such crimes' status as part of customary law. It repeated the statement in the decision of the Appeals Chamber that it was now a 'settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.' The conditions of applicability, as summarized in the opinion, included a nexus between the relevant acts and an armed conflict, that the acts be undertaken on a widespread and systematic basis in furtherance of a policy, that (in light of the Report of the Secretary General, p. 1147, *supra*) all relevant acts be undertaken on discriminatory grounds, and that the perpetrators have knowledge of the wider context in which their acts occur.

With respect to the need for discriminatory intent, the Trial Chamber described the law as 'quite mixed.' Many commentators and national courts had found the requirement of such intent to be inherent in crimes against humanity, necessary for the inhumane acts described in Article 5 as well as for persecution. The acts had to be taken against victims because of their membership in a group targeted by the perpetrator. The Tribunal's Statute did not include a requirement of discriminatory intent for all crimes against humanity, as did the Statute for the ICT for Rwanda. Nonetheless, in light of the Secretary General's report and comments of several Security Council members, the Trial Chamber adopted the requirement of discriminatory intent. It noted that the requirement was satisfied by the evidence that only the non-Serb part of the population was attacked precisely because they were non-Serb.

With respect to the requirement of a 'policy', the Trial Chamber rejected the notion at Nuremberg that the policy must be that of a state (as opposed to, for example, nonstate forces such as the organized groups of Bosnian Serbs). It observed that, as the 'first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War', the ICT 'is not bound by past doctrine but must apply customary international law as it stood at the time of the offences'.

After analyzing other components of the charges, such as the nature of the participation in events that was necessary for individual criminal liability, the Trial Chamber found Tadic guilty on numerous counts, but not guilty with respect to charges under Article 2 and with respect to several other counts.

NOTE

The Appeals Chamber in its Judgment of 15 July 1999⁵ affirmed the convictions of Tadic while reversing several holdings of the Trial Chamber, thereby rendering Tadic liable for additional crimes. Two illustrations follow.

⁵ <http://www.un.org/icty/tadic/appeal/judgement/main.htm>

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1. Contrary to the Trial Chamber, the Appeals Chamber concluded that Article 5 of the Statute did not require all crimes against humanity to have been committed with a discriminatory intent. Such an intent was necessary only for 'persecutions' provided for in Article 5(h). It stated:

285. ... [T]he interpretation of Article 5 in the light of its object and purpose bears out the above propositions. ... In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of 'crimes against humanity', thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. ... The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5(h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of 'class enemies' in the Soviet Union during the 1930s ... and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

2. Again contrary to the Trial Chamber, the Appeals Chamber concluded that, with respect to the provisions of Article 2 of the Statute on grave breaches, it had been proven that the victims were 'protected persons' under applicable provisions of the Fourth Geneva Convention. For Article 2 to be applicable, it was necessary to show that the conflict was international. The Appeals Chamber so found. It concluded that the many relationships between the army of the FRY and the Bosnian Serb forces amounted to one force under the direction of the FRY rather than two separate armies in any genuine sense. With respect to the issue of 'protected persons,' the Appeals Chamber stated:

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as de facto organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals.

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches ...

Sentencing of Tadic raised a range of issues that led to two judgments of the

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Trial Chamber and a judgment of the Appeals Chamber in 2000⁶ which put the long litigation to an end.

QUESTIONS

1. What are the significant interpretations or changes in the bodies of law relevant to these international crimes that these opinions introduce? Do they have a common characteristic? From these excerpts, how do you understand these opinions' methodological approaches to the ongoing development of customary international law?
2. Are you persuaded by the opinion on the interlocutory appeal? Or would you have preferred (a) the approach of the Trial Chamber to the issue of jurisdiction, or (b) a less deferential and more independent approach of the Appeals Chamber?
3. 'It is clear that Tadic, a mere foot soldier in these sordid events, was selected for prosecution because the Tribunal did not have custody of a higher ranking, more significant figure. There were hundreds or thousands of people like Tadic, starting with his close companions in perpetrating the horrors described in the opinion. What is the point of convicting one among them in what seems to be a mere lottery?' Comment.
4. 'It is wrong to imagine the prosecution of Tadic as serving the goal of individualizing guilt, so as to overcome notions of collective guilt and allow peoples like the Serbs to get on with their lives after the war. Tadic is part of a system. His guilt is deeply linked to the guilt of the larger bloody scheme in which he played a role. The opinion indicts an entire leadership and those who executed its plans. These are not the isolated, deviant crimes of murder or torture or rape that occur within all countries and that are sensibly punished as such.' Comment.
5. Observers have described the aims of the international criminal tribunals in ways that evoke traditional notions of the aims of the criminal law generally, but that also address specific characteristics of this conflict. Consider:
 - a. *Deterrence*. Whom is the Tribunal attempting to deter: the present leaders in this conflict, or those who might instigate and commit crimes in future conflicts? Should different strategies be at work to achieve one or the other goal? Who indeed can be deterred in an ethnic conflict stirring such deep hatreds and cruel actions—only the leaders, or also the foot soldiers who commit many of the atrocities? Is a court the most effective instrument of deterrence, or does the Tribunal play this role because of failure of other means of addressing the conflict?
 - b. *Punishment-retribution*. How can the Tribunal best serve this function? Is symbolic justice through the conviction and imprisonment of a small number of people (in relation to the number of people committing the international crimes defined by the Statute) sufficient to create a broad sense of justice among the conflict's victims? What other means (shy of forceful intervention) are available to help build this sense of justice?

⁶ <http://www.un.org/icty/tadic/appeal/judgement/tad-asj000126e.htm>

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c. *Reconciliation*, long-term peace and stability. Can reconciliation and a 'true' lasting peace be achieved partly through the work of the Tribunal? What role are convictions and imprisonment likely to play in this process of reconciliation in comparison with, for example, a Serbian-Bosnian settlement on issues like territorial control and resettlement, about an international agreement on compensation of victims that may permit them to get on with their lives, and so on?

6. 'Some have argued that the ICTY serves no important function in a context where the territorial aims of the aggressors have in good part been met, indeed to some extent ratified by the Dayton accords. Consider how different were the trials at Nuremberg, which followed the total defeat of Germany and left it with none of its spoils of war. Nuremberg ratified a victory in legal terms. The ICTY follows a defeat.⁷ But this is a mistaken argument. To have rejected the idea of an international criminal tribunal in the case of the Former Yugoslavia would have been to acquiesce in the argument of those who understand Nuremberg only as 'victor's law.' It was essential to make the point through the ICTY that international standards (at least of *jus in bello* if not *jus ad bellum*) must be vindicated independently of whether there was or would ever be a military victory to roll back the illegal gains. International law was more than an afterthought at Nuremberg after the crucial military victory was won. It made its independent point. This Tribunal too provides a golden opportunity for international law to demonstrate its autonomy from international military force as a means of protecting human rights. The differences between the two situations are irrelevant.' Comment.

7. How do you understand the savage cruelty shown by the Serbian captors to their prisoners? (The same question can be put to many parties to ethnic and other conflicts (such as the Rwandan conflict), as well as to members of majority or powerful groups that behave in physically cruel ways to the despised and dehumanized minority or powerless groups.) Is encouragement or condoning of such behaviour by those in charge meant to serve a purpose, like ethnic cleansing? Meant to humiliate? Does the context of weapons and force and killing encourage release of this base side of human nature, in the sense that violence dissolves all bonds and restraints? Is such mass conduct in the context of mass violence deterrable?

JOSÉ ALVAREZ, CRIMES OF STATES/CRIMES OF HATE: LESSONS FROM RWANDA

24 Yale J. Int'l L. 365 (1999), at 443

Attention to the ethnic divisions that underlie the 1994 genocide and the continuing violence in that country should make us skeptical as well about how the ICTR handles evidentiary issues. The difficulties in this regard have been raised most clearly in the ICTY's Tadic case. . . . [T]he vast bulk of the evidence in the Tadic case came not in the form of physical evidence, such as contemporaneous written records of atrocities (as at Nuremberg), but rather through the oral testimony of self-interested, live witnesses who replicated inside the courtroom the ethnic

⁷ Compare the argument of Kenneth Anderson in 'Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials', 7 Harv. Hum. Rts. J. 281 (1994).

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divides of the society at large. In the Tadic case, there were only Serbian witnesses for the defense, while the prosecution relied entirely on non-Serbs (mostly Muslim victims). For Tadic's judges, the situation posed considerable difficulties. How does a tribunal generate confidence in its neutral conclusions when the primary source for these must be conflicting testimony that is subject to the challenge that Muslim witnesses will say anything against those who they believe are at war with them and that Serbian witnesses will do the same against non-Serbs? How does a tribunal's treatment of the inevitable conflict between the biases of Serb and non-Serb witnesses avoid replicating among trial observers in the region the prevalent ethnic and religious tensions that gave rise to the Balkan conflict in the first place?

Tadic's judges reacted to these challenges in the time-honored fashion of judges in liberal states—they pretended such strains did not exist. . . . The Tadic judges' curt response to the politically explosive defense claim that all the Muslim witnesses were inherently biased because they would say anything against their perceived oppressors, is revealing:

The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person [of another] creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred . . . can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in chief.

Similarly, that chamber generally avoided casting aspersions on the veracity of defense witnesses due to their pro-Serb sympathies. Occasionally, however, the judgment indicates, without comment, certain background facts with respect to such witnesses, presumably letting these speak for themselves. The Tadic chamber papered over these difficult issues presumably to elicit confidence in the ICTY's neutrality.

Did the Tadic judges' efforts to generate confidence in their verdict succeed among significant segments of local communities within the former Yugoslavia? While it is difficult to judge success in this regard and impossible to predict how perceptions of success are likely to change over time, there is reason for skepticism. The immediate reaction to the Tadic judgment remained strongly divided along ethnic lines within the former Yugoslavia. Local governments in the Balkans remain highly suspicious, incredulous, skeptical, or, in some cases, even hostile towards international trials.

QUESTIONS

How do you assess Alvarez's criticism of the tribunal's handling of this issues of credibility, or indeed of the issue of deep ethnic conflict? What were the alternative

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approaches to enhance the Tribunal's claim to neutrality? Would that claim have been stronger if prosecutions were before national courts?

NOTE

By Resolution 955 (1994), the Security Council established an International Tribunal for Rwanda to prosecute persons 'responsible for genocide and other serious violations of international humanitarian law' committed principally in that country in 1994. The new tribunal (ICTR) had the same Prosecutor and appellate judges as the ICTY, but had separate trial judges.

The preamble to the resolution stated that the Council was convinced that prosecution of those responsible for serious violations 'would contribute to the process of national reconciliation and to the restoration and maintenance of peace', and would contribute to 'ensuring that such violations . . . are halted and effectively redressed'.

The Council, 'acting under Chapter VII of the Charter', adopted the annexed Statute of the ICTR, excerpts from which appear below.

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA reprinted in 33 I.L.M. 1590 (1994)

Article 1—Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2—Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article

2. [The definition of genocide is identical with Article 4 of the Statute of the ICTY, p. 1151, *supra*.]

...

Article 3—Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

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- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

Article 4—Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.

[Many articles in the ICTR Statute are identical with the equivalent articles in the ICTY Statute, p. 1150, *supra*, including articles on personal jurisdiction, individual criminal responsibility, concurrent jurisdiction, non-*bis-in-idem*, investigation and preparation of indictment, review of the indictment, commencement and conduct of trial proceedings, rights of the accused, protection of victims and witnesses, judgment, penalties, appellate proceedings, enforcement of sentences, cooperation and judicial assistance, and expenses of the tribunal.]

NOTE

One of the important novel features of the indictments and opinions of the ICTY and ICTR has been the strong attention to sexual crimes, particularly systematic sexual violence against women. Mass rape and other organized forms of sexual violence and humiliation have been frequent, and often used as instruments of

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fear, shame, and ethnic cleansing. Rape itself, long unmentioned in definitions of crimes in the humanitarian law of war, is included in the definition of several crimes in the two statutes. Note the attention to sexual violence against women in the *Akayesu* opinion below.

PROSECUTOR V. AKAYESU

Trial Chamber, International Criminal Tribunal for Rwanda, 1998

Case No. ICTR-96-4-T, www.icttr.org/ENGLISH/judgements/

AKAYESU/akay001.htm

[The indictment against Akayesu a Hutu, charged him with genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions, punishable under Articles 2–4 of the Statute of the ICT for Rwanda. All alleged acts took place in Rwanda during 1994. The country is divided into 11 prefectures, which are subdivided into communes placed under the authority of bourgmestres. Akayesu had served as bourgmestre, ‘the most powerful figure in the commune,’ of the Taba commune from April 1993 to June 1994. He was charged in that office with the maintenance of public order and had exclusive control over the communal police. Subject to the prefect’s authority, he was responsible for the execution of the laws and administration of justice.

There were 15 counts in the indictment. Some illustrative charges follow: (1) At least 2,000 Tutsis were killed in Taba from April to June 1994. Killings were so open and widespread that the defendant ‘must have known about them,’ but despite his authority and responsibility, he never attempted to prevent the killings. (2) Hundreds of displaced Tutsi civilians sought refuge at the bureau communal. Females among them were regularly taken by the armed local militia and subjected to sexual violence, including multiple rapes. Civilians were frequently murdered on or near the communal premises. Akayesu knew of these events and at times was present during their commission. That presence and his failure to attempt to prevent ‘encouraged these activities.’ (3) At meetings, Akayesu urged those present to kill accomplices of Tutsis, and on one occasion named three Tutsis who had to be killed. Two killings soon followed. (4) Akayesu ordered and participated in the killing of three brothers, and took eight detained men from the bureau communal and ordered militia members to kill them. (5) He ordered local people to kill intellectuals and influential people. On his instructions, five secondary school teachers were killed.

During the 43 trial days, the Prosecutor called 28 witnesses and the defence called 13 witnesses. All eye-witnesses requiring protection benefited from measures guaranteeing the confidentiality of their testimony. Pseudonyms and screens shielded such witnesses’ identities from the public, but not from the accused and his counsel.

The opinion notes that Akayesu, before the events in question, was a broadly liked and respected member of the community who seemed to be doing his job well. A witness said that a bourgmestre is considered the ‘parent’ of the entire population ‘whose every order would be respected.’ Another witness stated that ‘the people could not disobey the orders of the bourgmestre.’

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As bourgmestre, Akayesu had ultimate authority over the communal police, a civilian police not subject to the military penal code but to administrative law sanctions. His sanctions against the police reached no further than reprimand or suspension. He also had control over any gendarmes (part of a military force) put at his disposal. Nonetheless, it was 'far from clear' that in such circumstances Akayesu would have 'command authority over a military force.'

The Trial Chamber found it 'necessary to say, however briefly, something about the history of Rwanda, beginning from the pre-colonial period up to 1994'. Prior to and during colonial rule (first under Germany, and from 1917 until independence under Belgium), Rwanda was an advanced monarchy ruled by the monarch's representatives drawn from the Tutsi nobility. The demarcation line between Hutus and Tutsis was then blurred, and clear ethnic categories had not developed. Colonizers favoured the Tutsis, who were lighter colour, taller, looked more like them, 'and were, therefore, more intelligent and better equipped to govern.' In the 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three 'ethnic' groups, with the Hutu composing about 84 per cent of the population and the Tutsi about 15 per cent. Mandatory identity cards noted ethnicity. The Tutsi were more willing to be converted to Christianity; hence the church too supported their monopoly of power. Alison Desforges, an expert witness, testified at the trial:

The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time. . . . But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. . . . [R]eality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorization which was probably more fixed, and not completely appropriate to the scene. . . . The categorisation imposed at that time [by the Belgians] is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not in their daily lives have to take cognizance of that. . . . [T]his division into three ethnic groups became an absolute reality.

When the Tutsi led campaigns for independence, the allegiance of the colonizer shifted to the Hutu. In the 1950s, elections were held and political parties were formed. The Hutu held a clear majority in voting power. Violence broke out between Hutu and Tutsi. Independence was attained in 1962. In 1975, a one-party system was instituted under (Hutu) President Habyarimana, whose policies became increasingly anti-Tutsi through discriminatory quota systems and other methods. In 1991, following violence and growing pressures, Habyarimana accepted a multi-party system.

Many Tutsi in exile formed a political organization and a military wing, the Rwandan Patriotic Army (RPA). Their aim was to return to Rwanda. Violence, negotiations and accords led to the participation of the Tutsi political organization (RPF) in the government institutions. Hard-line Hutu formed a radical political party, more extremist than Habyarimana. There were growing extremist calls for elimination of the Tutsi.

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The Arusha accords between the government and the RPF in 1993 brought temporary relief from the threat of war. The climate worsened with assassinations, and the accords were denounced. Habyarimana died in an air crash, of unknown cause, in April 1994. The Rwandan army, Presidential Guard and militia immediately started killing Tutsi, as well as Hutu who were sympathetic to the Arusha accords and to power-sharing between Tutsi and Hutu. Belgian soldiers and a small UN peacekeeping force were withdrawn from the country. RPF troops resumed open war against Rwandan armed forces. The killing campaign against the Tutsi reached its zenith in a matter of weeks, and continued to July. The estimated dead in the conflict at that time, overwhelmingly Tutsi, ranged from 500,000 to 1,000,000.

The following excerpts from the opinion are taken from the text of the above-referenced website in 1999. Subsequent changes may have been made. The excerpts (Presiding Judge Kama, Judge Aspegren and Judge Pillay) begin with a discussion of the charge of genocide.]

As regards the massacres which took place in Rwanda between April and July 1994, . . . the question before this Chamber is whether they constitute genocide. Indeed, it was felt in some quarters that the tragic events which took place in Rwanda were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF).

. . . The second requirement is that these killings and serious bodily harm. . . be committed with the intent to destroy, in whole or in part, a particular group targeted as such. In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. . . . In this connection, Alison Desforges, an expert witness, . . . stated as follows:

On the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that—as they said on certain occasions—their children, later on, would not know what a Tutsi looked like, unless they referred to history books.

. . . Dr. Zachariah also testified that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. . . . [E]ven newborn babies were not spared. Even pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin. . . .

In light of the foregoing, it is now appropriate for the Chamber to consider the issue of specific intent that is required for genocide (*mens rea* or *dolus specialis*). In other words, it should be established that the above-mentioned acts were targeted at a particular group as such. In this respect also, many consistent and reliable testimonies . . . agree on the fact that it was the Tutsi as members of an ethnic

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group [who were targeted during the massacres.] . . . [I]n the context of the period in question, [the Hutu and Tutsi] were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups. . . . [T]he Tutsi were not the sole victims of massacres. Many Hutu were also killed, though not because they were Hutu, but simply because they were, for one reason or another, viewed as having sided with the Tutsi.

. . . [T]he propaganda campaign conducted before and during the tragedy by the audiovisual media . . . or the print media, like the *Kangura* . . . overtly called for the killing of Tutsi, who were considered as the accomplices of the RPF and accused of plotting to take over the power lost during the revolution of 1959. . . . Clearly, the victims were not chosen as individuals but, indeed, because they belonged to said group. . . . Consequently, the Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the Chamber, this genocide appears to have been meticulously organized. . . .

. . . [A]s to whether the tragic events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, the Chamber replies in the negative, since it holds that the genocide did indeed take place against the Tutsi group, alongside the conflict. The execution of this genocide was probably facilitated by the conflict, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi. . . . The Chamber's opinion is that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the 'Hutu-power', that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses. . . .

. . . [T]he fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence [the Tribunal] in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor. . . .

4. *Evidentiary matters*

. . . The Chamber notes that it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with Rule 89 of its Rules of Procedure and Evidence, the Chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.

[The Chamber discussed a number of issues, including whether there was need to have corroboration by other persons of testimony of a single witness before that testimony could be relied on, the problem of delay in the collection of evidence,

and the impact of trauma on the testimony of witnesses. It turned to the problem of interpretation from Kinyarwanda, in which most witnesses testified, into French and English, and stressed the great difficulties of translation. The problem arose in pre-trial interviews and during court proceedings, and interpretation often moved from Kinyarwanda into French and then into English. Experts pointed out that certain words relevant to the prosecution had to be contextualized in time and place, for their meaning changed among groups and in different historical periods.]

The terms *gusambanya*, *kurungora*, *kuryamana* and *gufata ku ngufu* were used interchangeably by witnesses and translated by the interpreters as 'rape'. The Chamber has consulted its official trial interpreters to gain a precise understanding of these words and how they have been interpreted. . . . The word *kuryamana* means 'to share a bed' or 'to have sexual intercourse', depending on the context. It seems similar to the colloquial usage in English and in French of the term 'to sleep with'. The term *gufata ku ngufu* means 'to take (anything) by force' and also 'to rape'. The context in which these terms are used is critical to an understanding of their meaning and their translation. . . . Having reviewed in detail with the official trial interpreters the references to 'rape' in the transcript, the Chamber is satisfied that the Kinyarwanda expressions have been accurately translated.

5. Factual findings

[The Chamber noted that in addition to testimony of witnesses, it would take 'judicial notice' of UN reports extensively documenting the massacres of 1994. Its listing included reports of a Commission of Experts established by a Security Council resolution, of a special rapporteur of the Secretary General, and of the High Commissioner for Human Rights. Note that the 'factual findings' *infra* are relevant to determining whether the conditions stated in several articles of the ICTR Statute were here met.]

Paragraph 8 of the indictment alleges that the acts set forth in each paragraph of the indictment charging crimes against humanity, i.e. paragraphs 12–24, 'were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds'. . . . For [reasons given in earlier parts of the opinion], the Chamber finds beyond a reasonable doubt that a widespread and systematic attack began in April 1994 in Rwanda, targeting the civilian Tutsi population and that the acts referred to in paragraphs 12–24 of the indictment were acts which formed part of this widespread and systematic attack.

Paragraph 9 of the indictment states, 'At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda'. The Chamber notes the testimony of General Dallaire, a witness called by the Defence, that the FAR was and the RPF were 'two armies' engaged in hostilities. . . . Based on the evidence presented, the Chamber finds beyond a reasonable doubt that armed conflict existed in Rwanda during the events alleged in the indictment, and that the RPF was an organised armed group, under responsible command, which exercised control over territory in Rwanda and was able to carry out sustained and concerted military operations. Paragraph 10 of the indictment reads, 'The victims referred to in

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this indictment were, at all relevant times, persons not taking an active part in the hostilities' . . . [T]he Chamber finds beyond a reasonable doubt that all the other victims referred to in the indictment were civilians, not taking any active part in the hostilities that prevailed in 1994. . . .

... The Chamber now considers paragraph 12 of the indictment, which alleges the responsibility of the Accused, his knowledge of the killings which took place in Taba between 7 April and the end of June 1994, and his failure to attempt to prevent these killings or to call for assistance from regional or national authorities. . . .

... The Chamber finds that the allegations set forth in paragraph 12 cannot be fully established. The Accused did take action between 7 April and 18 April to protect the citizens of his commune. It appears that he did also request assistance from national authorities at the meeting on 18 April 1994. . . . Nevertheless, the Chamber finds beyond a reasonable doubt that the conduct of the Accused changed after 18 April 1994 and that after this date the Accused did not attempt to prevent the killing of Tutsi in the commune of Taba. In fact, there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings. . . .

... [M]any witnesses, including Witnesses E, W, PP, V and G, testified to the collaboration of the Accused with the Interahamwe in Taba after this date. . . . The Accused contends that he was overwhelmed. Witness DAX and Witness DBB, both witnesses for the Defence, testified that the Interahamwe threatened to kill the Accused if he did not cooperate with them. The Accused testified that he was coerced by the Interahamwe. . . . The Chamber recognises the difficulties a bourgmestre encountered in attempting to save lives of Tutsi in the period in question. Prosecution witness R, who was the bourgmestre of another commune . . . averred that a bourgmestre could do nothing openly to combat the killings after that date or he would risk being killed; what little he could do had to be done clandestinely. The Defence case is that this is precisely what the accused did.

The Accused contends that he was subject to coercion, but the Chamber finds this contention greatly inconsistent with a substantial amount of concordant testimony from other witnesses. . . . [T]he Chamber does not accept the testimony of the Accused regarding his conduct after 18 April, and finds beyond a reasonable doubt that he did not attempt to prevent killings of Tutsi after this date. Whether he had the power to do so is not at issue, as he never even tried and as there is evidence establishing beyond a reasonable doubt that he consciously chose the course of collaboration with violence against Tutsi rather than shielding them from it.

Paragraph 18 alleges that defendant took steps to stop the flight of three others, and then ordered and participated in their killing. After reciting the detailed testimony of witnesses, the Chamber pointed out similarities or

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contradictions among the narrative accounts offered. It then made its findings of fact.]

... The brothers of Karangwa tried to flee, and the police officers blew their whistles and said stop those 'Inyenzi' [a pejorative term] from running away. A mob of people took up the call, chased after the brothers and brought them back. The brothers were bleeding from open wounds and their clothing was torn. They were made to sit on the ground about 2 metres from the entrance to the courtyard. The bourgmestre of Musambira asked the Accused if he knew the men and what should be done with them. The Accused said they came from his commune and said we need to finish these people off—they need to be shot. All three brothers were then shot dead at close range in the back of their heads by two policemen from Musambira, in the Accused's presence. ...

[The Chamber continued in its examination of each count of the indictment and, after presenting testimony of witnesses, made findings of fact. Several counts dealt with sexual violence. Some of the Chamber's findings follow.]

... [T]he Chamber finds that there is sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba. Witness H, Witness JJ, Witness OO, and Witness NN all testified that they themselves were raped, and all, with the exception of Witness OO, testified that they witnessed other girls and women being raped. Witness J, Witness KK and Witness PP also testified that they witnessed other girls and women being raped in the commune of Taba. Hundreds of Tutsi, mostly women and children, sought refuge at the bureau communal during this period and many rapes took place on or near the premises of the bureau communal. ... Witness JJ was also raped repeatedly on two separate occasions in the cultural center on the premises of the bureau communal, once in a group of fifteen girls and women and once in a group of ten girls and women. Witness KK saw women and girls being selected and taken by the Interahamwe to the cultural center to be raped. ... Witness PP saw three women being raped at Kinihira, the killing site near the bureau communal, and Witness NN found her younger sister, dying, after she had been raped at the bureau communal. ...

Witness KK and Witness PP also described other acts of sexual violence which took place on or near the premises of the bureau communal—the forced undressing and public humiliation of girls and women. The Chamber notes that much of the sexual violence took place in front of large numbers of people, and that all of it was directed against Tutsi women. ...

There is no suggestion in any of the evidence that the Accused or any communal policemen perpetrated rape. ... On the basis of the evidence set forth herein, the Chamber finds beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau

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communal and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence or to punish the perpetrators of sexual violence. In fact there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence. . . . On the two occasions Witness JJ was brought to the cultural center of the bureau communal to be raped, she and the group of girls and women with her were taken past the Accused, on the way. On the first occasion he was looking at them, and on the second occasion he was standing at the entrance to the cultural center. On this second occasion, he said, 'Never ask me again what a Tutsi woman tastes like'.

[Part 6 of the opinion turned to legal issues. The Chamber first addressed the problem of cumulative charges relating to the same sets of facts—for example, genocide, complicity in genocide, and crimes against humanity. It stated criteria for deciding when it was acceptable to convict the accused of two offenses in relation to the same set of facts. It then considered some issues of individual criminal responsibility as set forth in Article 6 of the Tribunal's Statute—for example, the necessary kind and degree of participation in the described events that ran a range from planning and incitement to ordering, or aiding and abetting. It examined the liability of civilians as well as state officials, and the complex questions of delegation of state authority to others. The opinion next turned to the charges of genocide and crimes against humanity. A few of its observations follow.]

The Chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent. As to whether the form of individual criminal responsibility referred to Article 6(3) of the Statute applies to persons in positions of both military and civilian authority, it should be noted that during the Tokyo trials, certain civilian authorities were convicted of war crimes under this principle. . . .

The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power or authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.

[Genocide]

The Genocide Convention is undeniably considered part of customary international law Thus, punishment of the crime of genocide did exist in

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Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime. . . .

... The Chamber holds that the expression [in the Statute's definition of genocide] deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. . . . [The methods include for purposes of Article 2(2)(c) of the Statute] subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

... For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

... [Crimes against Humanity] . . .

The Chamber considers that Article 3 of the Statute confers on the Chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. . . .

The Chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both. . . .

... The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause. Note that this definition assimilates the definition of 'civilian' to the categories of person protected by Common Article 3 of the Geneva Conventions; an assimilation which would not appear to be problematic. . . .

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The Statute stipulates that inhumane acts committed against the civilian population must be committed on 'national, political, ethnic, racial or religious grounds.' Discrimination on the basis of a person's political ideology satisfies the requirement of 'political' grounds as envisaged in Article 3 of the Statute. . . . The perpetrator must have the requisite intent for the commission of crimes against humanity. . . .

Article 3 of the Statute sets out various acts that constitute crimes against humanity . . . The Chamber notes that the accused is indicted for murder, extermination, torture, rape and other acts that constitute inhumane acts. The Chamber in interpreting Article 3 of the Statute, shall focus its discussion on these acts only.

[Rape]

. . . While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed (a) as part of a wide spread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

[With respect to Article 4 of the Statute—violations of Common Article 3 of the Geneva Conventions and of the 1997 Additional Protocol No. 2—the Chamber had concluded that there was in Rwanda an armed conflict not of an international character between the government of Rwanda and the RPF. Thus one requirement of Article 4 was met. But to hold the defendant criminally responsible under that article, the Prosecutor had to prove that he acted for the government or for the RPF. The Chamber concluded that it had not been proved beyond a reasonable doubt that acts of the defendant were committed in conjunction with an armed conflict, or that he was a member of the armed forces or expected as a public official to support the war effort. Hence Akayesu was not criminally liable under Article 4.]

[Sexual violence]

. . . In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define

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rape, as there is no commonly accepted definition of the term in international law. . . .

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of 'other inhumane acts', set forth in Article 3(i) of the Tribunal's Statute, 'outrages upon personal dignity', set forth in Article 4(e) of the Statute, and 'serious bodily or mental harm', set forth in Article 2(2)(b) of the Statute.

The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

[In its verdict, the Chamber unanimously found Akayesu guilty of several counts of genocide, of direct and public incitement to commit genocide, and of several crimes against humanity (extermination, murder, torture, rape, and other humane acts). It found him not guilty of certain other counts, particularly of violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol No. 2. As of March 2000, the decision was on appeal.]

QUESTIONS

1. Consider, as applied to the ICTR and the Akayesu decision, question 5 at p. 1173 *supra*.
2. This case was decided before the Tadic litigation, *supra*, came to an end. Do you find inconsistencies or contradictions in the interpretation of these international crimes between these two cases? If so, are they traceable to differences between the two Statutes?

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in definition of these crimes? (Recall that as of March 2000, the Akayesu decision was on appeal, and that the Appeals Chamber consists of the same judges for the ICTY and the ICTR.)

3. Does the Akayesu opinion (as presented in these excerpts) broaden the crimes defined in the Statute to any considerable degree? How? In particular, how does the ICTR respond to the sexual cruelty to which Tutsi women were subjected?

4. Suppose that evidence made clear that Akayesu had been threatened by Hutus committing the genocide and told that unless he assisted in the round-up of Tutsi he would be treated as a Tutsi sympathizer and, like other such persons, would be killed. Such evidence also shows that Akayesu then started to participate in the genocide by revealing the whereabouts of about 30 Tutsi, who were caught by Hutu and murdered. What result should the Trial Chamber reach on the charges of genocide and crimes against humanity?

BARBARA CROSSETTE, INQUIRY SAYS U.N. INERTIA IN '94 WORSENE GENOCIDE IN RWANDA

New York Times, December 17, 1999, p. A1

A strongly worded report issued today by an international panel of experts holds both the United Nations and leading member countries, primarily the United States, responsible for failing to prevent end the genocide in Rwanda in 1994, which cost hundreds of thousands of lives.

The report, commissioned by Secretary General Kofi Annan, who was then head of the peacekeeping department, spares no one, naming those in the highest reaches of the United Nations who were running the operation in Rwanda, including Mr. Annan and his predecessor, Secretary General Boutros Boutros-Ghali.

Mr. Annan and others in his department made weak and equivocal decisions in the face of mounting disaster, the panel found. At the same time the Clinton administration . . . persistently played down the problem, setting the tone for a Security Council generally lacking the political will for a tougher response.

Both the United Nations and the United States sent the wrong message to militias bent on genocide, the report concluded. Today Mr. Annan called the report 'thorough and objective.' 'On behalf of the United Nations, I acknowledge this failure and express my deep remorse,' he said, calling the events in Rwanda 'genocide in its purest and most evil form' . . .

. . . [T]he leader of the investigation, Ingvar Carlsson, a former Swedish prime minister, said it would 'always be difficult to explain' why the Security Council—managed by the world's major powers and not the United Nations bureaucracy—drastically cut the peacekeeping force in Rwanda, reducing it to a few hundred from 2,500 when the genocide began, and then increasing it to 5,500 when the weeks of massacres were over. The United States, . . . effectively blocked the Security Council in 1993 and 1994 from authorizing significant action in Rwanda. . . .

Today Mr. Carlsson repeated the Clinton administration's explanation that the loss of 18 American Rangers in Somalia in 1993 had scared the United States off

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peacekeeping, particularly in Africa, for domestic political reasons. . . . On a trip to Rwanda last year, President Clinton apologized for Washington's inaction.

... The Rwanda report follows by several weeks the release of an internal United Nations inquiry into problems in the Bosnia peacekeeping operation that led to thousands of deaths in Serbian attacks on Bosnian Muslims in Srebrenica and other towns. That report also found fault with both the organization and Security Council members.

The report issued today shows a pattern of ignored warnings and missed signs of the genocide to come in Rwanda. . . . 'Information received by a United Nations mission that plans are being made to exterminate any group of people requires an immediate and determined response', the panel said.

... In the bloody melee that followed [the very first steps in the genocide], groups of United Nations peacekeepers were rounded up by Rwandan Hutu troops and 10 Belgians were executed. The remaining Belgians, the best-qualified soldiers among the peacekeepers, were then abruptly withdrawn.

In the report, Belgium was criticized for this and for abandoning 2,000 civilians—hiding in a technical school after telling them they would be protected. They were savagely attacked. The Belgian withdrawal prompted others to pull out, an action—supported by the United States, the panel said.

...
JOSÉ ALVAREZ, CRIMES OF STATES/CRIMES OF HATE:
LESSONS FROM RWANDA

24 Yale J. Int'l L. 365 (1999), at 400

... [T]he West's complicity in the 1994 killings in Rwanda is a discomfiting fact. The scale and seriousness of that complicity take various forms. At one level, certain European powers, namely the colonizers of Rwanda who imported their racist notions of 'superior races' to Rwanda, need to accept their responsibility for creating the 'tribalism without tribes' that helped make genocide possible and continues to characterize Rwanda today. Much greater blame can be attributed to those, like the French, who, in the 1990s and through the 1994 killings themselves, continued to befriend and arm the Habyarimana [Hutu] government. But the circle of blame extends much wider and includes Kofi Annan, who ignored warnings of the impending genocide; all members of the U.N., and particularly the Security Council, who, in the wake of the fiasco of Somalia, failed to send the 5000 troops that, it is estimated, might have prevented the vast majority of the killings; and the international community as a whole, which, in the wake of the emergence of a new government in Rwanda after the genocide, ignored that new government's pleas for assistance but came to the aid of the Hutu killers in exile while failing to prevent their ongoing incursions into Rwanda to continue the genocide.

For all their attention to the attribution of individual blame for these crimes, international lawyers have not been attentive to these wider circles of guilt. In

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surreal fashion, international lawyers have argued that judges from some of the very countries that are regarded as partly 'to blame' for these crimes will be readily accepted as neutral arbitrators simply because they do not come from Rwanda. Blind to the colonial-era racism that helped to make the Rwandan genocide possible, and equally blind to the continuing insensitivities of the U.N. and its patrons since the genocide, international lawyers pin their hopes for verdicts that will be accepted as impartial on a U.N.-approved bench, simply because it does not contain a Hutu or a Tutsi. This seems a slim reed on which to rely. To the extent that the U.N., as an organization, was itself derelict in enforcing international humanitarian law, that fact is surely detrimental to the credibility of the ICTR's judgments. . . . Knowledge of what led to the Rwandan killings as well as who is to blame in this wider sense strengthens the very premise that individuals must be held responsible. In addition, sensitivity to colonial-era racism and what has occurred in its wake prompts scrutiny of the policies now being touted by the U.N.'s Security Council with respect to Rwanda. . . . Those who were blind once to the important consequences of acting on the basis of ethnic prejudices could be wrong a second time when they insist that international trials should proceed as if the prejudices they helped to instill can be ignored.

. . . Knowledge of the West's complicity should make us skeptical of a scheme that would deny to the Rwandan government what each Western state has for centuries enjoyed, namely the right to try its own war criminals.

QUESTIONS

1. Accepting the report of the panel appointed by Kofi Annan and Alvarez's analysis, what follows from them? Do they lessen, or strengthen, the argument for individual punishment of those committing the genocide on the ground? Should they lead to criminal liability under international law of non-Rwandans who are implicated in some other way in the genocide? Against whom, and under what charges?
2. Does this analysis delegitimize the ICTR and its judgments if a panel of the Trial Chamber or the Appeal Chamber consists dominantly of non-African judges, particularly judges from the states that are alleged to bear responsibility? Does it point to resort to the Rwandan judiciary rather than to an international tribunal—a small judiciary in a country where tens of thousands of prisoners have been long awaiting trial for the genocide? Would analogous problems to those described by Alvarez arise in constituting a judicial bench in state criminal proceedings in countries that have suffered massive tragedies in civil conflict or severe repression? Does the fact that a conflict or political repression has a strong ethnic dimension in addition to its deep political divisions complicate such issues?

ADDITIONAL READING

In addition to the readings noted at p. 1142, *supra*, see: Theodor Meron, *War Crimes Law Comes of Age* (1998); Stephen Ratner and J. Abrams, *Accountability for*

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Human Rights Atrocities in International Law (1997); Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Tribunal since Nuremberg* (1997); Virginia Morris and M. Scharf, *The International Criminal Tribunal for Rwanda* (1998); Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 EJIL 2 (1998); Jose Alvarez, 'Rush to Closure: Lessons of the Tadic Judgment', 96 Mich. L. Rev. 2031 (1998); Steven Ratner, 'New Democracies: Old Atrocities; An Inquiry in International Law', 87 Georgetown L.J. 707 (1999); Cherif Bassiouni, 'Strengthening the Norms of International Humanitarian Law to Combat Impunity', in Burns Weston and S. Marks (eds.), *The Future of International Human Rights* (1999), at 245; Symposium, 'Genocide, War Crimes, and Crimes against Humanity', 23 Fordham Int'l L. J. 275-488 (1999).

C. THE INTERNATIONAL CRIMINAL COURT

The idea of a permanent international criminal court has been a part of the human rights movement since 1948, when the General Assembly instructed the International Law Commission to study the possibility of establishing one. In 1992, the General Assembly requested the ILC to draft a statute for such a court. Four years later, it decided that a diplomatic conference should be held on establishing the court. That conference among states took place in Rome in 1998. It culminated in the overwhelming adoption of a Statute for the International Criminal Court (ICC) by a vote of 120 to 7, with 21 abstentions. The Statute will enter into force after 60 states have ratified it.

The following excerpts from the Statute state the crimes that are within the jurisdiction of the Court.

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

37 I.L.M. 999 (1998)

Article 5—Crimes within the jurisdiction of the Court

1. . . . The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6—Genocide

[This section repeats Article 2 of the Genocide Convention, as did the Statutes for the ICTY and ICTR.]

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Article 7—Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

3. For the purpose of this statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Article 8—War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949 namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

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- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [the designated acts include intentionally directing attacks against a civilian population as such, against civilian objects that are not military objectives, or against a humanitarian assistance or peacekeeping mission in accordance with the UN Charter; killing or wounding combatants who have surrendered; transfer by an Occupying Power of part of its own civilian population into territory it occupies, or deporting the population of the occupied territory outside the territory; employing poisonous gases or weapons that cause superfluous injury or unnecessary suffering; committing rape, sexual slavery, or forced pregnancy.]

[Section (c), concerning armed conflict not of an international character, is omitted.]

Article 9—Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 21—Applicable law

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national

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laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

KENNETH ROTH, THE COURT THE US DOESN'T WANT

N.Y. Rev. Books, November 19, 1998, at 45

... In favor of the [International Criminal] court were most of America's closest allies, including Britain, Canada, and Germany. But the United States was isolated in opposition, along with such dictatorships and enemies of human rights as Iran, Iraq, China, Libya, Algeria, and Sudan. ...

The Clinton administration's opposition to the ICC stemmed in part from its fear, a plausible one, that hostile states like Cuba, Libya, or Iraq might try to convince the court to launch a frivolous or politically motivated prosecution of US soldiers or commanding officers. The Rome delegates adopted several safeguards against this possibility, most importantly the so-called principle of complementarity. This gives the ICC jurisdiction over a case only if national authorities are 'unwilling or unable' to carry out a genuine investigation and, if appropriate, prosecution. The complementarity principle also reflects the widely shared view that systems of national justice should remain the front-line defense against serious human rights abuse, with the ICC serving only as a backstop. (By contrast, the Yugoslav and Rwandan tribunals are empowered to supersede local prosecutorial authorities at their discretion and have done so repeatedly.)

According to the principle of complementarity, if an American soldier were to commit a serious war crime—say, by deliberately massacring civilians—he could be brought before the ICC only if the US government failed to pursue his case. Indeed, even a national decision not to prosecute must be respected so long as it is not a bad faith effort to shield a criminal from justice. Because of the strength of the US judicial system, an ICC prosecutor would have a hard time dismissing a US investigation or prosecution as a sham. And, under the treaty, any effort to override a nation's decision not to prosecute would be subject to challenge before one panel of international judges and appeal before another.

Much would still depend on the character and professionalism of the ICC prosecutor and judges. The record of the International Criminal Tribunals for

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Rwanda and the former Yugoslavia suggests that faith in them would be well placed. . . .

There is every reason to believe that the ICC will be run by jurists of comparable stature. . . .

But the Pentagon and its congressional allies were not satisfied with the principle of complementarity as protection against unjustified prosecutions. . . .

Efforts by the US to exempt its nationals from the ICC's jurisdiction contributed to four points in contention during the Rome conference. . . . The resulting concessions [by other states] weakened the court significantly; still the Clinton administration ended up denouncing it.

The first controversy concerned whether and, if so, how the UN Security Council should be permitted to halt an ICC prosecution. The US proposed that before the ICC could even begin an investigation the Security Council would have to expressly authorize it. Because the United States, as a permanent Council member, could single-handedly block Council approval by exercising its veto, this proposal would have allowed Washington to prevent any investigation, including of its own soldiers and those of its allies. The other four permanent Council members—Britain, France, China, and Russia—would necessarily have had the same veto power. As a result, only criminals from a handful of pariah states would have been likely to face prosecution. . . .

Singapore offered a compromise to the veto problem which ultimately prevailed. It granted the Security Council the power to halt an ICC prosecution for a one-year period, which could be renewed. But the Security Council would act in its usual manner—by the vote of nine of its fifteen members and the acquiescence of all five permanent members. Therefore no single permanent Council member could use its veto to prevent a prosecution from being initiated.

... The third major controversy involved what restrictions should be placed on the ICC's definition of war crimes. . . .

... Of special concern was the so-called rule of proportionality under international law, which prohibits a military attack causing an incidental loss of civilian life that is 'excessive' compared to the military advantage gained. This less precise rule could implicate activity that US military commanders consider lawful but the ICC might not. For example, the Gulf War bombing of Iraq's electrical grid was claimed to have killed a disproportionate number of civilians, including the thousands said to have died because of the resulting loss of refrigeration, water purification, and other necessities of modern life. What if the ICC had been in existence and had found such claims well founded? . . .

To avoid prosecution in such borderline situations, US negotiators successfully redefined the proportionality rule to prohibit attacks that injure civilians only when such injury is 'clearly excessive' in relation to the military advantage. . . .

The United States, joined by France, also proposed that governments be allowed to join the ICC while specifying that their citizens would be exempted from war crimes prosecutions. . . . [A]s a compromise, the treaty allows governments to exempt their citizens from the court's war crimes jurisdiction for a period of seven

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years. That would allow a hesitant government to reassure itself about the court's treatment of war crimes without permanently denying the court jurisdiction over its citizens. . . .

The most divisive issue delegates faced was deciding how—once the ICC treaty was ratified by sixty countries—the court would get jurisdiction over a case that was referred by an individual government or initiated by the prosecutor. (This issue does not arise when the Security Council refers a matter for prosecution, since the Council has the power to impose jurisdiction.)

South Korea put forward a more limited proposal which gained broad support. It would have granted the ICC jurisdiction when any one of four governments concerned with a crime had ratified the ICC treaty or accepted the court's jurisdiction over the crime. These were: (1) the government of the suspect's nationality; (2) the government of the victims' nationality; (3) the government on whose territory the crime took place; or (4) the government that gained custody of the suspect. In any given case, some and perhaps all of these governments would be the same, but each separate category increases the possibility that the court could pursue a particular suspect.

Speaking for the Clinton administration, Ambassador Scheffer vehemently insisted that the court should be empowered to act only if the government of the suspect's nationality had accepted its jurisdiction. . . .

Clinton administration officials were not mollified by the fact that, under the doctrine of universal jurisdiction, American soldiers are already vulnerable to prosecution in foreign courts. The US government has many ways of dissuading governments from attempting to try an American—from diplomatic and economic pressure to the use of military force. But the administration fears such dissuasion would be less effective against the ICC. After all, the Pentagon could hardly threaten to bomb The Hague.

... Facing these extraordinary threats [from the United States], the Rome delegates gave in, but only partially. They got rid of two of Korea's proposed conditions for ICC jurisdiction: that the treaty would have to be ratified by the state of the victim's nationality or it would have to be ratified by the state that gained custody of the suspect.

This concession was damaging. Because a state could not give the ICC jurisdiction just by arresting a suspect, a leader who commits atrocities against his own country's citizens, such as a future Pol Pot or Idi Amin, could travel widely without being brought before the ICC—so long as his own government had not ratified the treaty (and assuming the Security Council does not act). . . . And if the victims' nationality cannot be used as grounds for ICC jurisdiction, then the ICC could not take action against the leader of a nonratifying government that slaughters refugees from a ratifying state who seek shelter on its territory (again, assuming the Security Council fails to act). . . .

But the Rome delegates did not accept the Clinton administration's demands entirely. They retained two grounds for the ICC's jurisdiction: not only that the government of the suspect's nationality had ratified the treaty (the only ground acceptable to the US) but also that the government on whose territory the crime

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took place had ratified it. In the case of a tyrant who commits crimes at home, these two governments would be the same. But the territorial 'hook' could catch, for example, Saddam Hussein for committing war crimes during a new invasion of Kuwait. . . . The United States, however, feared that the territorial hook might catch American troops, or their commanders, for alleged crimes committed while they were abroad. If the country where US troops are present has ratified the treaty, the ICC could pursue a case against them even though the United States had not joined the court.

Can the ICC survive without US participation? The Clinton administration is betting that it cannot. Already Jesse Helms, having declared the ICC treaty 'dead on arrival' in the Senate, has vowed to sponsor legislation forbidding the US government to fund the court or do anything to give it legitimacy. The State Department said publicly it might put pressure on governments not to join the court; and it is considering renegotiating the bilateral treaties that govern the stationing of US forces overseas in order to protect them from the ICC.

The Clinton administration . . . also contends that, small as the risk is of an American being brought before the court, the ICC will undermine humanitarian goals by making the United States reluctant to deploy troops in times of need.

ADDITIONAL READING

David Scheffer, 'The United States and the International Criminal Court', 93 AJIL 12 (1999); Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court', 93 AJIL 22 (1999); Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 AJIL 43 (1999).

D. THE PINOCHET LITIGATION

Until the International Criminal Court becomes operational, no international tribunal exists to try individuals for alleged international crimes that do not fall within the jurisdiction of the ICTY and ICTR. There is always, of course, the possibility of criminal trial in the country where the acts took place, particularly if the perpetrators are citizens and residents of that country. Such trials have taken place in numbers of European countries, particularly Germany with respect to Nazi war criminals. In very few instances, they have also taken place with respect to post-Second World War events, such as the trials in Argentina in the 1970s of members of the military junta who were in charge during that country's 'dirty war'.

But these have been rare phenomena. Often the terms of transfer from a government in charge during a period of massive violations to a successor elected civilian government have precluded trial of those responsible for the violations. Such was the case in Chile. Other ways of dealing with the prior period have been utilized in a growing number of countries, such as the truth commissions in Chile,

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