The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes

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I. INTRODUCTION

Over the course of the last century, several international criminal bodies have been created to deal with crimes committed by participants during internal and international conflicts.[1] These crimes have occurred

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1. International criminal bodies have been created to investigate and prosecute war crimes following World War I, World War II, the various conflicts in the Former Yugoslavia, and the massacres in Rwanda. Each of these efforts will be examined in this Article. The United

during world wars, civil wars, and more isolated armed conflicts. Unfortunately, however, the fighting and bloodshed has almost never been contained to purely military theaters. All too often, defenseless civilians have been subjected to a wide range of inhumane treatment, including murder, rape, torture, and attempted genocide. The international community has attempted to deal with these crimes in a few different ways, the most recent of which were in response to the fighting in the Balkans and Rwanda. This Article will trace the history of international responses to these crimes beginning with World War I through the recent decision in the Balkans in *Prosecutor v. Tadic*.[2] Particular emphasis will be placed on the problems encountered and the effectiveness of each of the international bodies. The *Tadic* decision will be examined in detail to illustrate how modern attempts have faired, and the means through which these models can be used and improved to help deter future crimes.

II. WAR CRIMES AND WORLD WAR I

The first international attempt to prosecute war criminals following a war occurred in 1919 when World War I reached its conclusion. Shortly thereafter, the Allies and the Associated Powers met and agreed to the terms of the Treaty of Versailles.[3] Of great interest to the Allies was the opportunity to prosecute Kaiser Wilhelm II (Kaiser) and other German leaders for allegedly starting the war.[4] This desire to force the German leaders to shoulder responsibility for their actions was manifested in articles 227-29 of the Treaty of Versailles.[5] Pursuant to article 227,[6] an

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States involvement in Nicaragua with the *Contras* will also be considered, although it was handled by an existing court.

2. Prosecutor v. Tadic, Case No. IT-94-1-T (May 7, 1997), *reprinted in* I.H.R.R. Vol. 4, No. 3 (1997).

3. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 2 BEVANS 43 (although the Treaty was signed in Versailles, initial groundwork was established at the Preliminary Peace Conference in Paris earlier that year) [hereinafter Treaty of Versailles].

4. *See* JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 37 (1982).

5. *See* Treaty of Versailles, *supra* note 3, arts. 227-29.

6. Article 227 states:

> A special tribunal will be constituted to try the accused [William II of Hohenzollern, formerly German Emperor]. [The special tribunal] will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
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> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

international criminal tribunal was established for the purpose of investigating and possibly prosecuting the Kaiser for waging a war of aggression. Articles 228 and 229[7] granted the tribunal power to pursue prosecution of suspected German military personnel.[8]

The Treaty of Versailles established the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (Commission) with the authority to seek information and evidence in order to aid in criminal proceedings.[9] The Commission spent approximately two months investigating various war crimes and subsequently submitted a list of 895 suspected war criminals to the Allied Tribunal.[10] By 1921, however, in the interest of regional stability and political agendas, the Allies decided to forego prosecuting the suspected criminals before independent military tribunals.[11] Rather, the Allies decided to defer control of the proceedings to the German Supreme Court (Reichsgericht).[12] The Reichsgericht, located in Leipzig, agreed to try the cases under German law, which meant that the Procurator General of the court had full discretion with regard to what cases would be heard.[13]

Id. art. 227.

7. Article 228 states:

> The German Government recognises the right of the Allied and Associate Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding an proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
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> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229 states:

> Persons guilty of criminal acts against nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.
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> Persons guilty of criminal acts against the national of more that one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.
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> In every case the accused will be entitled to name his own counsel.

Id. arts. 228-29.

8. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 14 (1997).

9. *See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference*, March 29, 1919, 14 AM. J. INT'L L. 95, 96 (1920).

10. *See* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 200 n.4, (1996).

11. *See* Bassiouni, *supra* note 8, at 19.

12. *See id.*

13. *See id.* at 20.

After discussions with the Germans regarding the problems faced by the defeated nation in trying its own citizens, the Allies agreed to shorten the list of suspects to forty-five, from which the Procurator General chose twelve to bring to trial.[14] Those convicted received sentences ranging from six months to four years, but few spent anytime in prison for their sentences.[15]

The original intent of the Allies in creating a commission to investigate war crimes and prosecute alleged offenders was to alert future potential aggressors that actions of aggression would not go unchecked by the international community.[16] This goal of setting a precedent, however, clearly was not achieved. World War I claimed hundreds of thousands of lives, and only twelve men were forced to answer for the deaths and the devastation created by their acts. Proceedings following the war "exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies" who "missed the opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice."[17]

III. WAR CRIMES AND WORLD WAR II

After the relatively unsuccessful attempt to bring war criminals to justice after World War I, the Allied Powers sought to create a more effective procedure for punishing military personnel who committed crimes during World War II. The first step taken toward forming an international criminal forum occurred on January 13, 1942, when representatives from nine European nations met and formulated the St. James Declaration.[18] The participating nations declared "international solidarity [to be] necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilised world."[19] A further step was taken on October 20, 1943, with the creation of the

14. *See id.*
15. *See* BASSIOUNI & MANIKAS, *supra* note 10, at 200 n.4.
16. *See* Bassiouni, *supra* note 8, at 20.
17. *See id.* at 20-21.
18. *See* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 301 (1994).
19. *See id*. (citing Resolution by the Allied Governments Condemning German Terror and Demanding Retribution (Jan. 13, 1942), *reprinted in* 144 BRIT. & FOREIGN PAPERS, 1940-1942, at 1072 (Her Majesty's Stationary Office, 1952)).

United Nations War Crimes Commission (UNWCC).[20] The UNWCC was created with the purpose of identifying and cataloging evidence of war crimes committed by war criminals.[21] Despite the fact that the UNWCC received little financial and political support during its initial existence, the commission was able to compile extensive files listing 24,453 accused war criminals, 9520 suspects, and 2556 material witnesses.[22]

A. Creation of the International Military Tribunal at Nuremberg

Although the St. James Declaration[23] and the United Nations War Crimes Commission were positive steps toward addressing the allegations brought forth against the Nazi war criminals, some members of the Allied Powers disagreed with the manner by which alleged war criminals should be prosecuted. Several high-ranking officials in both the British and United States governments opposed the creation of an international court and opted in favor of other procedures.[24] In the end, those in favor of creating an international court to adjudicate war criminals prevailed. On November 1, 1943, the formal decision to prosecute Nazi war criminals before this international court was declared pursuant to the Moscow Declaration,[25] which stated:

> Those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein . . . without prejudice to the

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20. *See id*. (although the Commission was named the United Nations War Crimes Commission (UNWCC), it had no relation to the modern day United Nations, which did not exist at the time).

21. *See id*. at 302.

22. *See* Bassiouni, supra note 8, at 22 (citing UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 508-09 (1984)).

23. *See* Wexler, *supra* note 18, at 301 (citing Resolution by Allied Governments Condemning German Terror and Demanding Retribution (Jan. 13, 1942), *reprinted in* 44 BRIT. & FOREIGN PAPERS, 1940-1942, at 1072 (Her Majesty's Stationary Office, 1952)).

24. *See* John F. Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 62 (Ginsburgs & Kudriavstev eds., 1990) (discussing a meeting in Quebec between then-U.S. President Roosevelt and Prime Minister Churchill, which occurred in September 1942, and how they adopted the "Morgenthau Plan" that called for Nazi war criminals to be shot on sight, and lesser Nazis to be sent to repair Allied property; also discussing Sir Malkin of the British Foreign Office and his brief entitled "Against the Establishment of an International Court" that called for the use of summary executions instead of judicial proceedings, because "their guilt was taken for granted").

25. *See* Wexler, *supra* note 18, at 302 (citing *Declaration of German Atrocities*, Nov. 1, 1943, 3 BEVANS 816, 834, DEP'T ST. BULL., Nov. 6, 1943, at 310-11).

> case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.[26]

The Moscow Declaration paved the way for the Allies to create the International Military Tribunal (IMT),[27] which would later be established under the London Accord[28] on August 8, 1945.[29]

Article 6 of the London Accord[30] created the IMT Charter and defined those crimes over which the IMT would have jurisdiction. The IMT Charter defined three crimes for which the court could hold individuals criminally responsible: crimes against peace, war crimes, and crimes against humanity.[31] The drafters of the IMT Charter looked to previous treaties and conventions to assist them in defining the article 6 crimes.[32] Article 6(b) refers to the Hague Convention of 1907[33] and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.[34] Article 6(c) specifically gave the IMT jurisdiction over crimes committed before and during the war, but the IMT only exercised jurisdiction if the crime "had been committed in connection with a war crime or crime

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26. *See id.*

27. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement]. The charter that established the International Military Tribunal was annexed to the London Agreement, 82 U.N.T.S. 279, at 284 [hereinafter IMT Charter].

28. *See id.*

29. *See id.*

30. *See* IMT Charter, *supra* note 27, art. 6.

31. Article 6 of the IMT Charter provides:

> (a) Crimes against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
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> (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id.

32. *See* Bassiouni, *supra* note 8, at 25-26.

33. *See* 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631.

34. *See* The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 BEVANS 932.

against the peace."[35] One of the problems with enforcing article 6(c) was that the drafters included a new crime, never before defined by previous agreements.[36] The IMT drafters were cautious not to enact legislation that could be attacked as ex post facto in court.[37] This led the IMT to interpret the language of 6(c) as requiring a connection to an actual war crime that was committed during the war and not prior to it.[38] Subsequently, much of the effectiveness of article 6 was removed, because accused war criminals could not be convicted of any crimes committed before the outbreak of the war in 1939.[39]

Despite the fact that the IMT restrained itself with regard to using the full force of the IMT Charter (specifically, limiting the scope of article 6(c)), the court did succeed in publicizing the idea that serious violations of human rights would be subject to international, not just local, scrutiny and process. After intense debate concerning whom to prosecute in front of the IMT, the Allies formed a list of twenty-four defendants.[40] Of the twenty-four original defendants, twenty-two went on trial.[41] Twelve were sentenced to death, three to life in prison, three were acquitted, and the remaining four received ten to twenty years.[42] Although the IMT succeeded in convicting some of the Nazi perpetrators, the court did not succeed in setting a solid precedent upon which future international

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35. *See* Wexler, *supra* note 18, at 309 (citing Roger S. Clark, *Crimes Against Humanity at Nuremberg*, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 196 n.73 (Ginsburgs & Kudriavstev eds., 1990)).

36. *See* Bassiouni, *supra* note 8, at 26.

37. *See id.*

38. *See* Wexler, *supra* note 18, at 309.

39. *See* Bassiouni, *supra* note 8, at 26.

40. *See* Wexler, *supra* note 18, at 306 (citing Judgment of Oct. 1, 1946, International Military Tribunal Judgment and Sentence, 41 AM. J. INT'L L. 172, 252 (1947)). The Allies decided that the IMT would only try cases involving "major" war criminals, and the municipal and military courts would try the minor criminals in the jurisdiction where the crime took place. *See id.* The trial of the "major" criminals started on Nov. 20, 1945, and ended Oct. 1, 1946. *See id.*

41. *See id.* at 308 (citing Judgment of Oct. 1, 1946, International Military Tribunal Judgment and Sentence, 41 AM. J. INT'L L. 172, 252 (1947)). Two of the defendants were not brought to trial. One of the two, Robert Ley, committed suicide on Oct. 25, 1945, before his trial began. The other defendant, Gustav Krupp von Bohlen und Halbach, avoided trial after he was found to be mentally ill. Another defendant, Martin Bormann, was represented by council and tried *in absentia*. *See* HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES 56-57 (1993).

42. While they awaited trial, the defendants were held in Berlin's Spandau Prison. Those who were sentenced to death were executed at the prison. The seven other convicted Germans also returned to Spandau to fulfill their sentences. Perhaps the most notable of the Spandau inmates, Rudolph Hess, died in the prison in 1987. The three defendants found not guilty by the IMT (Schacht, von Papen, and Fritsche) did not escape punishment. Each of them was subsequently tried and convicted by German courts. They all received prison sentences. *See* LEVIE, *supra* note 41, at 56-57.

bodies could rely.[43] Although the IMT was successful in bringing the problem of crimes against humanity to the world's attention, the IMT, in many instances, still failed to differentiate between crimes against humanity and war crimes.[44]

B. Creation of the IMT for the Far East at Tokyo

When the war came to an end in 1945, the Soviet Union requested that the Allies set up a similar commission for the Far East to investigate potential offenses committed by the Japanese. The Allies complied with the request, and, in Moscow, the Far East Commission (FEC) was established in December of 1945.[45] Unlike the IMT at Nuremberg, the FEC was a political body with no inherent judicial powers.[46] The main function of the FEC was to administer the Allied occupation of Japan by coordinating the Allies' policies for all of the Far East.[47] Control of the FEC was granted to the Supreme Commander of the Allied Powers (SCAP), General Douglas MacArthur.[48] Soon after the conclusion of the war, the Soviet Union began to push for the creation of a body similar to the IMT at Nuremberg to prosecute suspected Japanese war criminals.[49] General MacArthur responded by creating the International Military Tribunal for the Far East (IMTFE) at Tokyo in January 1946.[50] One of the major differences between the IMT and the IMTFE was that the latter was not created by treaty.[51] As a result, the United States could control the proceedings and ensure that the Soviet Union did not use the IMTFE to gain more power in the region by unduly punishing Japan.[52] As SCAP,

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43. Although the IMT did set a standard for future tribunals, much attention has been brought to the IMT's refusal to prosecute anyone other than German military personnel. This factor has lead some to call the proceedings "victor's justice." *See id.* This point is illustrated by considering the events involving the Katyn Forest Massacre. *See id.* at 68-69. In September 1941, 11,000 Polish officers were executed near Smolensk in the Soviet Union. *See id.* The Soviet Prosecutor attempted to indict German officers for the crime, however, the IMT found no evidence with which to proceed. *See id.* In 1990, the Soviet Government officially admitted that it was responsible for the massacre. *See id.* Had the truth come out during the IMT's investigation, however, the Soviets still would not have been held accountable for their actions. *See id*.

44. *See* Wexler, *supra* note 18, at 307-08.

45. *See* Bassiouni, *supra* note 8, at 31.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.* at 32 (citing Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, 4 BEVANS 20).

51. *See id.*

52. *See id.* at 37 n.93.

General MacArthur was able to guide the FEC and the IMTFE and ensure that the two bodies functioned just as the United States intended.[53]

The investigation of war crimes by the IMTFE began in April 1946.[54] The IMTFE consisted of representatives of each of the Allied Powers who acted on behalf of their respective governments and not as independent members of a judicial body.[55] This structure caused the group to become highly politicized and less effective.[56] Even if the group had functioned more efficiently, the fact that General MacArthur made all final decisions with regard to prosecuting and releasing alleged criminals meant that MacArthur had to take control of the outcome of these proceedings.[57]

Of the twenty-five convicted war criminals, not one served more than ten years in prison.[58] The most notable of the possible defendants, Emperor Hirohito, was never even prosecuted in the interest of stabilizing post-World War II Japan.[59] Although the IMTFE, like the IMT at Nuremberg, did not bring to justice nearly enough of the perpetrators of war crimes during World War II, both groups successfully brought these atrocities to the world's attention. Subsequent treaties and agreements brought more attention to both war crimes and crimes against humanity. Several of these treaties were developed while the trials in Nuremberg and Tokyo were taking place.[60]

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53. *See id.* at 32-33.

54. *See id.* at 33.

55. *See id.*

56. *See id.* at 35 (Political agendas influenced the selection of defendants. The need to help stabilize Japan's post-war government led the Allied powers to decline to prosecute Emperor Hirohito as a war criminal.).

57. *See id.* at 34.

58. *See id.*

59. *See id.* at 35.

60. The atrocities committed by the Germans during World War II led the United Nations to begin formulating more comprehensive lists of prohibited action during armed conflict. In November 1946, the U.N. representatives from Cuba, Panama, and India requested that the Secretary-General include the issue of punishing genocide to the General Assembly. *See* DOCUMENTS ON THE LAWS OF WAR 157 (Adam Roberts & Richard Guelff eds., 1989). *See also* The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 75 U.N.T.S. 970 [hereinafter Geneva Convention I]; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of Aug. 12, 1949, 75 U.N.T.S. 971 [hereinafter Geneva Convention II]; the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 75 U.N.T.S. 972 [hereinafter Geneva Convention III]; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12,1949, 75 U.N.T.S. 973 [hereinafter Geneva Convention IV], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra*, at 171-337. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

IV. INTERNATIONAL RESPONSE TO THE CRIMES OF WORLD WAR II

A. Background

As the trials in Nuremberg progressed, the international community began to realize the magnitude of the crimes committed by the Nazis troops, particularly those crimes committed against the Jewish population of Europe.[61] World War II holds the unfortunate honor of creating the term "genocide."[62] The term was first used by the Polish scholar Raphael Lemkin in 1944.[63] In his book, *Axis Rule in Occupied Europe*, Lemkin defined the term as "the destruction of a nation or of an ethnic group."[64] The first response to the events leading up to and throughout the Holocaust was the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[65] The Genocide Convention, although only used to a limited degree, was an important step for two main reasons. First, article 1 removed the IMT Charter requirement that war crimes be committed only during times of declared war.[66] Second, the Genocide Convention provided both a thorough definition of genocide, as well as a list of those related acts that would be punishable.[67] The Genocide Convention was immediately

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61. *See* BRADLEY F. SMITH, THE ROAD TO NUREMBERG 203-05 (1981).
62. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 60, at 157.
63. *See id.*
64. *Id.*
65. *See* Genocide Convention, *supra* note 60, at 277.
66. Article 1 states: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Id.* art. 1.
67. Article 2 states:

> In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (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.

Article 3 states:

> The following acts shall be punishable:
>
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct or public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

Id. arts. 2-3.

followed by four more conventions that offered detailed descriptions for several other war and related crimes.[68]

The "Nuremberg principles,"[69] regarding the need to protect members of all states from atrocities similar to the ones that occurred during World War II, were further developed and explained in the Geneva Conventions of 1949.[70] The four Geneva Conventions of 1949 sought to clarify and extend the laws governing war in light of World War II. Each convention dealt with specific issues, but all contained important common articles. Common article 3 has become an important jurisdictional device that international courts have looked to in recent times. Common article 3 sets the minimum standards of conduct that opposing parties must adhere to during internal conflicts.[71] Article 4 of Geneva Convention IV has also been helpful in determining which disputes fall within the jurisdiction of the international courts.[72] Article 4 defines the group of "protected people" that the convention seeks to shield with the articles of Geneva Convention IV.[73]

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68. *See generally* Geneva Conventions, *supra* note 60.

69. *See* Wexler, supra note 18, at 312.

70. *See supra* note 60.

71. Common article 3 of the four Geneva Conventions states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) 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.
>
> (2) The wounded and sick shall be collected and cared for.

Id.; *see* DOCUMENTS ON THE LAWS OF WAR, *supra* note 60, at 172.

72. *See id.*

73. *See id.* Article 4 of the Geneva Convention IV states: "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." *Id.* at 273.

B. Application of Geneva Conventions in Nicaragua

Common article 3 and article 4 of Geneva Convention IV were given a great deal of attention by the International Court of Justice (ICJ) in *Nicaragua v. United States of America*.[74] The *Nicaragua* case involved a dispute as to whether actions taken by the *contra* military forces in Nicaragua (*Contras*) could be imputed to the U.S. Government because the U.S. Government funded these activities.[75] The Nicaraguan Government claimed that the United States funded, trained, and chose the leaders of the *Contras*.[76] The ICJ was faced with the question of:

> whether or not the relationship of the [*C*]*ontras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the [*C*]*ontras*, for legal purposes, with an organ of the United States Government, or acting on behalf of that Government.[77]

The ICJ found that the United States participation, "even if preponderant or decisive, in the financing, organization, training, supplying, and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation . . . ,"[78] was still not enough to impute fault from the *Contras* to the United States. The ICJ reasoned that the *Contras* could still have committed the acts without help from the United States.[79] However, the significance of the case lies in the ICJ's determination that the U.S. Government was still bound to adhere to the guidelines of article 1 of the Geneva Conventions.[80] The Court reasoned that article 1 required the United States to avoid influencing "persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions."[81] Although strong evidence was shown connecting the United States to the *Contras*, the ICJ held that not enough conclusive evidence was presented to find in favor of the Government of Nicaragua.[82]

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74. *See generally* Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

75. *See id.* at 109.

76. *See id.* at 112.

77. *Id.* at 109.

78. *See id.* at 115.

79. *See id.*

80. Article 1 states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 60, at 171.

81. *See Nicaragua*, *supra* note 74, at 220.

82. *See id.* at 115. The ICJ found that even though there was much evidence showing that the United States had financed, organized, and trained the *Contras*, there still was insufficient evidence imputing the *Contras*' actions to the United States. *See id.* The Court concluded that the acts in question could have been committed by the *Contras* without the aid and control of the

The ICJ's treatment of the Geneva Conventions was an indication that the international community had not completely forgotten the value of enforcing international humanitarian law. However, the first substantial use of the laws and treaties created after World War II did not come to fruition until the summer of 1992.[83] It was during the summer months of 1992 that the world began to hear about the prison camps in Bosnia and Herzegovina that were run by the Serbs.[84] News of the atrocities being committed in the Balkans led the United Nations to establish an investigative body similar to those used following World War II.[85] The United Nation's initial move was to establish a Commission of Experts to collect evidence of "grave breaches of the Geneva Conventions and other international humanitarian law" committed during the fighting in Yugoslavia.[86] The Commission of Experts mandate was given in Resolution 780.[87] The first report of the Commission of Experts[88] was submitted in February 1993,[89] and triggered the UN Security Council to begin the process of establishing a tribunal for hearing cases.[90]

V. THE ESTABLISHMENT OF THE ICTY

On May 25, 1993, the United Nations officially created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

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United States. *See id.* This analysis is of particular importance when considering the ICTY's decision regarding the issue of whether or not an international armed conflict existed in the Balkans during the time when Dusko Tadic was alleged to have committed his crimes.

83. *See* James Podgers, *A Victory for Process*, 83 JUL. A.B.A. J. 30 (1997).

84. *See* Roy Gutman, *Prisoners Of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia*, NEWSDAY (N.Y.), July 19, 1992, at 7.

85. *See id.*

86. *See* S.C. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/780 (1992), *reprinted in* 31 I.L.M. 1476 (1992) [hereinafter Resolution 780].

87. Resolution 780 provides:

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

Id.

88. *See* Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 48th Sess., Annex, at 20, U.N. Doc. S/RES/808 (1993).

89. *See id.*

90. *See id.*

Territory of Former Yugoslavia Since 1991 (ICTY).[91] The ICTY's first indictment was issued by the Prosecutor against Dusko Tadic in February 1995.[92] Tadic was accused of various acts that involved crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the laws or customs of war.[93] The charges stemmed from Tadic's alleged actions in Prijedor in the Republic of Bosnia and Hercegovina, and at the Omarska, Keraterm, and Trnopolje prisoner camps.[94] *Tadic* was the first case to be adjudicated by the ICTY.[95] Before the trial could begin, however, the tribunal had to address three important contentions brought by the defense in its July 25, 1995, motion on jurisdiction. First, the defense alleged that the establishment of the ICTY was not legally justified; second, that the ICTY lacked primacy jurisdiction over the national courts; and third, that that ICTY lacked subject-matter jurisdiction over the alleged crimes.[96]

A. Trial Chamber's Decision Regarding Defense Motion on Jurisdiction

The Trial Chamber addressed the defense's first contention, stating that the issue was outside the Court's scope of review because the Security Council had not granted the power of constitutional review.[97] Furthermore, the Chamber "held that the Security Council's finding that events in the former Yugoslavia constituted a threat to peace was a nonjusticible, political question inappropriate for judicial review."[98] However, seeing the need for some type of an answer, the Chamber did

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91. *See* U.N. Doc. S/RES/808 (1993), *reprinted in* 32 I.L.M. 1159, 1163-1205 (1993) [hereinafter Resolution 808]; U.N. Doc. S/RES/827 (1993) [hereinafter Resolution 827]. Resolution 808, issued by the U.N. Security Council on Feb. 22, 1993, authorized the creation of the Tribunal and directed the Secretary-General to produce a report on the formation of the Statute of the Tribunal within 60 days. The Secretary-General submitted his report to the Security Council on May 3, 1993, and it was unanimously approved in Resolution 827, on May 25, 1993, thus establishing the Tribunal and the Statute by which it would operate. For a description of the process of establishing the Tribunal, see BASSIOUNI & MANIKAS, *supra* note 10, at 199-236 (1996).

92. *See* Indictment 3: Tadic & Other (Feb. 13, 1995), *reprinted in* 34 I.L.M. 1013, 1028 (1995).

93. *See id.* at 1028-44.

94. *See* Prosecutor v. Tadic, Case No. IT-94-1-T (May 7, 1997, *reprinted in* I.H.R.R. Vol. 4, No. 3 (1997).

95. *See* Michael P. Scharf, *The Prosecutor v. Tadic: An Appraisal of The First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 862-63 (1997).

96. *See* Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT'L L. 687, 692 (1996).

97. *See id.* (citing Prosecutor v. Tadic, Trial Chamber, Decision on the Defense Motion or Jurisdiction, Case No. IT-94-1-T (Aug. 10, 1995)).

98. Douglas Stringer & Diane Marie Amann, *International Criminal Law*, 31 INT'L LAW 611, 617 (1997) (discussing the Tribunals reliance on *Baker v. Carr*, 389 U.S. 186, 217 (1962)).

comment that the Security Council's actions were a valid exercise of power under Chapter VII of the UN Charter.[99] The Chamber based its comment on article 41 that gives a "no[n] exhaustive" list of economic and military measures that the Security Council can employ to deal with serious threats to peace.[100]

The Trial Chamber then discussed the issue of primacy jurisdiction. The defense had contended that the ICTY was overstepping its bounds by violating the rights of individual states to try criminals alleged to have committed crimes within their jurisdiction.[101] Since jurisdiction was granted by article 9(c) of the ICTY Statute,[102] the Chamber reasoned that the Court did not have the authority to review the question.[103] Recognizing that this issue needed elaboration, the Chamber belabored the merits despite its self-pronounced lack of authority to adjudicate the issue.[104] First, the Chamber held that Tadic lacked standing to raise the issue because he was not a State.[105] Second, the Chamber pointed out that the two interested states in the case, Germany and Bosnia, voluntarily supported the trial of Tadic before the ICTY.[106]

The last issue the Chamber addressed was the alleged lack of subject-matter jurisdiction. The Chamber held that the ICTY Statute granted jurisdiction over the war crimes whether they were committed during an international or internal armed conflict.[107] In arriving at their decision, the Chamber reviewed the claim with regard to each individual article that was alleged to have been violated.

The Chamber first considered article 2 of the Statute, which covers grave breaches of the four Geneva Conventions of 1949. The Court noted that the text of article 2 did not explicitly require the conflict to be

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99. *See* George H. Aldrich, Comment, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 A. J.I.L. 64, 65 (1996).

100. *See* Watson, *supra* note 96, at 693 (citing Prosecutor v. Tadic, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) [hereinafter Decision of the Appeals Chamber]).

101. *See* Decision of the Appeals Chamber, *supra* note 100, at 39-41, 50-51.

102. Article 9(2) of the ICTY Statute states: "The International Tribunal shall have primacy over national courts. At any stage of 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."

The Statute of the ICTY that established guidelines for the Trial and Appellate Chambers, as well as instructions on how the ICTY was to be structured and function, is reprinted in 32 I.L.M. 1169 (1993); it can also be accessed via the U.N. website: <http://www.un.org/icty/i-b-en.htm> [hereinafter ICTY Statute].

103. *See* Decision of the Appeals Chamber, *supra* note 100, at 36.

104. *See id.* at 38.

105. *See* Stringer & Amman, *supra* note 98, at 617 (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chambers Decision on the Jurisdiction of the Tribunal 6, 11).

106. *See id.*

107. *See* Watson, *supra* note 96, at 693.

international[108] and, therefore, applied to both internal and international conflicts.[109] The Chamber then considered article 3, which covers violations of the laws or customs of war.[110] The defense claimed that article 3 was based on the fourth Hague Convention,[111] which applies only to international armed conflict, while the prosecution contended that article 3 referred to customary humanitarian law, thereby international and internal conflicts.[112] The Chamber accepted the Prosecutor's contention and, in addition, stated that article 3 also encompassed common article 3 of the Convention[113] that covers, specifically, internal conflicts.[114] The final jurisdictional challenge involved article 5, crimes against

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108. *See id.* at 693-94 (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chambers Decision on the Jurisdiction of the Tribunal ¶ 50)). Article 2: Grave Breaches of the Geneva Conventions of 1949 states:

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

ICTY Statute, *supra* note 102, at 1171.

109. *See* Watson, *supra* note 96, at 693-94.

110. Article 3: Violations of the Laws or Customs of War states:

> The International Tribunal shall have the power to prosecute persons violating that 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 willful 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.

ICTY Statute, *supra* note 102, at 1172.

111. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 60, at 43.

112. *See* Watson, *supra* note 96, at 694.

113. *See* Common Article 3, *supra* note 71.

114. *See* Watson, *supra* note 96, at 694.

humanity.[115] The defense relied on the decision reached by the Nuremberg Tribunal that crimes against humanity could not be claimed in an internal conflict given the principle of *nullum crimen sine lege*.[116] The Chamber recognized the validity of the argument, but decided that modern international law removed the nexus requirement between the crime and conflict.[117] As such, the Chamber held that it had subject-matter jurisdiction over article 5 claims.[118] The most important aspect of the Chamber's decision was its determination that Tadic's alleged crimes did not have to occur during international armed conflict.[119]

B. Appeal Chamber's Decision on Jurisdiction

The defense immediately filed an interlocutory appeal of the Trial Chamber's decision with the Appeals Chamber. Although the Appeals Chamber affirmed the decision, the five-judge panel disagreed with some parts of the Trial Chamber's reasoning.[120] The Appeals Chamber first reviewed the issue of the legitimacy of the establishment of the ICTY. The Appeals Chamber agreed with the Trial Chamber's assertion that it was not a constitutional court, that the Security Council properly responded to the threat to the peace, and that article 41 was not exclusive.[121] However, the Appeals Chamber disagreed with the Trial Chamber's conclusion that the issue was a nonjusticiable political

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115. *See* ICTY Statute, *supra* note 102, at 1173-74. Article 5: Crimes Against Humanity states:

> The International Tribunal shall have the power to prosecute persons responsible 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.

Id.

116. *See* Watson, *supra* note 98, at 695. The principle of *nullum crimen sine lege* is essentially the same as the *ex post facto* laws. *See id.* Its literal translation is "no crime without prior law." *See id.*

117. *See id.*

118. *See id.*

119. *See* Stringer & Amann, *supra* note 98, at 617.

120. *See id.*

121. *See* Watson, *supra* note 96, at 696.

question.[122] The Appeals Chamber's final ruling on the issue was that the Trial Chamber was correct in dismissing the contention.[123]

The Appeals Chamber then addressed the issue of whether article 9(2) of the Statute granted the ICTY primacy jurisdiction. On appeal, the defense argued that Tadic should not have been taken from Germany because he was already being tried for the crimes in Germany.[124] The Appeals Chamber noted that article 10 of the Statute would be a valid argument if a national court had already tried Tadic, but it stated that the proceedings against Tadic were still in the investigation stage in Germany.[125] Although the Appeals Chamber rejected the Trial Chamber's decision that Tadic lacked standing, it still affirmed the dismissal of the appeal.[126]

The Appeals Chamber's decision was dominated by its review of whether or not the Tribunal had subject-matter jurisdiction over the claims in articles 2, 3, and 5.[127] With regard to article 2 claims, the Appeals Chamber reversed the holding of the Trial Chamber.[128] The Appeals Chamber held that article 2 claims were to protect persons and property and that the relevant articles in the Geneva Conventions dealing with "persons and property" only dealt with international conflicts.[129] Therefore, the Appeals Chamber held that in order to sustain an article 2 claim, the Prosecution had to show that the crime was committed during an international armed conflict.[130]

With respect to the article 3 jurisdictional question relating to violations of the laws or customs of war, the Trial Chamber dismissed the appeal stating that the text of the article did not limit jurisdiction to international or internal conflicts, holding that it applied to both.[131] The Appeals Chamber agreed with the decision and elaborated on its reasoning. The Chamber held that article 3 covered "all violations of international humanitarian law other than the grave breaches of the four Geneva Conventions."[132] The expansion of the reach of the article was intended to ensure that no serious charges evaded the grasp of the Tribunal for minor procedural shortcomings of the Statute.[133] The

122. *Id.*
123. *See* Decision of the Appeals Chamber, *supra* note 100.
124. *See* Watson, *supra* note 96, at 697.
125. *See id.*
126. *See* Decision of the Appeals Chamber, *supra* note 100.
127. *See* Watson, *supra* note 96, at 698.
128. *See* Decision of the Appeals Chamber, *supra* note 100.
129. *See* Watson, *supra* note 96, at 699.
130. *See* Decision of the Appeals Chamber, *supra* note 100, at 60.
131. *See* Watson, *supra* note 96, at 694.
132. *See* Decision of the Appeals Chamber, *supra* note 100, ¶ 87.
133. *See id.* at 61.

Appeals Chamber then considered article 5 and affirmed the Tribunal's decision, reasoning that "it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."[134] Although the Appeals Chamber's reasoning varied slightly from that of the Trial Chamber, the appeals were still dismissed, thereby granting the ICTY the legitimacy and the authority to adjudicate all of the charges against Tadic.[135]

C. Motion for Protective Measures for Witnesses and Victims

On May 18, 1995, the Prosecution filed a motion seeking protective measures for seven of its witnesses and victims.[136] The Prosecution based its motion on the theory that the witnesses would be forced to endure fear of retribution and retraumatization if they had to testify in front of the public.[137] The motion requested that four of the witnesses remain anonymous and that three others be permitted to testify without being subject to direct confrontation with the accused.[138] On June 2, 1995, the Defense filed a motion in opposition, asserting Tadic's right to confront his accusers as part of a fair trial.[139] In deciding the motion, the Trial Chamber first determined whether its jurisdiction was limited by any other judicial bodies.[140] Tadic's counsel claimed that the Tribunal should accept the rules set out by the European Court of Human Rights and the European Convention on Human Rights.[141] Furthermore, he asserted that the Tribunal's current standards fell short of the precedent set by those two bodies.[142] The Trial Chamber disagreed with defense counsel's contention and concluded that the Tribunal was a unique creation that needed to be free to set up its own guidelines and rules of procedure.[143] With the jurisdictional issue settled, the Trial Chamber then looked to the ICTY Statute for guidance, citing articles 21 and 22 that list certain rights to which the victims and accused were entitled.[144]

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134. *Id.* at 72, para. 141.

135. *See id.* at 73.

136. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, para. 11 (May 7, 1997), *reprinted in* I.H.R.R. Vol.4, No. 3 (1997).

137. *See* Stringer & Amann, *supra* note 98, at 618.

138. *See id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *reprinted in* 7 CRIM. L.F. 139 [hereinafter *Decision on Protective Measures*]).

139. *See Tadic*, Case No. IT-94-1-T, para. 11.

140. *See* Decision on Protective Measures, *supra* note 138, at 146.

141. *See* Stringer & Amann, *supra* note 98, at 618.

142. *See id.*

143. *See id.*

144. Article 22: Protection of Victims and Witnesses states: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses.

To determine whether the identity of the witnesses and victims could be kept anonymous, the Trial Chamber relied upon the five-part test developed by the English courts in *R. v. Taylor*.[145] Based on several criteria from *Taylor*, including fear of safety, fairness to defendant, and existence of witness protection programs, the Trial Chamber concluded that the Prosecution had proved the need to protect the witnesses.[146] To ensure a fair trial, the Trial Chamber set out guidelines to be followed to ensure that the interests of the victims did not overshadow the defendant's fundamental right to a fair trial.[147] After balancing the interests of both parties, the Chamber concluded that the request for confidentiality for the six witnesses should be granted, and the request for anonymity for four other witnesses should also be granted.[148]

D. Commencement of the Trial of Dusko Tadic

Having resolved all procedural matters, the trial of Tadic commenced on May 7, 1996.[149] First, the Trial Chamber characterized the circumstances that gave rise to the allegations by determining whether

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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." ICTY Statute, *supra* note 102.

145. *See* Decision on Protective Measures, *supra* note 138, ¶¶ 62-66 (citing R. v. Taylor, Transcript of Decision, at 17 (CT) APP. CRIM. DIV. (1994)).

146. In the Decision on Protective Measures, the Trial Court evaluated all five criteria in *R. v. Taylor*:

> (1) there must be real fear for the safety of the witness or her or his family;
> (2) the testimony of the particular witness must be important to the Prosecutor's case;
> (3) the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
> (4) the ineffectiveness or non-existence of a witness protection program is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case;
> (5) any measures taken should be strictly necessary.

Decision on Protective Measures, *supra* note 138, ¶¶ 62-66.

147. The Trial Chamber set out the following guidelines to be adhered to ensure a fair trial when witness anonymity or confidentiality is sought by the Prosecutor:

> (1) the judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony;
> (2) the judges must know the identity of the witnesses, in order to test the reliability of the witness;
> (3) the defense must be afforded ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts;
> (4) the witness's identity must be released when there are no longer reasons to fear for his or her safety.

Id. ¶ 71.

148. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, para. 12 (May 7, 1997), *reprinted in* I.H.R.R. Vol. 4, No. 3 (1997).

149. *See* Scharf, *supra* note 95, at 861, 863.

an armed conflict existed during the time the alleged acts were committed and whether the alleged acts were committed within the context of the conflict.[150] In determining that a state or armed conflict existed at all relevant times, the Trial Chamber focused on the intensity and organization of the situation.[151] The Chamber had little trouble in finding documentation that clearly proved that the situation in Bosnia-Herzegovina was one that involved highly organized and intense conflict during the time in question.[152]

One of the main reasons why the Trial Chamber found the situation to be characteristic of an armed conflict was that the "intensity of the conflict has ensured the continuous involvement of the Security Council since the outbreak of fighting in the former Yugoslavia."[153] The Security Council declared that the fighting in the area was a serious threat to international peace and sought to ease the conflict by both imposing a total arms embargo[154] and implementing economic sanctions against the Federal Republic of Yugoslavia.[155] The Security Council's final step Trial Chamber's final step was the creation of the ICTY to help remove some of the instigators of the conflict.[156]

The Trial Chamber began its review of the evidence of each allegation according to the relevant ICTY Statute article that was involved. The allegations falling under article 2 were analyzed first.[157]

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150. *See Tadic*, Case No. IT-94-1-T, para. 560.

151. *See id.* para. 562.

152. *See id.* para. 568.

153. *Id.* para. 567.

154. *See id.* (citing Security Council Resolution 713, U.N. Doc. S/RES/713 (1991)).

155. *See id.* (citing Security Council Resolution 757, U.N. Doc. S/RES/757 (1993)).

156. The power of the U.N. Security Council derives from Chapter VII of the U.N. Charter. Article 39 of Chapter VII states "[t]he 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."

U.N. Charter, article 41 states:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and severance of diplomatic relations.

U.N. Charter, article 42 states:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. CHARTER, arts. 39, 41, 42.

157. *See Tadic*, Case No. IT-94-a-T, para. 577.

The Appeals Chamber had previously decided that the article only covered those breaches that were committed against "persons or property protected under the provisions of the relevant Geneva Conventions."[158] The Appeals Chamber found that the people affected by the crimes were civilians, such that Geneva Convention IV, specifically article 4, would apply.[159] In order to satisfy the elements of article 4, the Chamber stated that the victims: (1) had to be in the hands of, (2) a party to the conflict or occupying power, and (3) not be nationals of the party in control.[160] The Trial Chamber found that the determination of this issue was based on the third element: whether or not the victims were nationals of the perpetrators.[161]

The conflict in and around Prijedor, a town located in the Republic of Bosnia and Hercegovina, frequently involved several different groups.[162] When the conflict began, the population distribution of the town was 44% Muslim, 42.5% Serb, and 5.6% Croat.[163] The opstina (district) in which Prijedor is located, however, was one of few in Bosnia-Herzegovina that had a larger population of Muslims than Serbs.[164] On April 30, 1992, the Serb Democratic Party (SDS), which disassociated itself from Bosnia and Hercegovina and established the independent Serb government of the Republic of Srpska, took control of Prijedor.[165] At that time, the forces of the Federal Republic of Yugoslavia, the "JNA," were operating within the borders of Bosnia and Herzegovina. On May 15, 1992, just three weeks after the Serb forces took Prijedor, the UN Security Council demanded that the JNA disband or completely withdraw from Bosnia and Hercegovina.[166] The JNA agreed to leave, but left behind most of its officers, 300 tanks, 800 armored personnel carriers, and more than 800 pieces of artillery for incorporation into the Republic of Srpska's army, the VRS.[167] The JNA officers who joined the VRS continued to receive their pay from the Federal Republic of Yugoslavia.[168] Although the Federal Republic of Yugoslavia technically adhered to the Security Council's order, it still effectively served its own interests by aiding an ally in the pursuit of a common objective.[169]

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158. *See* Decision of the Appeals Chamber, *supra* note 100, ¶ 81.
159. *See* article 4, *supra* note 73.
160. *See Tadic*, Case No. IT-94-1-T, para. 578.
161. *See id.* paras. 584-586.
162. *See id.* para. 55.
163. *See id.* para. 128.
164. *See id.*
165. *See id.* paras. 124, 137.
166. *See id.* para. 113 (citing U.N. Doc. S/RES/752 (1992)).
167. *See id.* para. 114.
168. *See id.* para. 115.
169. *See id.* paras. 114-118.

Thus, the Trial Chamber had to determine whether "the acts of the armed forces of the Republic of Srpska, although nationals of the Republic of Bosnia and Hercegovina, after 19 May 1992, in relation to Opstina Prijedor may be imputed to the Federal Republic of Yugoslavia (Serbia and Montenegro) if those forces were acting as de facto organs or agents of that State . . . ."[170] If the actions of the VRS could be controlled and dominated by the Federal Republic of Yugoslavia, then it would be the same as if the JNA committed the acts.[171] But, if the Trial Chamber found that the VRS simply acted in concert with the Republic, then the victims were not in the hands of an occupying force.[172] The Trial chamber held that, even though the VRS was in large part an extension of the JNA, it still retained its independence and did not act as a de facto organ of the Federal Republic of Yugoslavia.[173] The two allies were found to have coordinated their movements and objectives, but they were still no "more than mere allies, albeit highly dependent allies" with the common goal "to achieve a Greater Serbia from out of the remains of the former Yugoslavia."[174] Therefore, since the victims of the crimes under article 2 failed to meet the standards of "protected persons," the Trial Chamber found Tadic not guilty of eleven of the charges against him.[175]

The Trial Chamber then considered the charges of violations of the laws or customs of war under article 3. The Appeals Chamber created criteria to be satisfied in order to be able to prosecute under article 3. Specifically: (1) the crime had to violate international humanitarian law, (2) the rule had to be customary, and (3) the violation had to be serious and entail individual responsibility.[176] With regard to the first two elements, the Appeals Chamber held that common article 3 of the Geneva Conventions satisfied these requirements.[177] The Trial Chamber further held that the allegations were serious and that Tadic could be held personally responsible for them.[178]

After reviewing the elements established by the Appeals Chamber, the Trial Chamber then determined whether common article 3 was satisfied. The Trial Chamber held that (1) an armed conflict existed, (2) the victims were civilians, and (3) the offenses were committed within

170. *Id*. para. 584.
171. *See id.*
172. *See id.* paras. 607-608.
173. *See id*. paras. 587-588.
174. *Id*. para. 606.
175. *See id*. para. 608.
176. *See id.* para. 610.
177. *See* Decision of the Appeals Chamber, *supra* note 100, para. 98.
178. *See Tadic*, Case No. IT-94-1-T, para. 613.

the context of the conflict.[179] Therefore, Tadic could be held accountable for all charges pursuant to article 3.

The final set of allegations the Trial Chamber considered were those falling under the purview of article 5, crimes against humanity. The Trial Chamber had little trouble interpreting article 5 because of the plain text approach that had been used in drafting the article. Article 5 explicitly states that it applies to all conflicts, whether international or internal.[180] The Chamber also stated that in order to use the article to prosecute the accused, the prosecutor had "to prove the existence of armed conflict, even though customary international law does not seem to require an armed conflict."[181] Therefore, the Trial Chamber had established the necessary elements to proceed with the article 5 charges. On May 7, 1997, the Trial Chamber of the ICTY returned its verdict as to the charges against Dusko Tadic.[182] The Trial Chamber found Tadic guilty of eleven counts of article 3 and article 5 crimes.[183] All of these crimes fell under the categories of inhumane treatment, cruel treatment, and persecution.[184] Tadic was also found not guilty on all charges of murder.[185] The crimes Tadic was convicted of carried a total sentence time of ninety-seven years, but the Court held that they were to run concurrently, therefore obligating Tadic to twenty years in prison.[186]

VI. ESTABLISHMENT OF THE ICTR

During the initial stages of the ICTY proceedings, the United Nations was confronted with another problem of even greater magnitude. In the summer of 1993, news of widespread murder and violence in Rwanda was known worldwide. In response to these alleged acts of genocide, the Security Council enacted Resolution 935 in July 1994, which established a Commission of Experts similar to the one created by Resolution 780 to investigate crimes in the Balkans.[187] The Commission's final report, issued on December 9, 1994, prompted the Security Council to begin the process of establishing the International Criminal Tribunal for Rwanda (ICTR). The ICTR was created by

179. *See id.* para. 617.
180. *See* article 5, *supra* note 115.
181. Watson, *supra* note 96, at 718.
182. *See Tadic*, Case No. IT-94-1-T, para. 908.
183. *See* James Walsh, *"I'm Kind of a Crusader" with the First Bosnian War Crimes Sentence*, TIME INT'L (EUROPE), July 28, 1997, vol. 150, No. 4.
184. *See Tadic*, Case No. IT-94-1-T, paras. 715-765.
185. *See* Podgers, *supra* note 83, at 30.
186. *See* Walsh, *supra* note 183.
187. *See* S.C. Res. 935, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/935 (1994).

Security Council Resolution 955, which closely followed the statute that created the ICTY.[188]

A. History Behind the Massacre

The events in Rwanda during the summer of 1994 were the culmination of decades of sporadic fighting.[189] The population of Rwanda prior to the massacres of 1994 was approximately 7.5 million,[190] of which eighty-five percent were Hutu and fourteen percent were Tutsi.[191] In October 1990, a group of previously exiled Tutsis began a campaign against the Hutu-dominated government.[192] The rebel group, known as the Rwandan Patriotic Front (RPF), launched attacks from its refugee camps in Uganda, where the group had been in exile for thirty years.[193]

The RPF and the Rwandan Government troops fought sporadically for three years, until the two groups decided to meet at the Arusha Peace Accords on August 4, 1993.[194] Although many members of his party disagreed, Rwandan President Habyarimana agreed to the Tutsi's request for more influence in government, as well as to the request to allow refugees to move back to Rwanda.[195] The accord had only limited success. On April 6, 1994, the plane carrying President Habyarimana and President Ntaryamira of Burundi crashed, killing both presidents as they were returning from a meeting in Tanzania.[196] Although conclusive evidence has not been presented, some believe the plane was shot down by political opponents.[197]

The events that immediately followed the plane crash bring to mind the atrocities committed by Nazis during the Holocaust. Within hours, by some accounts, the Presidential Guard began systematic elimination of

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188. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter Rwanda Charter].

189. *See* Dorinda Lea Peacock, *"It Happened and It Can Happen Again": The International Response to Genocide in Rwanda*, 22 N.C. INT'L L. & COM. REG. 899, 911-14 (1997).

190. *See* Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 328 (1997).

191. *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 350 (1997).

192. *See* Peacock, *supra* note 189, at 913-14.

193. *See* Morris, *supra* note 191, at 350-51 (the Tutsis had been widely persecuted in 1959 following the withdrawal of Belgium and the turning over of the government to the Hutus).

194. *See id.* at 351.

195. *See id.*

196. *See id.*

197. *See id.*

political opponents.[198] The Prime Minister, President of the Supreme Court, and several human rights activists were among the first people to be murdered.[199] During the next three months, between half a million and one million citizens of Rwanda were killed by fellow Rwandans.[200] The killing spree did not end until the RPF succeeded in defeating the Rwandan Army, and thereby effectively taking control of the country on July 17, 1994.[201]

The terror of Rwanda to many raises a simple question: how could this happen in the world today? Possible causes were identified by a UN Special Rapporteur in a 1994 report.[202] The first cause cited was the presence of strong political discord between the hardline Hutus, the moderate Hutus, and the Tutsi.[203] The ruling Hutus saw both the Tutsi and moderate Hutus as a threat to their power and sought to eliminate their members in the wake of the President's death.[204] A second major contributing factor to the attempted genocide was the provocation and incitement put forth by various Hutu organizations.[205] The most influential group was the Radio-Television Libre des Mille Collines (RTLM).[206] The RTLM consistently broadcast propaganda intended to incite the Hutus to attack their enemies.[207] The RTLM repeatedly stated that "the cleansing of the Tutsi must be completed" and that "the grave is still only half full; who will help us to fill it?"[208] The third major factor that contributed to the attempted genocide was the overall feeling of the Hutu perpetrators that they were immune from punishment.[209] Rwandans realized that the UN would not attempt to stop the massacres, so they continued to kill their opponents.[210]

The formation of the International Tribunal in Rwanda caused some controversy with regard to the newly formed Rwandan Government.

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198. *See id.*
199. *See* Peacock, *supra* note 189, at 915.
200. *See* Morris, *supra* note 191, at 350 (citing Letter Dated 1 October 1994 From the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, pt. 43, U.N. Doc. S/1994/1125 (1994)).
201. *See id.* at 352.
202. *See* Akhavan, *supra* note 190, at 333 (citing Report of the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, U.N. ESCOR Commission on Human Rights, 51st Sess., Prov. Agenda Item 12, para. 24, U.N. Doc. E/CN.4/1995/7 (1994)).
203. *See id.*
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.* at 333-34.
208. *Id.* at 333.
209. *See id.* at 334.
210. *See id.*

Despite the fact that the government of Rwanda requested that the ICTR be established, Rwanda was the only dissenting vote when the issue came in front of the Security Council for approval.[211] Rwanda had several important objections as to how the ICTR should be established. First, Rwanda did not approve of limiting the ICTR's jurisdiction to the period between January 1, 1994, and December 31, 1994.[212] This limitation was objected to mainly because it would cause all crimes committed prior to 1994 to go unpunished by the ICTR.[213] The Rwandan Ambassador to the UN presented evidence that the genocide was being planned as far back as 1990.[214] The time limitation proved to be an ineffective restriction because the ICTR Statute gave the Court the power to prosecute crimes committed in preparation of genocide.[215]

Another objection asserted by the Rwandans was the relatively small size of the ICTR.[216] In addition to a limited number of support personnel, the ICTR was to share appellate judges and the prosecutor with the ICTY.[217] Perhaps the most influential factor leading Rwanda to vote against the ICTR was the inability of the ICTR to render the death penalty.[218] The Rwandan government realized that the ICTR would be responsible for prosecuting most of the high-ranking criminals, and it did not want to allow those perpetrators to escape death.[219] Despite voting against the ICTR, however, the government of Rwanda expressed its intentions to fully cooperate with and assist the ICTR as soon as it began functioning.[220] Although the prosecutions in Rwanda are progressing slowly, the ICTR is helping to take some of the stress off the Rwandan national courts, which are faced with approximately 75,000 prisoners awaiting trial.[221]

B. National Court Proceedings

The large number of defendants awaiting trial in Rwanda makes it necessary for the national government to supplement the ICTR's proceedings with national justice.[222] In response to the need for speedy

211. *See* Morris, *supra* note 191, at 353.
212. *See id.* at 353-54.
213. *See id.* at 354.
214. *See id.*
215. *See id.*
216. *See id.* at 355.
217. *See id.*
218. *See id.* at 356-57.
219. *See id.* at 356.
220. *See id.* at 357.
221. *See* Bassiouni, *supra* note 8, at 48.
222. *See* Morris, *supra* note 191, at 357-58.

trials, the government of Rwanda passed legislation in September 1996 to govern the national prosecutions.[223] The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990,[224] was implemented to help simplify the process of bringing the perpetrators of the war crimes to justice.[225] The key element of the Rwandan National Law is its heavy reliance on plea agreements.[226] All defendants will be placed in one of four categories according to their alleged crimes. The first category covers all persons in positions of leadership, and also those who participated in particularly gruesome murders and assaults.[227] The second category covers all other defendants who are charged with homicide.[228] The third category includes persons responsible for assaults that did not result in death.[229] Finally, the fourth category covers those alleged to have committed only crimes against property.[230] The defendants accused of category one crimes are not eligible for the plea agreements and are also subject to the death penalty.[231] All other defendants can receive substantial reductions in their sentences if they plead guilty to the charges before the trial commences.[232] These defendants can also receive lesser sentences if they plead guilty during the trial; however, they would receive substantially lesser sentences by admitting guilt before the trial begins.[233]

C. Problems Facing the National Proceedings

Although the Rwandan National Law may help accelerate the reconciliation process within Rwanda, there are potentially serious flaws. The plea agreement system will likely convince some defendants, who may be wrongly accused, to admit guilt to a crime they did not commit. A category-two defendant may opt for seven years instead of risking life

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223. *See id.* at 358.

224. *See id.* (citing Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since Oct. 1, 1990, Organic Law No. 08/96 (Aug. 30, 1996), in Official Journal of the Republic of Rwanda (Sept. 1, 1996) [hereinafter Rwandan National Law]).

225. *See id.*

226. *See* Morris, *supra* note 191, at 358.

227. *See id.* (citing Rwandan National Law, *supra* note 224, article 2).

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. For example, if a second category defendant pleads guilty prior to the trial, he receives 7-11 years in prison; if he pleads guilty during the trial, he receives 12-15 years; however, if he tries his luck and is convicted of the crime, then he automatically receives life in prison. *See id*. at 359.

233. *See id.*

behind bars.[234] Moreover, some defendants might forego a trial because of their belief that the Tutsi-dominated government will convict them because they are Hutu. Therefore, these national court proceedings will potentially evolve into a system of "victor's justice" in the eyes of the Hutu.[235] If this is the case, the proceedings will only help to fuel the tension between the Tutsi and Hutu and lead to yet another bloody power struggle. The plea agreements may also anger the victims and relatives of the victims who would not like to see persons guilty of murder set free in seven years.

In addition to the potential problems faced by the national proceedings within Rwanda, the prosecutions will also create problems with regard to the ICTR. The issue of concurrent jurisdiction will, undoubtedly, create many problems.[236] Although the Rwandan government will express a great interest in prosecuting category-one defendants, the ICTR will probably assert its priority over the defendant to ensure the trial is conducted thoroughly and in an unbiased way. This, however, creates two major problems. First, the ICTR does not have the authority to impose the death penalty.[237] The government of Rwanda will be hard pressed to keep its citizens under control if any leader in the genocide campaign escapes with his life intact. Second, even if a category-one defendant is convicted, he will serve his sentence in a prison outside of Rwanda, which will again incense the Rwandans.[238]

VII. CONCLUSION

The ICTY and the ICTR have performed commendably in light of the pressure placed on them by the international community. The two judicial bodies were established in response to two of the worst displays of inhumanity in the twentieth century. Although the ICTY and ICTR were created by the United Nations, some still question the validity and authority of the two entities to grant judgment upon suspects traditionally prosecuted by national courts. The United Nations, however, created these bodies in response to threats to international peace and to humanity in general. As previously discussed, the Security Council was well within the confines of its authority granted under Chapter VII of the UN Charter.[239] Furthermore, the United Nations, more specifically the Security Council, has the responsibility to ensure that all member nations

234. *See id.*
235. *See id.* at 371.
236. *See id.* at 362.
237. *See id.* at 371.
238. *See id.*
239. *See* U.N. CHARTER, *supra* note 156.

respect the international norms that have been created over the course of the last century. It is the United Nations' responsibility to protect the rights of innocent bystanders involved in the armed conflicts around the world. The first attempt to do this, following World War I, was not a great success;[240] however, the attempt did bring to light the notion that armed combatants must be subject to the rules of warfare. The IMT at Nuremberg demonstrated that the leaders of groups who perpetrated war crimes would be held accountable for their actions. Unfortunately, the world is still trying to learn from the mistakes of the past. Hopefully, the events in the Balkans and Rwanda over the course of the last several years will gain enough international attention to prompt more efforts to bring criminals to justice. We cannot afford to keep ignoring situations like Rwanda and the Balkans. The international community, through the United Nations, needs to gather its resources and create an International Criminal Court that will have a deterrent effect on the world's aggressors, who may then think twice before resorting to the barbaric tactics that seem to have become all too familiar in the past few decades.

240. *See* Bassiouni, *supra* note 8, at 20-21.