COMMENTS

Hunting the Hunters: The United Nations Unleashes Its Latest Weapon in the Fight Against Fugitive War Crimes Suspects—Rule 61

Brian T. Hildreth*

> Rule 61 is basically an apology for this Tribunal's helplessness in not being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender accused persons, or even to recognize or cooperate with the Tribunal. In such circumstances, it is the International Tribunal's painful and regrettable duty to adopt the next [most] effective procedure to inform the world, through open public hearings, of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.
>
> Judge Rustam S. Sidhwa
> The International Criminal Tribunal for the Former Yugoslavia[1]

---

* B.A. 1994, California State University, Chico; J.D. Candidate 1999, Tulane University School of Law. The author wishes to thank Dana Dallas Atchison for her support of this Comment and her dedication to international and comparative law; Nancy England for her much-needed criticism at crucial times; Lynn Becnel for tolerating missed deadlines and mistakes, only to achieve perfection; the United Nations War Crimes Tribunal, Office of Public Affairs, for providing much of the information contained in this Comment; and finally Professor Hether Macfarlane for her superb instruction and unconditional support. The author will serve as the 1998-99 Editor in Chief for the *Tulane Journal of International and Comparative Law*.

1. Prosecutor v. Rajic, Case No. IT-95-12-R61, 1, 5-6 (1996) (Sidhwa, J., concurring).

I. INTRODUCTION

In mid-July 1997 British Special Air Service commandos, an elite and aggressive military unit working with the North Atlantic Treaty Organization (NATO), gunned-down Simo Drljaca, a suspected Bosnian-Serb war criminal, while trying to arrest him.[2] The surprise NATO-authorized raid on the outskirts of Prejador, located in the Republic of Bosnia and Herzegovina, symbolized the international community's deep frustration with fugitive war crimes suspects and illustrated the sometimes deadly force that world leaders are willing to use in seeking suspect seizure.[3] The failed capture attempt, however, also managed to ignite a firestorm of controversy regarding the jurisdictional reach of the United Nations War Crimes Tribunal and the methods used to locate and capture suspects wanted by the world's highest criminal court.[4] The dilemma centers on what means are appropriate for achieving justice for victims of war-time atrocities, and it is as old as the UN's International Criminal Tribunal itself.

Forty years ago a group of Israeli citizens known as "Nazi hunters"[5] removed suspected Nazi war criminal Adolf Eichmann from Argentina and transported him back to Israel to stand trial for allegedly masterminding the "final solution," the extermination of over six million Jews throughout the course of World War II.[6] Argentina officially protested the Israelis' actions, yet the United Nations Security Council could only muster an inconsequential warning that future citizen "snatch-squads" should refrain from abducting suspected war criminals from foreign countries without that country's consent.[7] The Security Council also required that Israel make "reparations" to Argentina (which would

---

2. *See* Tom Walker, *Bosnia Serbs Accuse SAS Snatch Squad of "Assassination,"* TIMES (LONDON), July 12, 1997, at 17.

3. *See id.*

4. *See id.*

5. The "Nazi hunters" were Israeli citizens and Holocaust survivors who coordinated efforts to seek out and capture wanted Nazi officials and death camp guards and transport them to Israel for prosecution by the Israeli national court. *See* Andrew D. Wolfberg, Israel v. Ivan (John) Demjanjuk*; Wachmann Demjanjuk Allowed to Go Free*, 17 LOY. L.A. INT'L & COMP. L.J. 445, 454 (1995). Their arduous task was made even more difficult when, after the end of World War II, many surviving Nazis scattered across the globe with the assistance of a Nazi underground railroad. *See id*. The Nazis' attempt to elude capture was largely successful as is evidenced by the small number of suspected war criminals caught by the Nazi hunters and tried by Israeli courts. *See id*. Yet, the Nazi hunters were dogged in their pursuit of the Nazi war criminals, and their efforts on behalf of a devastated nation are a permanent part of the history of the Holocaust.

6. *See* Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 311 (1961)*; see also* Wolfberg, *supra* note 5, at 454 (citing GIDEON HAUSNER, JUSTICE IN JERUSALEM 266 (1966)).

7. *See* Wolfberg, *supra* note 5, at 454-55.

ultimately amount to nothing more than an official apology by Israel).[8] Surprisingly, the Security Council did not force the return of Eichmann to Argentina (nor did Argentine officials demand his return), and as a result, his prosecution as a war criminal commenced in Israel.[9] The Israelis eventually convicted and executed Eichmann.[10] Presented again with the difficult task of extricating suspected war criminals from independent sovereign territories, this time from the Balkans, the International Criminal Tribunal is grappling with the unresolved dilemma of how to bring justice to war-crime victims.

In an attempt to prevent events similar to those that transpired during Summer 1997 in the former Yugoslavia, and to dissuade other types of citizen "snatch-squads" such as the one involving Eichmann (read "kidnapping"), the United Nations adopted Rule 61 of Evidence and Procedure (hereinafter Rule 61) to its War Crimes Tribunal operating guidelines. Rule 61 was adopted with the hope that it will allow victims a formal means of redress when war crimes suspects are not present before the court.[11] The rule was created to target such war criminals who appear to be avoiding the Tribunal's service-of-process attempts.[12] Even though the requirements of international due process prohibit them from running an official trial against the accused, the Tribunal has successfully utilized the new statutory authority to hold publicized hearings on suspected war criminals.[13] These hearings allow the prosecution to present its case against the suspect and afford witnesses the opportunity to enter their testimony into the official record for use against the suspect, should he eventually stand trial.[14]

If a Rule 61 hearing produces enough supporting evidence against the accused, the Tribunal has the power to issue an international warrant for arrest of the suspect.[15] This international warrant obliges all member-

---

8. *See id.*

9. *See id.* at 455. Eichmann remains the only individual convicted and punished as a Nazi by Israel. (John (Ivan) Demjanjuk was captured and tried by Israel in 1988, but the Israeli Supreme Court set him free after refusing to affirm his lower court conviction). *See id*.

10. *See* Wolfberg, *supra* note 5, at 453.

11. *See* U.N. Rules of Procedure and Evidence for the International Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), at 1.

12. *See* U.N. International Criminal Tribunal for the Former Yugoslavia: Information Memorandum, U.N. Doc. CC/PIO/092-E (1996) [hereinafter Information Memorandum]. The memorandum states three scenarios where there has been a failure to effect service of process upon the suspected war criminal addressed by Rule 61. These scenarios occur when the accused has voluntarily avoided the authorities addressed by Rule 61; when the governments of the territories concerned have not been able to locate the suspect; and when those same government officials have refused to cooperate with the location and capture of the suspect. *See id*.

13. *See id.*

14. *See id.*

15. *See id.*

nations of the United Nations to locate and arrest suspects if located in their territories.[16] It also allows for the immediate arrest of the accused war criminal should he cross any international border.[17] Because there can be no finding of guilt in a Rule 61 proceeding,[18] and hence no imposition of sentence, the primary thrust of Rule 61 is to provide victims of atrocities with an opportunity to be heard and to create a public record.[19] Furthermore, it allows the alleged crimes of the suspect to be aired publicly in an international setting.[20]

This Article examines the War Crimes Tribunal in its past and present forms, relating to the means through which victim reparations are, and should be, made when the Tribunal's access to the suspect is limited or nonexistent. Part II of the Article focuses on the need for, and the initial proposals for, an international criminal court. This segment will specifically concentrate on the initial calls for an international criminal court during and following World War II and will conclude with a discussion of the recent proposals of a permanent international court. In Part III, an examination of the past and present War Crimes Tribunals will serve to analyze the 1949 Geneva Conventions and critique the strengths and the weakness of the Tribunal, focusing primarily on the dilemma of fugitive capture and extradition. Part IV critically analyzes the ongoing War Crimes Tribunal for the Former Yugoslavia and defines and discusses the obligations of countries that are knowingly harboring wanted war crimes suspects to capture and turn over those fugitives under the UN Security Council's guidelines. Part V contemplates remedies available to the court and to the victims when countries refuse to extradite known fugitives within their country and provides a discussion of the obligations Rule 61 creates for governments to find, capture, and turn over suspected war criminals to the War Crimes Tribunal. Part VI provides an example of the practical applications of Rule 61 and an illustration of how the Tribunal employs it. Finally, Part VII concludes that while not an absolute solution to the question of prosecuting fugitive war criminals, Rule 61 provides numerous tangible benefits to the Tribunal and to the victims of atrocities.

---

16. *See* Prosecutor v. Rajic, Case No. IT-95-12-R61, at 5-6 (1996) (Sidhwa, J., concurring).
17. *See id.* at 5.
18. *See* Information Memorandum, *supra* note 12.
19. *See Rajic*, Case No. IT-95-12-R61, at 5 (Sidhwa, J., concurring).
20. *See id.*

II. THE NEED FOR AN INTERNATIONAL COURT

When Allied armored cavalry units rolled into Berlin in late April of 1945, troops attached to those units were only just getting a sense of the ferocity and viciousness of a Third Reich controlled by one of the most infamous men in history.[21] More than 5.7 million of Europe's Jews had been murdered at the direction of Adolph Hitler for membership in what he called an "inferior" race.[22] Many of the world's high ranking political and military leaders publicly called for the prosecution and punishment of those Nazi chiefs and other individuals responsible for carrying out the execution orders.[23] Those Nazi chiefs and other war criminals who were captured by Allied forces were brought before a relatively new International War Crimes Tribunal in Nuremberg.[24] Created by the fledgling United Nations and designed specifically to investigate and discipline political leaders and nationalists accused of large-scale criminal activity, the court was presented with the opportunity to punish some of the world's most vicious criminals.[25] This international cooperation spoke volumes about the heinousness of the crimes and further illustrated that a union of nations could band together for a common cause to seek justice for the millions of people affected by the Nazi campaign of terror and destruction throughout World War II.[26]

The first significant public calls for an international criminal court came several years earlier, in 1941, from the London International Assembly of Parliamentarians.[27] Allied officials ultimately agreed, in

---

21. *See* SUSANNE EVERETT & BRIGADIER PETER YOUNG, THE TWO WORLD WARS 474, 475, 477, 478 (1982).

22. *See* C.L. SULZBERGER, WORLD WAR II 556 (David G. McCullough ed., 1966).

23. *See id*. at 624. As is widely known, Hitler did not stand trial before the Nuremberg Tribunal. He killed himself on April 29, 1945, as the Allied Russian army advanced on his Berlin bunker. *See* EVERETT & YOUNG, *supra* note 21, at 478. Other high-ranking Third Reich officials such as Dr. Joseph Goebbels and Heinrich Himmler also never faced the Nuremberg court because they had each committed suicide after the Allies marched on Berlin in the Spring of 1945. *See* SULZBERGER, *supra* note 22, at 624.

24. *See generally* United Nations Charter and Judgment of the Nuremberg Tribunal: History and Analysis, U.N. Doc. A/CN.4/5 (1949) [hereinafter Judgment of the Nuremberg Trial].

25. *See id.*

26. *See id.*

27. *See generally* United Nations Secretariat, Historical Survey of the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/7/Rev. 1 (1949) [hereinafter Historical Survey]. There were attempts to form an international criminal court following World War I, though they proved largely unsuccessful. Article 227 of the Treaty of Versailles specifically leveled charges against Germany's Kaiser Wilhelm II for "a supreme offense against international morality and the sanctity of treaties." *See* Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919. The Treaty also provided for the creation of an international court for his prosecution and other German nationals accused of war crimes. *See id*. arts. 227, 228, 229. However, due to Wilhelm's escape to the Netherlands and that country's subsequent refusal to extradite him, his trial never took place. The international court was considered a failure by many

October of 1943, that a United Nations international crime commission should be created to try those accused of grave offenses against humankind.[28] On October 18, 1945, six months after the fall of Berlin, prosecutors appeared before the ad hoc International War Crimes Tribunal at Nuremberg [hereinafter Nuremberg Tribunal], charged twenty-one Nazis with war crimes, and gave them thirty days to prepare a defense.[29] The sentences handed down by the court ran the spectrum, from acquittal to death, and illustrated a crucial point: in order to be perceived as a successful judicial organization, the international tribunal must focus on justice, not vindictiveness or retribution.[30]

In 1946, upon conclusion of the World War II Tribunals, the United Nations sought to draft standard operating guidelines for the court so that the United Nations would not be in the position to assemble and conduct a "new" tribunal each time one was warranted.[31] The UN General Assembly established the Committee for the Progressive Development of International Law and its Codification and assigned to it the arduous task of codifying the principles championed at the Nuremberg Tribunal.[32] Almost immediately, the Committee proposed the creation of a permanent international criminal court.[33] The issue split the Committee almost down the middle.[34] However, no steps were taken towards creating a permanent court, a surprising result considering that the ad hoc status of the post-World War II Tribunals was heavily criticized throughout the Committee's hearings.[35] Instead, the UN General Assembly approved language that allowed for the use of an international criminal court, but stopped short of allowing it to remain in existence on a continuous basis.[36] What should be noted here, however, is that although the

---

thereafter. *See* Historical Survey, *supra*, at 2-3. The importance of the post-World War I attempt at international criminal proceedings, however, should not be understated. It appears that their embryonic form in 1919 led to, and was the cornerstone for, the creation of the international tribunals following World War II. *See id.*; *see also* Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 80-81 (1995).

28. *See* Question of International Criminal Jurisdiction: Report of Ricardo J. Alfaro, U.N. Int'l. L. Comm'n, 2d Sess., U.N. Doc. A/CN.4/15 (1950), at 5-7 [hereinafter Report of Ricardo J. Alfaro]; *see also generally* Judgment of the Nuremberg Tribunal, *supra* note 24.

29. *See* SULZBERGER, *supra* note 22, at 624; *see also generally* Report of Ricardo J. Alfaro, *supra* note 28, at 5-7; *see also* Judgment of the Nuremberg Tribunal, *supra* note 24.

30. *See* SULZBERGER, *supra* note 22, at 624.

31. *See* G.A. Res. 94(I) (1946); G.A. Res. 95(I) (1946).

32. *See* Historical Survey, *supra* note 27, at 25-30.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* at 43. The language approved by the General Assembly allowed that offenders may be tried by individual nations "or by such international penal tribunal as may have jurisdiction with respect to such contracting parties as shall have accepted the jurisdiction of such

proposal for a permanent court was rejected at the time (and several times thereafter), a representative group of international jurists have almost unanimously agreed on the creation of a permanent international criminal court.[37] The United Nations will likely officially establish a permanent court during its 1998 summer conference in Rome.[38]

III. SEARCHING FOR SUSPECTS: THE PAST

Whatever advantages a permanent international criminal court possesses, permanence can never guarantee the presence of the accused before the bench. Many victims consider this to be the critical breakdown of past international criminal tribunals. Furthermore, the creation of a permanent international court is unlikely to remedy the emotional torment brought by a wanted suspect on the run.[39] Prior to the enactment of Rule 61, victims of atrocities could only be assured redress from an international tribunal if the suspect himself was present before the court.[40]

The international war crimes tribunal originally depended on the 1907 Hague Convention for its grant of jurisdiction and imposition on countries to search for wanted international criminals within their borders.[41] In its original form, The Hague Convention IV Agreement was vague and contained only a preamble and nine articles.[42] The true substance of the 1907 Convention is found in its fifty-six articles of annexed regulation materials designed to supplement the original agreement.[43] The Nuremberg Tribunal in 1945 lent much-needed support to the articles after the Trial Chamber explicitly stated that the 1907 Hague Convention IV codified customary international law (international common law) with respect to searching for and capturing war crimes

---

tribunal." *See id*. This effectively tied the hands of the United Nations in its ability to try international criminals, while requiring an additional agreement by the international community before a criminal tribunal could be created. *See id.*

37. *See* Barbara Crossette, *Legal Experts Agree World Court Outline*, TIMES-PICAYUNE, Dec. 14, 1997, at A-35.

38. *See id.*

39. *See generally* Walter G. Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411 (1997).

40. *See generally* U.N. Rules of Procedure and Evidence for the International Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), at 1; *see also* Information Memorandum, *supra* note 12.

41. *See* Sharp, *supra* note 39, at 428-29 (citing Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 48 (Adam Roberts & Richard Guelff eds., 2d ed. 1989)).

42. *See id.* at 428.

43. *See id*. (citing Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, *in* Hague Convention IV, *supra* note 41 [hereinafter 1907 Hague Regulations], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 41, at 48).

suspects.[44] Although it encompassed this international common law, the Hague Convention IV and its adjoining annexation did not expressly mandate the obligation to hunt and seize wanted war criminals.[45] The customary international law at the time merely called for the capture of a country's own nationals and lacked the requirement that a country hunt non-citizen suspects who may be within their borders.[46]

The Geneva Conventions of 1949 provided the next attempt at placing an "obligation" upon all countries to search for, and either extradite or prosecute, wanted suspects within their own national criminal courts.[47] The commentary accompanying the 1949 Geneva IV Agreement specifically provides that countries will actively pursue those accused of war crimes.[48] It states:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[49]

By placing this obligation on all nations, the 1949 Geneva Conventions took the first step toward recovering international fugitives. However, even this progressive step was tainted by a potential loophole. While the conventions placed an express duty on nations to hunt war criminals in their jurisdictions regardless of nationality, it required only those suspects

---

44. *See id.*

45. *See id.*

46. *See id.* at 428-29 (citing FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 68 (2d ed. 1991)). Were international common law sampled today, it would conceivably include a much broader requirement on nation-states to search for criminals in their territories. However, in 1945, issues of national sovereignty prevailed and required a country to look only for its own citizens residing in its country. *See id.* These were clearly substantial loopholes: a suspect needed only to enter and reside in a country other than his own to elude capture and prosecution by the Tribunal.

47. There are four conventions that comprise the "Geneva Conventions." Their individual citations are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I]; and Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV].

48. *See* Sharp, *supra* note 39, at 423.

49. *Id.* (quoting COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 583 (Jean S. Pictet ed., 1958)).

accused of the most serious offenses to be searched for and captured.[50] This limitation excluded those individuals normally compromising the majority of those accused of war crimes: the prison guards and the lower ranking officials who might have followed orders instead of giving them, but were, nonetheless, responsible for war crimes and other atrocities.

The UN General Assembly, intent on providing a permanent solution to the dilemma of bringing wanted criminals to the court, approved a 1970 resolution that addressed the issue of suspect location and capture.[51] The declaration states in pertinent part:

> Convinced that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes . . . are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of co-operation between peoples and the safeguarding of international peace and security, . . .
>
> (2) Calls upon all states to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them . . . so that they can be brought to trial and punished . . .;
>
> (4) Also calls upon all the States concerned to intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity;
>
> (5) Once again requests the States concerned, if they have not already done so, to take the necessary measures . . . for the detection, arrest, extradition and punishment of all war criminals . . . .[52]

Three years later the General Council recognized the importance of cooperation between nations in searching for and capturing international fugitives.[53] Two of the nine principles of the 1973 UN resolution deserve mention here:

> (1) War crimes and crimes against humanity, *wherever* they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial, and, if found guilty, to punishment;

---

50. *See id.* at 429.

51. *See* G.A. Res. 2712, U.N. GAOR, 25th Sess., 1930th plen. mtg. at 79, U.N. Doc. A/RES/272 (1970).

52. *See id.*

53. *See* G.A. Res. 3074, U.N. GAOR, 28th Sess., 2187th plen. mtg. at 78, U.N. Doc. A/RES/272 (1973).

> (4) States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.[54]

The resolutions of the UN General Assembly clearly indicate its commitment to bring international war criminals to justice, though, unfortunately, such resolutions do not bind member states to the obligations contained therein.[55]

The Security Council, however, *can* create binding resolutions under article 39 of the UN Charter.[56] When UN member nations granted the Security Council the power to monitor international activity as it pertains to peace and security, they also agreed to abide by and execute the decisions of the Council.[57] The most significant aspect of the Council's power to create regulations that bind member states is the ability to create the International Tribunal.[58] This grant of authority to the Security Council can also be used to create international arrest warrants for the arrest and prosecution of those accused of atrocities against noncombatants in a theater of war.[59] Yet, similar to the creation of a permanent court, the rights of the victims appear unsatisfied.

IV. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

When Yugoslavia crumbled into civil war in early 1992, several ethnic groups viciously fought each other to gain control of that territory's fragile new existence.[60] Out of the bloodshed rose Radovan Karadzic, who ascended to the presidency of the powerful Bosnian-Serb faction.[61] In what is now called the Republic of Bosnia and Hercegovina, the Bosnian-Serb republic currently claims it maintains lawful and political control over much of the country and simultaneously exercises militaristic

---

54. *See id.* (emphasis added).

55. *See* Sharp, *supra* note 39, at 434 (citing M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 527 (1992) and THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 237-37 (Bruno Simma ed., 1994) [hereinafter CHARTER COMMENTARY]).

56. *See id.* (citing CHARTER COMMENTARY, *supra* note 55, at 605-15).

57. *See id.* (citing U.N. CHARTER arts. 24, 25). If the Security Council determines that a "threat to the peace, breach of the peace, or act of aggression has occurred, the Security Council has the coercive authority to adopt legally binding decisions as to what measures shall be taken in accordance with Articles 41 and 42 to maintain, restore, international peace and security." *Id.* (citing CHARTER COMMENTARY, *supra* note 55, at 613).

58. *See id.* (citing CHARTER COMMENTARY, *supra* note 55, at 626).

59. *See id.* (citing S.C. Res. 837, U.N. SCOR, 48th Sess., 3229 plen. mtg. at 4, U.N. Doc. S/RES/837 (1993)).

60. *See* Rod Nordland, *"Let's Kill the Muslims!,"* NEWSWEEK, Nov. 8, 1993, at 48, 49.

61. *See* Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).

control over the same.[62] Soon after the fighting started, Muslims living in that region reported that atrocities and acts of genocide against members of their ethnicity, including rapes, torture, forced prostitution, and execution, were allegedly committed at the hands of individuals and military forces under Karadzic's control.[63] When the reports persisted, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia, charged it with investigating the Muslims' gruesome allegations, and, if necessary, trying and punishing those responsible for the atrocities.[64] The ad hoc Tribunal, however, faced a major obstacle almost immediately upon its inception. How should those suspected of committing the alleged offenses be brought before the court for trial? To whom did the responsibility fall to find the suspects and hand them over to the UN International Criminal Court (the War Crimes Tribunal)?[65] The issue of achieving justice over absentee war crimes suspects raises significant questions of territorial sovereignty and the jurisdiction of the War Tribunal itself.[66]

---

62. *See id.* at 237.

63. *See id.*

64. *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES827 (1993); *see also* U.N. CHARTER arts. 39-42. After the Muslim reports surfaced in 1993, the United Nations created an investigative commission to examine the claims. *See generally* Report of Ricardo J. Alfaro, *supra* note 28 (citing S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/80 (1993)). After 18 months of study and investigations, the commission determined that "grave breaches of the Geneva Conventions and other violations of international humanitarian law [had] been committed . . . on a large scale, and were particularly brutal and ferocious in their execution." *Id.* (quoting Letter from the Secretary-General to the President of the Security Council (May 24, 1994), U.N. Doc. S/1994/674 (1994)). Upon the expert committee's recommendation, the UN Security Council granted approval for the creation of an international criminal tribunal under Chapter VII of its charter and charged it with prosecuting those individuals accused of committing "serious violations of international humanitarian law in the former Yugoslavia." *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 48th Sess., paras. 37-40, U.N. Doc. S/25704 (1993) [hereinafter Report of Secretary-General Pursuant to S.C. Res. 808]; *see also* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg. at 2, U.N. Doc. S/RES/827 (1993).

65. During the Nuremberg Trials following World War II, the only large-scale tribunal to which the Yugoslav judiciary could look for operational precedence, no prevalent problem existed in bringing suspected war criminals to trial. By the time the tribunal was in place, the war was over, the Allies had defeated the Axis Powers, and most of those who were charged with committing atrocities were either dead or had been captured and detained. *See generally* Judgment of the Nuremberg Tribunal, *supra* note _____; *see also* Marquardt, *supra* note 27, at 81-82. There was hope among the international community that the formation of the Tribunal for the Former Yugoslavia would curb the vicious fighting in the region and assist the peace process, yet, as is commonly known, its establishment did not achieve this goal. *See* Theodore Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFFAIRS No. 1, Jan./Feb. 1997, at 3.

66. *See generally* Report of Ricardo J. Alfaro, *supra* note 28. The Alfaro Report tells, in part, of suspected war criminals seeking political asylum in countries that would refuse to allow the extradition of the criminal to the War Crimes Tribunal.

The current War Crimes Tribunal provides a recent and illustrative example of the UN Security Council's power and weakness under its own charter and demonstrates how one of its primary missions, the conviction of war crimes suspects, is subject to failure when encountering absentee suspects. Initially, because of a legitimate concern that the new tribunal would not receive international cooperation, the Security Council added the following requirement to the guidelines of the newly created court:

> (4) [The Security Council] [d]ecides 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 . . . .[67]

In a further attempt to fortify the court's international authority, the Security Council also approved an annex to the Statute of the International Tribunal in 1993.[68] Pertinent parts of the statute for this discussion include article 19(2), which authorizes the Trial Chamber Judges to issue arrest warrants upon the request of the prosecutor, and article 29, which restates the obligation of sovereigns to search for and extradite suspects within their borders.[69] Specifically the statute states:

> (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; . . .
> (d) the arrest or detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.[70]

The Secretary-General explained that these responsibilities would obligate all states to take every action necessary to find and capture those suspects sought by the Tribunal and that all states should consider a warrant for arrest issued by the Tribunal as an official request for the state to act in furtherance of its obligations enumerated in the statute.[71]

Even to a lay-person, the purpose behind the Secretary-General's strong statement, and the Tribunal's dogmatic approach to countries that do not cooperate with finding and turning over suspects to the court, is

---

67. *Id.* at 5-6.
68. *See id.*
69. *See id.*
70. *Id.*
71. *See* Report of Secretary-General Pursuant to S.C. Res. 808, *supra* note 64, para. 23.

vividly apparent. Before the enactment of Rule 61, the court proved to be virtually powerless without access to an indicted criminal.[72] The Tribunal's dependence on having suspects in custody threatened to cripple its mission. This frustration may have contributed to the decision last summer to authorize NATO forces to hunt war criminals in the former Yugoslavia.[73] These same troops ultimately killed Simo Drljaca in Prejador after the former Serb concentration camp commander opened fire on the arresting forces.[74]

Nonetheless, it seems as if neither the warnings and threats from the United Nations, nor the hostile NATO raids to capture suspects, have provided any encouragement to the reigning Bosnian-Serb government to hand over wanted war criminals residing in its territory.[75] Of the seventy-five original indictments issued by the Tribunal since 1993, only nine individuals have been brought to the Hague to stand trial.[76] Of those nine, only one was considered to be a high official (the primary targets of the Tribunal).[77] Some commentators have argued that the time for diplomacy is past, and the time for police and/or military action is long overdue.[78] Yet, the Tribunal has no police force of its own.[79] Under the terms of the Dayton Peace Accord, the Tribunal relies on the unreliable ex-Yugoslav officials to turn over suspects, or hopes that the military forces of the UN in the area might detain suspects they encounter.[80] Until the peacekeeping forces in the area are authorized to seek out and capture suspects, or territories in the area voluntarily start turning over suspects, the victimized ethnic groups of the former Yugoslavia will need to rely on the Tribunal's administrative power to achieve their justice. Fortunately,

---

72. *See* Sharp, *supra* note 39, at 441 (quoting 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS xiv, 311-13 (1995)).

73. *See* Walker, *supra* note 2, at 17. The Summer 1997 NATO raid that resulted in one capture and killing seems to have attracted the attention of the Bosnian-Serb government. *See* Tim Judah, *We'll Try Karadzic Say Serbs as NATO Kidnap Looms*, SUNDAY TELEGRAPH (LONDON), Aug. 24, 1997, at 21. Anticipating kidnapping and extradition of their beloved former president Radovan Karadzic, the Serbs offered to try him in one of their own national courts last year. *See id*. Though this small point of light suggests that the Tribunal is making progress, the Serbs have neither turned over at-large war criminals nor tried Karadzic. *See id*.

74. *See id.*

75. *See* Meron, *supra* note 65, at 2.

76. *See id.*

77. *See Trials, Tribulations, and Tribunals*, ECONOMIST, June 28, 1997, at 50. This count does not include the one fatality from the shooting during the NATO raid in the summer of 1997. *See* Walker, *supra* note 2, at 17.

78. *See* Meron, *supra* note 65, at 8.

79. *See Trials, Tribulations, and Tribunals*, *supra* note 77, at 50.

80. *See id.* The only cooperation the Tribunal has received from any of the Balkan states is from Bosnia, which turned over four wanted individuals. *See id*. at 51.

the new Rule 61 has become the engine of the Tribunal's effort and, so far, has tallied an impressive achievement record.

V. RULE 61 OF EVIDENCE AND PROCEDURE

When it became apparent that the tide of wanted suspects being brought into the War Crimes Tribunal was never going to flow much faster than a trickle, officials at the UN Security Council conceded the need for a different approach to ensure that proper amends were made to those who had suffered at the hands of these fugitives.[81] Rule 61, revised to its present form in 1995,[82] was specifically enacted to address the situation in which a warrant for arrest has been issued, but the suspect has refused to appear before the Tribunal.[83] The Rule essentially provides a method for the International Criminal Tribunal to reconfirm and publicize the indictments that have been issued against suspected war criminals.[84] The hearing is considered to be at a higher authoritative level than a public hearing, and its primary mission is to publicize globally the oftentimes heinous acts allegedly committed by the accused.[85] Because it is still only an advanced form of a public hearing, a sentence will not be imposed on the fugitive through Rule 61 hearings.[86] The prosecutors in a Rule 61 hearing present their case in essentially the same manner they would if the accused were present in court.[87] The Prosecutor presents evidence, calls witnesses to the stand to testify, and generally attempts to persuade the court with evidence presented that the accused is culpable for the alleged acts.[88] If the Trial Chamber judges find reasonable grounds for believing that the accused is responsible for the charged acts, the Tribunal will issue an international warrant for arrest obligating all

---

81. *See* Unofficial U.N. Doc., *Rule 61: The Voice of the Victims*, at 1 (issued by the International Criminal Tribunal for the Former Yugoslavia, Press and Information Office) (1995) [hereinafter Unofficial U.N. Doc.]. To date, the War Crimes Tribunal has indicted 75 men (most of them Serbs) for crimes related to the civil war in the former Yugoslavia. Of those 75, less than 10 are in Tribunal custody. *See Trials, Tribulations, and Tribunals*, *supra* note 77, at 50.

82. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), at 1.

83. *See id.*

84. *See* Prosecutor v. Rajic, Case No. IT-95-12-R61, at 5 (1996) (Sidhwa, J., concurring). The Trial Chamber can also order the Rule 61 hearing to be conducted *in camera* if it so desires. *See id.*

85. *See id.*

86. *See id.* The UN Charter mandates that an accused be present before the Tribunal before he is tried. The accused can, however, assign counsel for representation, and by so doing, the suspect need not be present before the Tribunal to have sentence imposed. *See* U.N. CHARTER art. 21(4)(d).

87. *See Rajic*, Case No. IT-95-12-R61, at 4-5 (Sidhwa, J., concurring).

88. *See id.*

nations to arrest the suspect should they encounter him.[89] Rule 61, discussed in greater detail below, is seen as the best weapon against the many wanted war criminals who have been avoiding the Tribunal and is evidenced by the Tribunal's ever more common usage of the Rule.[90]

Rule 61 flexes its strongest muscle when the Tribunal has issued a warrant for the arrest of the accused but has been unable to execute the warrant on the suspect.[91] The Tribunal provides several all-too-common scenarios that result in the nonservice of a warrant for arrest: if the accused has voluntarily eluded capture; if representatives from the territory in which the suspect is believed present have not been able to locate the suspect; if those same representatives have denied the Tribunal access to its territory; or they have generally failed to cooperate with the Tribunal.[92] A public hearing under the authority of Rule 61 will not occur immediately after the Tribunal has been unable to execute the arrest warrant; however, after a "reasonable [amount of] time has elapsed," Tribunal judges can commence the proceedings as they see fit.[93]

Rule 61 is not a trial in absentia.[94] However, a Tribunal judge presides over the proceedings, and a prosecutor is granted the power to call witnesses, officially submit evidence exhibits, and argue his case against the suspect.[95] In the interest of international due process, a Rule 61 hearing will not allow a verdict to be entered or a sentence imposed.[96] Since the suspect is absent, the hearing acts only as a public airing of charges and the (normally substantial) evidence against him.[97] Furthermore, Tribunal judges must be satisfied that:

> (i) the Prosecutor has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and
> (ii) the Prosecutor has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements . . . .[98]

---

89. *See id.*
90. *See id.* at 5.
91. *See* Unofficial U.N. Doc., *supra* note 81, at 1.
92. *See id.*
93. *See id.*; s*ee also* Evidence Hearing Against Radovan Karadzic and Ratko Mladic, 1 U.N. Doc. CC/PIO/092-E, at 1 (1996).
94. *See* Unofficial U.N. Doc., *supra* note 81, at 1.
95. *See id.*
96. *See id.*
97. *See id.*
98. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), ¶ (A)(i), (ii), at 1.

The victims of war crimes also play a key role in the course and success of a hearing.[99] Their participation is considered to be the most innovative aspect of the law and is truly unique to the International Criminal Tribunal.[100] The Rule explicitly affords victims an opportunity to speak on the record against the accused war criminal in open court.[101] As stated by the Security Council, this allows the "voices of the victims" to be heard in a public forum backed by international recognition.[102] According to the Tribunal, this public forum allows victims a formal means of redress in a proceeding sponsored by the body that will prosecute the war criminals when, or if, they are captured.[103] The victim's testimony, provided either directly before the court or prerecorded and read into the record by the Prosecutor, is saved as part of the official record against the suspect.[104]

While the entire Rule 61 hearing process was essentially created for the victims, the testimonial phase provides the greatest impact. The process is paramount to both the victims and the court. By providing victims an opportunity to speak about the atrocities that they have endured, they begin the healing process and, at the same time, assist the Tribunal in the suspect's prosecution.

After the evidence and witness testimony have been presented to the court, the Trial Chamber judges retire to determine the outcome of the hearing.[105] The Chamber considers whether the crimes attributed to the accused are crimes that would fall within the purview of the International Tribunal and attempts to ensure that the charges against the suspect are grounded in substantial fact.[106]

Again, while no penalty is imposed upon the suspect, consequences flow from a Rule 61 hearing.[107] Subsection (C) of Rule 61 is the precursor to the consequences phase of the hearing.[108] It states:

---

99. *See* Unofficial U.N. Doc., *supra* note 81, at 1.

100. *See* Prosecutor v. Rajic, Case No. IT-95-12-R61, at 5 (1996) (Sidhwa, J., concurring).

101. *See id.*

102. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), ¶ (B), at 1. The Rule specifically states that "[t]he Prosecutor may also call before the Trial Chamber and examine any witnesses whose statements have been submitted to the confirming Judge." *Id.*

103. *See* Unofficial U.N. Doc., *supra* note 81, at 2.

104. *See id.*

105. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev. 8 (1996), ¶ (C), at 1.

106. *See Rajic*, Case No. IT-95-12-R61, at 4-5 (Sidhwa, J., concurring).

107. *See id.*

108. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), ¶ (C), at 1.

> If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (A) above.[109]

These actions by the Tribunal are designed to proclaim that the suspect is charged with serious offenses and that the International Criminal Tribunal seeks to prosecute.[110] The Tribunal then offers the accused an opportunity to defend himself at the Tribunal or face the consequences of being branded a "fugitive from international justice."[111]

In addition to attaching the stigma of "international fugitive," the court has the power to apply further pressure in attempting to capture fugitive suspects.[112] Immediately following its identification of the fugitive, the Trial Chamber issues an international arrest warrant to all States, naming the individual and the crimes for which he is accused.[113] Furthermore, should the Prosecutor so request, the Trial Chamber can order States to commence action against the suspect's property and holdings.[114] This order to adopt provisional measures can focus on, but is not limited to, freezing of assets.[115]

The international arrest warrant carries additional liabilities aimed at compelling a wanted suspect to appear before the court. First, the Tribunal names the fugitive's country of residence as an "open-air prison."[116] This categorization is usually accompanied by an order from the Tribunal directing "all States" to search for and apprehend the suspect.[117] Additionally, the Tribunal believes that the international fugitive will become a hostage to political turmoil occurring in his country, and that any protection he enjoys will prove to be temporary.[118] Finally, if the accused holds a position of military or political power, his ability to operate in that position would prove difficult.[119] Theoretically,

---

109. *See id.*
110. *See* Evidence Hearing Against Radovan Karadzic and Ratko Mladic, *supra* note 93, at 1.
111. *See id.*
112. *See* U.N. Rules of Procedure and Evidence for the Criminal Tribunal, 61 U.N. Doc. IT/32/Rev.8 (1996), ¶ (D), at 1.
113. *See id.*
114. *See id.*
115. *See id.*
116. *See* Unofficial U.N. Doc., *supra* note 81, at 2.
117. *See* Prosecutor v. Nikolic, Case No. IT-94-2-R61, at 5-6 (1995).
118. *See* Unofficial U.N. Doc., *supra* note 81, at 2.
119. *See id.*

since all other countries will be directed to arrest him on sight, his capacity to operate in the international arena will be diminished.[120]

The closest comparison between Rule 61 and U.S. law is the federal grand jury hearing. Grand jury proceedings allow the presentation of evidence *ex parte*, without the participation of the accused.[121] The grand jury can proceed legally without the testimony of the defendant.[122] Another similarity between a Rule 61 hearing and a grand jury proceeding is that there is no possibility of a violation of the right of an accused to cross-examine witnesses, nor face the accuser.[123] Furthermore, each proceeding is designed to hear charges brought against an accused.[124] Evidence is presented, and witness testimony is heard.[125] Similarly, in each hearing procedure there is no finding of guilt or sentencing.[126]

However, the two diverge on the philosophy of purpose. The grand jury is meant to be a proactive measure to prevent government overreaching and false claims.[127] Rule 61, however, is meant to publicize the acts of the accused and call upon all nations to find and arrest the suspect.[128] The large gap between the objectives of each proceeding illustrates the uniqueness of Rule 61. Nowhere in U.S. statutory law are official legal hearings initiated merely to publicize the wrongful acts of a fugitive suspect.

VI. *PROSECUTOR V. IVICA RAJIC*: A SITUATIONAL ANALYSIS OF RULE 61

When Croat commander Ivica Rajic marched his brigade of Croatian Defense Council troops into the village of Stupni Do, located in the Republic of Bosnia and Hercegovina, on October 23, 1993, and ordered them to destroy the village and its inhabitants, the War Crimes Tribunal for the Former Yugoslavia was less than six months old.[129] The

120. *See id.*; *see also* Prosecutor v. Rajic, Case No. IT-95-12-R61, at 4-5 (1996) (Sidhwa, J., concurring).

121. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.1-.3 (2d ed. 1992).

122. *See id.* § 15.2(b).

123. *See id.* The 6th Amendment of the U.S. Constitution provides that the accused shall have the right "to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

124. *See* LAFAVE & ISRAEL, *supra* note 121, § 15.1; *see generally* Unofficial U.N. Doc., *supra* note 81.

125. *See* LAFAVE & ISRAEL, *supra* note 121, § 15.1.

126. *See id.*

127. *See id.*

128. *See generally* Unofficial U.N. Doc., *supra* note 81.

129. *See* Prosecutor v. Rajic, Case No. IT-95-12-R61, para. 1, at 4 (1996) (Sidhwa, J., concurring); *see also* Meron, *supra* note 65, at 2.

type of acts committed by Rajic and his troops on that day, however, provided strong justification for the Tribunal's creation.[130] Rajic was charged on August 23, 1995, with six counts of grave breaches of the Geneva Convention of 1949 relating to the laws and customs of war.[131] Six months later in March of 1996, the prosecutor of the case informed the presiding judge that he had been unable to effect personal service of the indictment on Rajic or otherwise notify him of the charges.[132] Satisfied that the Prosecutor had unsuccessfully employed all reasonable means to execute service of process on Rajic (without success), Judge Rustam S. Sidhwa[133] ordered the indictment submitted to his chamber for "review under Rule 61 of the International Tribunal's Rules of Procedure and Evidence . . . ."[134]

---

130. *See Rajic*, Case No. IT-95-12-R61, at 4 (Sidhwa, J. concurring); *see also* Meron, *supra* note 65, at 2.

> The [Security C]ouncil created the [T]ribunal in response to the deliberate, systematic and outrageous violations of human rights and humanitarian norms . . . atrocities committed include summary executions, torture, rape, arbitrary mass internment, deportation and displacement, hostage taking, inhumane treatment of prisoners, indiscriminate shelling of cities and unwarranted destruction of private property.

Id.

131. *See Rajic*, Case No. IT-95-12-R61, at 4 (Sidhwa, J., concurring). The six-count indictment included:

> Count I—a grave breach of the Geneva Convention of 1949, as recognized by Article 2(a) (willful killing) of the Statute of the International Tribunal ("Statute"); Count II—a grave breach of the Geneva Conventions of 1949, as recognized by Article 2(d) (destruction of property) of the Statute; and Count III—violations of the laws and customs of war, as recognized by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. In the alternative, he is charged with: Count IV—*command responsibility* for a grave breach of the Geneva Convention of 1949, as recognized by Article 2(a) (willful killing) of the Statute; Count V—*command responsibility* for a grave breach of the Geneva Convention of 1949, as recognized by Article 2(d) (destruction of property) of the Statute; and Count VI—*command responsibility* for violations of the laws and customs of war, as recognized by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute.

Id. (emphasis added).

132. *See id*. at 2. While the trial record does not indicate the reasons for which the Prosecutor was unsuccessful in his attempts to serve notice of the indictment in this particular case, as stated above there are three scenarios that result in this failure: "the accused has voluntarily eluded justice; the authorities of the territory concerned have not succeeded in locating him; or else those same authorities have refused to cooperate with the Tribunal." *See* Unofficial U.N. Doc., *supra* note 81, at 1.

133. Tribunal Judges are appointed to four-year terms. Sidhwa's term ended in 1997. *See* Meron, *supra* note 65, at 1.

134. *See Rajic*, Case No. IT-95-12-R61, at 2 (Sidhwa, J., concurring).

Upon settling pre-hearing matters between the Prosecutor and Judge,[135] the Trial Chamber commenced the Rule 61 hearing with a discussion of its subject-matter jurisdiction over the offenses allegedly committed by Rajic.[136] The three-judge panel stated the two-part test under article 2 of the Statute of the International Tribunal that must be satisfied before the Tribunal can assert jurisdiction over any Rule 61 hearing.[137] The first part of the test determines the existence of an international armed conflict occurring in the theater of war at the time of the alleged crime.[138] The second step determines whether the crime was directed at "protected" persons or property protected under the relevant articles of the Geneva Convention.[139]

The Trial Chamber seemed to struggle initially with the determination of whether the conflict constituted an internal struggle or "international" hostility.[140] Since the predominant fighting in the conflict was internal, and between ethnic factions contained within the borders of the former Yugoslavia, the court closely inspected the military role of other countries within that conflict to determine whether the civil war had crossed international borders.[141] In the light of prior Tribunal opinions on challenges to its jurisdiction, the panel concluded that it could assert jurisdiction in the matter of Rajic.[142] The court held that for purposes of the Geneva Convention of 1949, continued military assistance of Croatia provided to the Bosnian Croats against the Bosnian Serbs, at the time of the attack on Stupni Do, satisfied the requirement that the conflict be international for the Tribunal to take jurisdiction.[143] The Trial Chamber

---

135. *See id.* at 2, 3. A notable aspect of the pre-hearing conferences and motions was the Prosecutor's motion to conceal the identity of seven witnesses scheduled to testify against Rajic at his hearing. *See id.*

136. *See id.* at 3, 7.

137. *See id*. at 7. Article 2 of the Statute of the International Tribunal covers grave breaches of humanitarian law under the 1949 Geneva Convention. *See id*.

138. *See id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-AR72, at 2 (1995)).

139. *See id.*

140. *See id.* at 7-9.

141. *See id.* at 8-9.

142. *See id.* at 9.

> To the extent that the conflicts [in the former Yugoslavia] had been limited to clashes between Bosnian Government Forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serb-Montenegro) could be proven).

Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶ 72, Case No. IT-94-1-AR72 (1995), *quoted in Rajic*, Case No. IT-95-12-R61, at 8 (Sidhwa, J., concurring).

143. *See Rajic*, Case No. IT-95-12-1961, at 9 (Sidhwa, J., concurring). The Prosecutor submitted evidence that demonstrated that between 5,000 to 7,000 members of the Croatian

also stated that the prosecution's evidence further showed that the Bosnian Croats were under the direct military control of Croatia in their clashes with the Bosnian Government forces, adding support to its finding that the conflict was "international."[144]

The court next approached the second requirement in the jurisdictional analysis of article 2 of the Statute of the International Tribunal: whether the alleged offense was directed at protected people or property.[145] War crimes can only be prosecuted under article 2 if they are specifically directed at persons or property considered "protected" under the 1949 Geneva Convention IV.[146] Protected persons under article 4 of Geneva Convention IV are those individuals who, during an armed conflict, find themselves in the control of a foreign occupying force and are to be safeguarded under the Convention.[147] The Trial Chamber stated that it was presented with "considerable evidence" that Bosnian Croats controlled the area surrounding Stupni Do.[148] However, the court reasoned that regardless of the evidence presented by the Prosecutor, the "protected people" requirement would have remained satisfied due to the controlling influence of Croatia (an occupying party of which the residents of Stupni Do were not nationals).[149]

For an occupying power to destroy both real and personal property in a foreign territory, its destruction must be militarily necessary by the occupying power.[150] To completely satisfy the requirement, set out in the Geneva Convention IV, the power must be considered as "occupying" the territory.[151] Since the court previously determined that the Croats were in control of the area when they overran Stupni Do, they have satisfied the

---

Army, along with representatives from the Croatian Armed Forces (known as HOS), were involved in clashes with Bosnian Government forces in central and southern Bosnia. *See id.*

144. *See id.* at 15. The specific language of the opinion calls the Bosnian Croats "agents" of the Croatian Government, and likens it to the U.S. involvement in backing the Contras in Nicaragua during the early 1980s. *See id.*

145. *See id.* at 18.

146. *See id.*

147. *See id*. at 18-19 (citing 1949 Geneva Convention IV, *supra* note 47, art. 4). The specific text of the Geneva Convention reads that: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." 1949 Geneva Convention IV, *supra* note 47, art. 4.

148. *See Rajic*, Case No. IT-95-12-R61, at 19 (Sidhwa, J. concurring).

149. *See id.* at 19-20.

150. *See id.* at 20 (citing 1949 Geneva Convention IV, *supra* note 47, art. 53). The specific text of the Geneva Convention reads that: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." *See* 1949 Geneva Convention IV, *supra* note 47, art. 53.

151. *See Rajic*, Case No. IT-95-12-R61, at 20 (Sidhwa, J., concurring).

occupation requirement.[152] Thus, when the Croats burned and destroyed almost every house in the village, and when they stole the possessions of the residents, the Tribunal found they were in clear violation of the Geneva Convention.[153] Additionally, there was testimony that Stupni Do had no military significance whatsoever, and the attack was likely an act of retribution for an earlier Bosnian Muslim attack on a Bosnian Croat stronghold.[154] The Trial Chamber approved jurisdiction.[155]

After establishing subject-matter jurisdiction, the next step of the Rule 61 process entails the presentation of evidence against the accused.[156] The evidence against Rajic in this case was substantial. The prosecution entered into the record evidence that showed the attack was especially vicious on the residents of Stupni Do.[157] Besides burning the villagers' homes and stealing their personal belongings, evidence illustrated that the Croat troops showed no regard for the well-being of the residents.[158] Witness statements detailed that while Croat troops leveled the village, some of the female residents were raped and shot in their homes, while some of the men of the village were beaten, stabbed, and their bodies thrown into the fires of the burning houses.[159] In addition, the attack was believed to be targeted at the residents of the village.[160] Finally, the prosecutor presented "significant evidence" that connected Rajic to the attack.[161] Witness statements provided to the Trial Chamber showed that Rajic was intricately involved in, and probably planned, the attack on Stupni Do.[162] Other testimony indicated that he was an authority figure in the Bosnian Croat military forces and that he made boastful statements regarding his troops' activities.[163]

---

152. *See id.*
153. *See id.* at 20, 24.
154. *See id.*
155. *See id.* at 22.
156. *See id.* at 23.
157. *See id.* at 24.
158. *See id.*
159. *See id*. There were no hearsay objections in the record of the *Rajic* Rule 61 hearing. Due to the similarities between the Rule 61 hearings and grand jury proceedings, it is apparent why there would not be hearsay objections in the record; absences of hearsay objections occur either because the accused (or his attorney) is not present during the Rule 61 hearing, or because there is a low standard for admissibility of evidence. Though the former is the most likely situation in many Rule 61 hearings, the latter plays a role in the admissibility of hearsay evidence.
160. *See id.* at 25.
161. *See id.* at 26.
162. *See id*. The testimony was from Brigadier Angus Ramsey, a high ranking UN official. *See id*. Brigadier Ramsey testified that he felt Rajic was brutal enough and possessed the seniority to plan and execute an attack equal to the magnitude of that which occurred at Stupni Do in 1993. *See id*.
163. *See id.* at 27.

Before issuing its decision, the Trial Chamber considered Rajic's failure to cooperate with the Tribunal and his absentee status.[164] Upon the initial indictment of Rajic, the Tribunal sent notice to the Republic of Croatia's embassy in Belgium requesting it publish the indictment with the intent of notifying Rajic of the actions that had commenced against him.[165] The Croat Government rejected the request.[166] This rejection, coupled with the evidence presented to the Trial Chamber showing that Rajic was residing within Croatia's borders, caused the court to determine, first, that government authorities of the Republic of Croatia probably knew of Rajic's whereabouts but failed to respond to the Trial Chamber's request to notify him of the indictment against him and, second, that Rajic himself probably knew of the indictment, but also refused to cooperate with the International Criminal Tribunal.[167]

In concluding its Rule 61 hearing against Ivica Rajic, the Trial Chamber opined that it was satisfied that the assault on Stupni Do had, indeed, occurred and that the attack was ordered and coordinated by Rajic himself.[168] Furthermore, the court concluded that the attack was aimed at the civilian population of the village as there was no military significance to the area.[169] In confirming all the counts brought by the Prosecutor, the court authorized the issuance of an "international arrest warrant" against Rajic, obligating all member states to arrest him upon entering their borders.[170] Additionally, the warrant was sent to the multinational military Implementation Force (IFOR), deployed in the territory encompassing the former Yugoslavia pursuant to the Dayton Peace Accords. IFOR has the same obligation to arrest Rajic should its constituents encounter him.[171] The final act of a Rule 61 hearing is the issuance of an information memorandum (press release) to the world's media outlets describing the charges against the accused and the Trial Chamber's findings in the Rule 61 hearing.[172]

The information memorandum is issued by the public information officer of the Tribunal.[173] In Rajic's case, the information memorandum commenced with a discussion of the Trial Chamber's finding of Croatia's direct and indirect involvement in the war in Bosnia and Hercegovina and

164. *See id.*
165. *See id.* at 28.
166. *See id.*
167. *See id.* at 28-29.
168. *See id.*
169. *See id.*
170. *See id.* at 30, 31.
171. *See id.* at 30.
172. *See* Information Memorandum, *supra* note 12.
173. *See id.*

described the significant evidence showing that Bosnian-Croats were acting under the influence of Croatia.[174] The press release next described the test used to determine whether the Tribunal had jurisdiction to perform a Rule 61 hearing.[175] Following the jurisdictional discussion, the memorandum described the Tribunal's findings of whether there were reasonable grounds to believe that Rajic was responsible for the crimes for which he was accused.[176] Finally, the press release noted the Tribunal's opinion regarding the failure of Croatia and Bosnia and Hercegovina to arrest Rajic.[177] The information memorandum for the Rajic case was a condensed version of the Trial Judges' opinions and summarized their findings.[178]

VII. CONCLUSION

Early signs indicate that Rule 61 might have saved the International Criminal Tribunal for the Former Yugoslavia. While the Tribunal's mandate was to have expired in the fall of 1997,[179] it continues to thrive today and produce international arrest warrants through Rule 61 hearings. Such hearings have turned the Hague courtroom back into an active organization, and the international community, and fugitives, are again taking note as to the Tribunal's findings. Are these the results of Rule 61? It is surely safe to assume that the only administrative authority in the Security Council's Rules of Evidence and Procedure that allows a post-indictment evidentiary record to be created against an accused has breathed life back into the almost-extinct Tribunal. Where once the Tribunal was stalemated by the absence of suspects, the court now has revitalized itself under the auspices of Rule 61.

The revival of the International Tribunal possesses other important, positive side effects. The turnaround can almost certainly be credited to the favorable discussions of late, regarding a permanent international criminal court. Furthermore, the mere effect on the psyche of both would-be war criminals and their potential victims also should be considered significant. An active Tribunal illustrates with great clarity that the international community is ardent in its support of justice for those suspected of crimes against humanity and equally zealous in its support of their victims. For the potential victims, the recent activity at

174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*
179. *See* Meron, *supra* note 65, at 2.

the Hague provides at least some sense of security that the world is watching what transpires in their villages and towns.

Critics might argue that Rule 61 should not be seen as the ultimate answer to fugitive war crimes suspects because the statute clearly possesses its own shortcomings. Yet, many of these shortcomings can be sufficiently addressed. Rule 61 cannot guarantee that justice will be achieved with respect to each and every individual accused of a violation of international humanitarian law. The statute, however, does not attempt to guarantee such a result. Ultimately, it is foreseeable that many of those found culpable of their acts in a Rule 61 hearing will never appear before the International Criminal Court.[180] Regardless of the number of international warrants, demands upon nations to search for and capture wanted suspects, or countries or implementation forces with authority to arrest the accused on sight, there still can be no guarantee that each suspect will be present for his trial. It is likely that a 100 percent defendant turnout will never come to pass on a large scale, especially in the international legal setting presided over by the United Nations. The purpose of Rule 61 is not to determine the suspect's guilt.[181] It will neither act as an engine for an absentee fugitive's trial, nor allow for the pronouncement of a sentence.[182] The Rule will not allow "shotgun-justice," where the court compiles a list of war crime suspects, calls them conspirators, and then calls them "international fugitives."[183] Rule 61 requires substantiated information and a previous indictment by the prosecutor before the Trial Chamber will even consider the evidence under the Rule.[184] Although the Rule may be the product of a frustrated UN Security Council, it is not sloppy patchwork for the international justice system as some might suggest. It is not an acquiescence by the United Nations that the fugitives have won; there is evidence that the

180. *See* Bradley Graham & Rick Atkinson, *NATO Remains Uncertain About Future Pursuit of Suspected War Criminals*, WASH. POST, July 19, 1997, at A16. The most notable of those fugitives found culpable under a Rule 61 hearing is Radovan Karadzic, the former Bosnian Serb president who was indicted in 1995 by the War Crimes Tribunal. *See id.*; *see also* Information Memorandum, *supra* note 12, at 2. Karadzic, however, remains in his territory of residence as this Article is published and has repeatedly refused to defend the charges levied against him by the United Nations. *See id.* Observers of Karadzic and NATO forces in the area have indicated they are ready to arrest him should he provide the opportunity. *See* Judah, *supra* note 73, at 21.

181. *See* Unofficial U.N. Doc., *supra* note 81, at 2.

182. *See id.*

183. *See* Prosecutor v. Rajic, Case No. IT-95-12-R61, at 3 (1996) (Sidhwa, J., concurring).

184. *See id.*

accused themselves have acknowledged the potential impact of a Rule 61 hearing.[185]

The mission of Rule 61 as stated by the International Criminal Tribunal is that it provides the "voice of the victims" when the victims have no redress.[186] The Rule empowers all nations, and sometimes multinational organizations, to hunt fugitive suspects if they believe that those suspects are within their borders.[187] The Rule forces into the public domain details of the devastation exacted by the suspect.[188] The Rule allows the suspect to be publicly branded as an "international fugitive" from justice.[189] The Rule weakens the power a war criminal might have as political or military leader in his territory.[190] But, most importantly, the Rule allows an identity to be put with the oftentimes faceless victims.

This participation will, hopefully, ease the pain victims have suffered at the hands of some of history's most evil forces. The opportunity to testify is the critical aspect of Rule 61. Such testimony is not only chronicled for the official record, but provides victims an invaluable and cathartic opportunity to participate in bringing the wanted fugitive to justice.[191]

185. *See id.* at 2. Rajic in his Rule 61 case granted the power of attorney to an individual meant to represent him at the hearing. *See id.*

186. *See* Unofficial U.N. Doc., *supra* note 81, at 2.

187. *See id.*; *see also Rajic*, Case No. IT-95-12-R61, at 30 (Sidhwa, J., concurring).

188. *See* Unofficial U.N. Doc., *supra* note 81, at 2.

189. *See id.*

190. *See id.*

191. *See id.*