

# THE INTERNATIONAL CRIMINAL TRIBUNALS: CRIME AND PUNISHMENT IN THE INTERNATIONAL ARENA\*

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The International Criminal Tribunals for the former Yugoslavia and for Rwanda have come a long way since their establishment in 1993 and 1994, respectively. This article will give some background on the two Tribunals and detail some of their contributions to the international community.

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\*\* Gabrielle Kirk McDonald is the recent past president of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). In 1993, the United Nations General Assembly elected her as a judge of the Tribunal, and in 1997 she was elected to a second four-year term. As president of the Tribunal, she presided over rapid growth in the Tribunal's activities and effectiveness. Judge McDonald increased the visibility of the Tribunal within the former Yugoslavia by creating an outreach program designed to inform the people about the work of the Tribunal and combat misinformation. During the course of her presidency, the number of detainees held by the Tribunal more than tripled, a third chamber was added, and two new courtrooms were constructed. Judge McDonald also presided over the Appeals Chamber, which receives appeals from both the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"). She served as the presiding judge over *Prosecutor v. Dusko Tadic*, the ICTY's first successful prosecution in 1995-1997. Judge McDonald also participated in the proceedings leading to the establishment of the permanent International Criminal Court. Judge McDonald graduated first in her class at Howard University Law School in 1966 and was a highly successful lawyer, before becoming the first African American appointed to a federal court in Texas, where she served for nine years. She also worked for the NAACP and taught at the law schools of St. Mary's University, the University of Texas, and Texas Southern University. Judge McDonald has received numerous awards and honors, including the CEELI Leadership Award, the National Bar Association's First Equal Justice Award, the Ronald Brown International Law Award, and the American Society of International Law's Goler Teal Butcher Award for Human Rights.

## I. BACKGROUND OF THE ICTY AND THE ICTR

On May 25, 1993, the Security Council adopted the Statute drafted by the Secretary General of the United Nations ("U.N.") resulting in the formation of the International Criminal Tribunal for the former Yugoslavia ("ICTY").<sup>1</sup> On November 8, 1994, the Security Council established the International Criminal Tribunal for Rwanda ("ICTR").<sup>2</sup> Though it may appear otherwise to many, these tribunals were not created overnight. They were decades in the making, with several elements coming together to support their creation. Perhaps the most significant precursor to the Tribunals was the formation of courts, which were used to try persons responsible for the staggering atrocities committed during World War II. Thereafter, states formed the U.N. and joined in drafting agreements designed to protect basic human rights, including the International Bill of Human Rights,<sup>3</sup> the Genocide Convention,<sup>4</sup> and the four Geneva Conventions of 1949.<sup>5</sup> Each of those instruments significantly strengthened international humanitarian law, showing a new respect for the rights of individuals caught up in conflicts and laying the groundwork for the Tribunals.

This trend continued with the joint adoption by states of several additional covenants and conventions protecting human rights, including those prohibiting apartheid, slavery, and torture.<sup>6</sup> Despite the admirable goals, these instruments served largely as lip service to the protection of human rights since the international community failed to enforce them in large measure. Indeed, during the twentieth century, more than 170 million innocent civilians - not combatants - lost their lives in armed conflicts.<sup>7</sup> The most alarming fact about that statistic is that these civilians were the very targets of aggression, as opposed to accidental casualties. Thus, these lofty instruments did not deter such abuses.

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1. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/INF/49 (1993).

2. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. SC/5974 (1994).

3. 1947-48 U.N.Y.B. 575, U.N. Doc. A/810.

4. 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).

5. 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. 3217, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); 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 (entered into force Oct. 21, 1950).

6. See generally International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

7. Gabrielle Kirk McDonald, *Friedmann Award Address Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 COLUM. J. TRANSNAT'L L. 1, 3 (2000).

The creation of the ICTY finally empowered the international community with the ability to punish such abuses by individuals. Not only were such abuses prohibited after the creation, but they became punishable by an international Tribunal.<sup>8</sup> Numerous reasons are cited explaining why the Tribunals were created at this time, given that wartime atrocities have occurred many times in the past.<sup>9</sup>

Some say that it was because the Cold War thawed. Others point to the effect of the media, bringing images of the atrocities into living-rooms throughout the world. Still others say that it was because these heinous acts were carried out in Europe, the site where the First World War began.

In any event, when we [the international community] witnessed the horrific methods of "ethnic cleansing" and . . . [were] either unable or unwilling to stop this carnage, the decision was made to establish a tribunal to prosecute persons responsible for these crimes.<sup>10</sup>

The decision to form a similar Tribunal for the atrocities that occurred in Rwanda followed soon thereafter.

Both the ICTY and the ICTR are limited strictly in their respective jurisdiction and mandates. The *Statute of the ICTY*<sup>11</sup> gives that Tribunal jurisdiction to prosecute persons who committed or ordered the commission of grave breaches of the Geneva Conventions of 1949,<sup>12</sup> violations of laws or customs of war,<sup>13</sup> genocide,<sup>14</sup> or crimes against humanity.<sup>15</sup> Similarly, but not identically, the *Statute of the ICTR*<sup>16</sup> gives that Tribunal subject matter

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8. S.C. Res. 827, *supra* note 1.

9. *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, Human Rights Ctr., Int'l Human Rights Law Clinic, Univ. of Cal., Berkeley and Ctr. for Human Rights, Univ. of Sarajevo, May 2000 p. 8-9, available at <http://globetrotter.berkeley.edu/humanrights/documents> (last visited Jan. 30, 2001).

10. McDonald, *supra* note 7, at 3.

11. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. SCOR, Annex, art. 2, U.N. Doc. S/25704 (1993) (adopted May 25, 1993, amended May 13, 1998) [hereinafter *ICTY Statute*].

12. *Id.*; A.B.A., REPORT OF THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 61-71 (July 8, 1993) [hereinafter REPORT OF THE INTERNATIONAL TRIBUNAL]; S.C. Res. 827, *supra* note 1.

13. *ICTY Statute*, *supra* note 11, at art. 3.

14. *Id.* at art. 4.

15. *Id.* at art. 5.

16. *Statute of the International Criminal Tribunal for Rwanda*, U.N. SCOR., Annex, art. 2, U.N. Doc. S/RES/955 (1994) (adopted Nov. 8, 1994) [hereinafter *ICTR Statute*].

jurisdiction over acts of genocide,<sup>17</sup> crimes against humanity,<sup>18</sup> and violations of common Article 3 and Additional Protocol II of the Geneva Conventions of 1949 committed in Rwanda or by Rwandese nationals during 1994.<sup>19</sup>

To accomplish these prosecutions, both Tribunals have three organs - the Chambers, the Office of the Prosecutor, and the Registry.<sup>20</sup> The Chambers of each Tribunal are comprised of three Trial Chambers and one Appeals Chamber, which they share.<sup>21</sup> The President of the ICTY, which is one of the ICTY judges, presides over the Appeals Chamber.<sup>22</sup> The position of President of the ICTR is held by one of the ICTR Trial Chamber judges.<sup>23</sup> The Office of the Prosecutor, which is also shared by both Tribunals, includes investigators and attorneys who prosecute the cases against the accused before the Chambers.<sup>24</sup> The Prosecutor heads this office from the Hague, the Netherlands,<sup>25</sup> although there is a Deputy-Prosecutor for the ICTR in Kigali, Rwanda.<sup>26</sup> The Registry is responsible for servicing the Chambers and the Office of the Prosecutor,<sup>27</sup> much like a clerk of a federal court in the United States. A Registrar heads the Registry of both Tribunals.<sup>28</sup> The ICTY is located in the Hague,<sup>29</sup> and the ICTR is located in Arusha, United Republic of Tanzania.<sup>30</sup>

The Tribunals are ad hoc, that is, they were established solely for the conflicts in the former Yugoslavia and Rwanda. The trials are conducted by judges without a jury,<sup>31</sup> but with the assistance of a prosecutor who is independent and responsible for initiating the investigation and submitting the indictment to a judge who determines whether a prima facie case has been established.<sup>32</sup> The judges are elected by the General Assembly of the U.N. for

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17. *Id.*; S.C. Res. 955, *supra* note 2.

18. *ICTR Statute*, *supra* note 16, at art. 3.

19. *Id.* at art. 4.

20. *ICTY Statute*, *supra* note 11, at art. 11; *ICTR Statute*, *supra* note 16, at art. 10.

21. *ICTY Statute*, *supra* note 11, at art. 11; *ICTR Statute*, *supra* note 16, at art. 10.

22. *ICTY Statute*, *supra* note 11, at art. 14.

23. *ICTR Statute*, *supra* note 16, at art. 13.

24. *See id.* at art. 16; *ICTY Statute*, *supra* note 11, at art. 16; REPORT OF THE INTERNATIONAL TRIBUNAL, *supra* note 11, at 17.

25. *See ICTY Statute*, *supra* note 11, at art. 31.

26. *See ICTR General Information, Structure of the ICTR*, available at <http://www.ictcr.org/ENGLISH/geninfo/structure.htm> (last visited Feb. 3, 2001).

27. *Id.*; REPORT OF THE INTERNATIONAL TRIBUNAL, *supra* note 12, at 18.

28. *ICTY Statute*, *supra* note 11, at art. 17; *ICTR Statute*, *supra* note 16, at art. 16.

29. *ICTY Statute*, *supra* note 11, at art. 31.

30. *ICTR, General Information About the Tribunal*, available at <http://www.ictcr.org/ENGLISH/geninfo/intro.htm> (last visited Feb. 3, 2001).

31. *See ICTY Statute*, *supra* note 11, at art. 23; *ICTR Statute*, *supra* note 16, at art. 22.

32. *ICTY Statute*, *supra* note 11, at art. 18; *ICTR Statute*, *supra* note 16, at art. 17.

a four-year term and are eligible for re-election.<sup>33</sup> As originally constituted, the Chambers had two Trial Chambers and one Appeal Chamber shared by both Tribunals.<sup>34</sup> A third Trial Chamber was added for each of the Tribunals in 1998.<sup>35</sup>

As mentioned, the Registry is somewhat like a clerk of the court in the United States. However, it has considerably more responsibilities, which include overseeing the Tribunal's Detention Unit and the Victims and Witnesses Section, and maintaining contacts with states.<sup>36</sup> National courts have concurrent jurisdiction with the Tribunals, but the Tribunal, established by the Chapter VII powers of the Security Council, have primacy, giving them the authority to request national courts to defer to their competence.<sup>37</sup>

Those accused before the Tribunals are guaranteed internationally recognized rights, including the presumption of innocence and the right to be tried in person.<sup>38</sup> The maximum penalty that may be imposed is life imprisonment.<sup>39</sup> If an accused is found guilty, he serves his sentence in a state that has agreed to accept convicted persons from the Tribunal.<sup>40</sup> States are required to cooperate with the Tribunal, including the arrest or detention of persons.<sup>41</sup> If a state fails to cooperate, the President may report this noncompliance to the Security Council for appropriate action.<sup>42</sup>

This is all reflected in the resolution establishing the Yugoslav Tribunal, but in 1993, when the judges met at The Hague and were installed, they were the entire Tribunal.<sup>43</sup> The court had no premises, no rules, and no one in custody. Moreover, the first Prosecutor selected decided he did not want the job after all, and the U.N. could not agree on his replacement until nine months later. As a result, Richard Goldstone came on board as Prosecutor some fifteen months after the Tribunal was established.

Despite these obstacles, the judges went to work in loaned space in the Peace Palace, where the International Court of Justice sits. The first task was to draft the rules of procedure and evidence, merging elements of common and

33. *ICTY Statute*, *supra* note 11, at art. 13; *ICTR Statute*, *supra* note 16, at art. 12.

34. *See ICTY Statute*, *supra* note 11, at art. 11; *ICTR Statute*, *supra* note 16, at art. 10.

35. *ICTY Statute*, *supra* note 11, at art. 11; *ICTR Statute*, *supra* note 16, at art. 10.

36. *ICTR, General Information, Lawyers and Detention Facility Management Section*, available at <http://www.ictt.org/ENGLISH/geninfo/lawyersd.htm> (last visited Feb. 17, 2001); *see generally* REPORT OF THE INTERNATIONAL TRIBUNAL, *supra* note 12.

37. *ICTY Statute*, *supra* note 11, at art. 9; *ICTR Statute*, *supra* note 16, at art. 8.

38. *ICTY Statute*, *supra* note 11, at art. 21; *ICTR Statute*, *supra* note 16, at art. 20.

39. *ICTY Statute*, *supra* note 11, at art. 24; *ICTR Statute*, *supra* note 16, at art. 23.

40. *ICTY Statute*, *supra* note 11, at art. 27; *ICTR Statute*, *supra* note 16, at art. 26.

41. *ICTY Statute*, *supra* note 11, at art. 29; *ICTR Statute*, *supra* note 16, at art. 28.

42. *ICTY Rules of Procedure and Evidence*, July 14, 2000, Rules 7bis, 11, 13, 59, and 61, available at [http://www.un.org/icty/basic/rpc/IT32\\_rcv18.htm](http://www.un.org/icty/basic/rpc/IT32_rcv18.htm).

43. *See* S.C. Res. 827, *supra* note 1.

civil law into one hundred and twenty-nine rules. Uniquely charged with providing rules for the protection of victims and witnesses, and as the first judicial body specifically mandated to try crimes of sexual violence under international law, they developed significant measures to protect the identity of witnesses without infringing on the rights of the accused to a fair trial. This balancing of rights of the victims and the accused was an extraordinary challenge and a major accomplishment for a criminal institution. Moreover, the application of these rules produced the first comprehensive international code of criminal procedure.

Even after adopting the rules and procedures for the Tribunal, it was still many months before any of us went near a courtroom, principally because none existed and there were no prosecutors. However, by late 1994, the Office of the Prosecutor had a skeletal staff. Prosecution lawyers had reviewed evidence collected by the Commission of Experts, which had been created by the Security Council prior to the establishment of the Tribunal to investigate events in the former Yugoslavia<sup>44</sup> and collect supplementary material. Thus, on November 4, 1994, the first indictment was issued against Dragan Nikolic, an alleged commander of one of the notorious detention camps in eastern Bosnia and Herzegovina, charging him with war crimes and crimes against humanity.<sup>45</sup> The indictment was reviewed and confirmed by Judge Elizabeth Odio-Benito from Costa Rica.<sup>46</sup>

However, it was not until early 1995, two years after its creation, that the Tribunal secured custody of an accused.<sup>47</sup> The first accused in custody was Dusko Tadic.<sup>48</sup> After extensions of time requested by the parties, the first full trial in the ICTY began on May 7, 1996.<sup>49</sup> As the Presiding Judge, I sat on the bench with the two other members of the Chamber, Sir Ninian Stephen of Australia and Lal Chand Vohrah from Malaysia.<sup>50</sup> The opening day was a real media event; over 300 reporters were on hand. Two red tents served as their headquarters and almost made for a circus-like atmosphere. The public gallery, separated from the courtroom by bulletproof floor-to-ceiling glass, was filled to its 150 seat capacity.

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44. S.C. Res. 780, U.N. SCOR, 46th Sess., 3119th mtg., U.N. Doc. S/24618 (1992).

45. Prosecutor v. Nikolic, Indictment, Case No. IT-94-2-I (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 4, 1994) (*amended* Feb. 12, 1999), available at <http://www.un.org/icty/indictment/english/nik-ii941104c.htm>.

46. Prosecutor v. Nikolic, Review of Indictment, Case No. IT-94-2-I (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 4, 1994), available at <http://www.un.org/icty/nikolic/decision-e/41104RIB.htm>.

47. See Trial Information Sheet, Tadic Case No. IT-94-01, available at <http://www.un.org/icty/glance/tadic.htm> (last visited Dec. 8, 2000).

48. See *id.*

49. *Id.*

50. *Id.*

After a few days, however, most of the press left. I was later told that they were looking for more “blood and gore” than the Prosecutor’s opening case offered. Court TV continued to air the trial in the United States. The trial lasted some eighty-six days, spanning a six month period, primarily because the single courtroom had to be shared for other proceedings. We heard from over 125 witnesses and admitted over 300 exhibits.<sup>51</sup> Many important issues were raised and decided, which set the tone for the trials to follow. These issues included the handling of hearsay (it is admissible),<sup>52</sup> dealing with the conflicting interests of protecting witnesses from harm while preserving an accused’s right to a fair trial<sup>53</sup> and handling the disclosure of documents between the parties.<sup>54</sup> From a broader perspective, however, what is of significance is that the *Tadic* trial gave the Tribunal the first opportunity to apply the rules it crafted especially the rules of evidence - in a way that protected the accused’s right to a fair trial, thereby demonstrating that international criminal justice was possible.

Certainly, both the ICTY and the ICTR are making significant progress in fulfilling their respective mandates. Since the *Tadic* trial, the international community, most notably NATO forces in some sectors, has given the Tribunals the support they need to arrest those indicted, since the Tribunals do not have a police force. Alleged perpetrators of some of the worst abuses are now being arrested. For example, included in the thirty-seven persons currently in custody of the ICTY are: Momcilo Krajisnik, Radovan Karadzic’s deputy and the former Bosnian Serb member of the post war national Presidency of Bosnia;<sup>55</sup> Dario Kordic, a major political representative for Bosnian Croats;<sup>56</sup> Stanislav Galic and Radislav Krstic, the generals allegedly responsible for organizing

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51. *Id.*

52. See ICTY Rules of Procedure and Evidence, *supra* note 42, at sec. 3, Rules 89–90 (providing for the admission of “any relevant evidence which [a Chamber] deems to have probative value”); see generally Prosecutor v. Tadic, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).

53. Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Aug. 10, 1995), available at <http://www.un.org/icty/tadic/trialc2/decision-c/100895pm.htm>.

54. Prosecutor v. Tadic, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Nov. 27, 1996), available at <http://www.un.org/icty/tadic/trialc2/decision-c/61127ws21.htm> (last visited Feb. 17, 2001); Prosecutor v. Tadic, Decision on the Prosecutor’s Motion for Production of Defence Witness Statements, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Nov. 27, 1996), available at <http://www.un.org/tadic/trialc2/decision-c/61127ws2.htm>.

55. Prosecutor v. Krajisnik, Indictment, Case No. IT-00-39-I (Int’l Crim. Trib. Former Yugo., Trial Chamber, Feb. 21, 2000) (amended Mar. 21, 2000), available at <http://www.un.org/icty/indictment/english/kra-1ai000321c.htm>.

56. Prosecutor v. Kordic & Cerkez, Indictment, Case No. IT-95-14/2 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Nov. 10, 1995) (amended Sept. 30, 1998), available at <http://www.un.org/icty/indictment/english/kor-1ai980930c.htm> (charging Dario Kordic and Mario Cerkez).

Serb military operations against Sarajevo and against Srebrenica;<sup>57</sup> the commanders of detention camps in northwestern Bosnia,<sup>58</sup> and three men accused of controlling detention facilities and widespread sexual slavery and other torture in Foca.<sup>59</sup> Moreover, fifteen persons have been tried in seven completed trials,<sup>60</sup> four cases are on appeal,<sup>61</sup> four more are ongoing,<sup>62</sup> and nine are in the pretrial stage.<sup>63</sup> Four individuals have exhausted appeals and are

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57. *Prosecutor v. Galic*, Indictment, Case No. IT-98-29-I (Int'l Crim. Trib. Former Yugo., Trial Chamber, Mar. 26, 1999), available at <http://www.un.org/icty/indictment/english/gal-ii990326c.htm>; *Prosecutor v. Krstic*, Indictment, Case No. IT-98-33 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 2, 1998) (amended Oct. 27, 1999), available at <http://www.un.org/icty/indictment/english/krs-ii981102c.htm>.

58. *Prosecutor v. Kvočka*, Indictment, Case No. IT-98-30 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Feb. 13, 1995) (amended Nov. 9, 1998, May 31, 1999), available at <http://www.un.org/icty/indictment/english/kvo-2ai990531c.pdf> (charging Miroslav Kvočka, Mladen Radic, Miloja Kos, and Zoran Zigic).

59. *Prosecutor v. Kunarac*, Indictment, Case No. IT-96-23 (Int'l Crim. Trib. Former Yugo., Trial Chamber, June 26, 1996) (amended July 13, 1998, Sept. 6, 1999, Dec. 1, 1999), available at <http://www.un.org/icty/indictment/english/kun-1ai980819e.htm> (charging Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic).

60. *Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14 (Mar. 3, 2000); *Prosecutor v. Kupreskic*, Judgment, Case No. IT-95-16 (Jan. 14, 2000) (prosecuting Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic, and Dragan Papic); *Prosecutor v. Jelusic*, Judgment, Case No. IT-95-10 (Dec. 14, 1999); *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1 (Dec. 10, 1998); *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1 (June 25, 1999); *Prosecutor v. Delalic*, Judgment, Case No. IT-96-21 (Nov. 16, 1998) (prosecuting Zenjil Delalic, Hazim Delic, Zdravko Mucic, and Esad Landzo); *Prosecutor v. Tadic*, Judgment, Case No. IT-94-01 (May 7, 1997). For more information on these trials, see <http://www.un.org/icty/glance/profact-e.htm>.

61. *Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14 (Mar. 3, 2000); *Prosecutor v. Kupreskic*, Judgment, Case No. IT-95-16 (Jan. 14, 2000); *Prosecutor v. Jelusic*, Judgment, Case No. IT-95-10 (Dec. 14, 1999); *Prosecutor v. Delalic*, Judgment, Case No. IT-96-21 (Nov. 16, 1998). For more information on these appeals, see <http://www.un.org/icty/ind-e.htm>.

62. *Prosecutor v. Krstic*, Indictment, Case No. IT-98-33 (Nov. 2, 1998); *Prosecutor v. Kunarac*, Indictment, Case No. IT-96-23 (June 26, 1996); *Prosecutor v. Kordic & Cerkez*, Indictment, Case No. IT-95-14/2 (Nov. 10, 1995); *Prosecutor v. Kvočka*, Indictment, Case No. IT-98-30 (Feb. 3, 1995). For more information on these trials, see <http://www.un.org/icty/glance/profact-e.htm>.

63. *Prosecutor v. Plavsic*, Indictment, Case No. IT-00-40 (Apr. 7, 2000); *Prosecutor v. Krajisnik*, Indictment, Case No. IT-00-39 (Feb. 21, 2000); *Prosecutor v. Galic*, Indictment, Case No. IT-98-29 (Mar. 26, 1999); *Prosecutor v. Brdjanin*, Indictment, Case No. IT-99-36 (Mar. 14, 1999) (charging Radoslav Brdjanin and Momir Talic); *Prosecutor v. Martinovic*, Indictment, Case No. IT-98-34 (Dec. 21, 1998) (charging Vinko Martinovic and Miaden Naletilic); *Prosecutor v. Vasiljevic*, Indictment, Case No. IT-98-32 (Aug. 26, 1998); *Prosecutor v. Krnojelac*, Indictment, Case No. IT-97-25 (June 17, 1997); *Prosecutor v. Sikirica*, Indictment, Case No. IT-95-8 (July 21, 1995) (charging Dusko Sikirica, Dragan Kolundzija, and Damir Dosen); *Prosecutor v. Simic*, Indictment, Case No. IT-95-9 (July 21, 1995) (charging Milan Simic, Miroslav Tadic, Simo Zaric, and Stevan Todorovic); *Prosecutor v. Nikolic*, Indictment, Case No. IT-94-2 (Nov. 4, 1994). For more information on these trials, see <http://www.un.org/icty/glance/profact-e.htm>.



serving or have served their sentences,<sup>64</sup> while ten others are appealing theirs.<sup>65</sup> Two individuals have been acquitted and released.<sup>66</sup> With respect to the ICTY's growth, from virtually no staff the ICTY now has over 1000 staff members from over sixty-eight different countries and the budget increased from \$276,000 in 1993 to close to \$100 million in 2000.<sup>67</sup>

Despite the difficulties faced by the Tribunals, including a delayed start with trials while it awaited the appointment of a Prosecutor, the failure of the states and the NATO forces to arrest indictees for so long, and the general apathy and doubts that a judicial institution would help the peace effort, both the ICTY and ICTR have made important contributions to international criminal justice. In particular, I will discuss some of the decisions of the Tribunals relating to crimes of sexual violence and highlight what I consider to be the broader, more general contributions.

## II. AN ASSESSMENT OF THE WORK OF THE TRIBUNALS

### A. Contributions Regarding Crimes of Sexual Violence

One of the most significant contributions of the Tribunals is that they have broken new ground with respect to crimes of sexual violence; crimes which, for the most part, have been ignored in international prosecutions.

In the context of war, and otherwise, "[s]exual violence demoralizes and humiliates its victims. It instills fear, anger, and hatred that may far outlast the conflict among the warring parties. In the end, its power reaches beyond its immediate victims to destroy the family and the fabric of society."<sup>68</sup> Widespread sexual violence has been used in armed conflicts as a fighting tactic, to reward soldiers, to build morale, or to terrorize or destroy inferior people, as women were sometimes called.<sup>69</sup> Unfortunately, sexual violence largely has gone unprosecuted in the international arena. Some say it is because sexual violence harms primarily women and in international law, men primarily have made policy and decisions. Whatever the case may be, the Tribunals are

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64. These individuals include: Dusko Tadic, Zlatko Aleksovski, Drazen Erdemovic, Anto Furundzija. For more information on these individuals, see <http://www.un.org/icty/glance/procfact-e.htm>.

65. These individuals include: Hazim Delic, Zdravko Mucic, Esad Landzo, Goran Jelusic, Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic, and Tihomir Blaskic. For more information, see <http://www.un.org/icty/glance/procfact-e.htm>.

66. Dragan Papic was released on Jan. 14, 2000. Zejnil Delalic was released pending appeal on Nov. 16, 1998. For more information, see <http://www.un.org/icty/glance/detainees-e.htm>.

67. *ICTY Key Figures*, at <http://www.un.org/icty/glance/keyfig-e.htm> (last visited Jan. 23, 2001).

68. M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA 3* (DePaul Int'l Hum. Rts. L. Inst. Occasional Paper No. 1, 1996).

69. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (Simon & Shuster, N.Y. 1975).

changing this unfortunate tradition. Some historical background will help to put this in perspective.

### 1. Prosecution of Crimes Against Women Before the ICTY and the ICTR

Crimes of sexual violence against women in an international context have always occurred. Whether seen as an unavoidable consequence of war or as intentional conduct, rape and other acts of sexual violence date back as far as war.<sup>70</sup> However, the prosecution of such conduct in an international context is a relatively new phenomenon.<sup>71</sup>

After World War I, the Allies established a commission to investigate reports of mass rape of French and Belgian women by other troops.<sup>72</sup> However, no real action was taken.<sup>73</sup> Similarly, after World War II, significant evidence of mass rape was written into the trial record of the Nuremberg trials.<sup>74</sup> However, the French prosecutor declined to orally cite the details of crimes of sexual violence, although he had no problem reciting atrocious details of other war crimes.<sup>75</sup> Yet, the Nuremberg Judgment does not contain one reference to rape.<sup>76</sup>

However, in a rare occurrence, rape was prosecuted in the international context at the International Military Tribunal for the Far East, which sat in Tokyo.<sup>77</sup> This Tribunal found several high ranking officials guilty of violations of the laws and customs of war for their responsibility for widespread rapes and sexual assaults during World War II, despite the fact that the Tribunal's Charter did not explicitly criminalize rape.<sup>78</sup> These assaults included the notorious Rape of Nanking, during which Japanese soldiers raped approximately 20,000 women and children and later killed most of them.<sup>79</sup> Yet, the Tribunal completely ignored the enforced prostitution of "comfort women" kept by Japanese soldiers to rape at will.<sup>80</sup> Control Council Law No. 10,<sup>81</sup> which was enacted after World

70. BASSIOUNI & MCCORMICK, *supra* note 68, at 1, 3-4.

71. See Theodor Meron, *Rape as a War Crime*, in *WAR CRIMES LAW COMES OF AGE*: 1998, 204, 206 (Oxford Univ. Press 1998) (discussing national prosecutions of soldiers for rape).

72. Catherine Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 *HUM. RTS. Q.* 649, 663 (1995).

73. BASSIOUNI & MCCORMICK, *supra* note 68, at 3-4.

74. Niarchos, *supra* note 72, at 663.

75. *Id.* at 664.

76. *Id.* at 665.

77. *Id.* at 666.

78. See *id.* at 677.

79. See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* 6 (1998).

80. Niarchos, *supra* note 72, at 666.

81. Allied Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, reprinted in *VI Trials of War Criminals Before the*

War II to try the lesser Axis war criminals, continued this advancement by specifically listing rape as a prosecutable crime against humanity. Unfortunately, these crimes were not prosecuted under this provision.

## 2. The Consideration of Crimes of Sexual Violence by the ICTY and the ICTR

As noted above, the ICTY and the ICTR have even further advanced the jurisprudence and prosecution of crimes of sexual violence. Rape is explicitly listed in the *Statutes of the ICTY* and the *ICTR* as a crime against humanity.<sup>82</sup> Although other crimes of sexual violence are not included in the statutes, the tribunals have held that rape and other forms of sexual violence can constitute grave breaches of the Geneva Conventions of 1949, laws or customs of war and genocide, as well as crimes against humanity.<sup>83</sup>

Three judgments in particular show the development of this jurisprudence: *Prosecutor v. Akayesu*<sup>84</sup> from the ICTR and the *Celebici*<sup>85</sup> and *Furundzija*<sup>86</sup> judgments from the ICTY.

In the *Akayesu* case, the Prosecutor indicted the accused for killings and sexual assaults of Tutsi residents in Rwanda during 1994.<sup>87</sup> Although not accused of raping anyone himself, the Trial Chamber found that as the bourgmestre of the Taba commune in Rwanda, Akayesu “had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated.”<sup>88</sup> The Chamber determined that Akayesu facilitated the commission of these acts through his words of encouragement, “which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.”<sup>89</sup>

This judgment is tremendously important for two reasons. First, it was the first judgment of either of the Tribunals to define rape, finding it to be “a

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*Nuremberg Military Tribunals Under Control Council Law No. 10 XVIII* (1952).

82. See *ICTY Statute*, *supra* note 11, at art. 5; *ICTR Statute*, *supra* note 16, at art. 3.

83. *Prosecutor v. Akayesu*, Judgment, Case No. 96-4-T (Int'l Crim. Trib. Former Rwanda, Trial Chamber, Sept. 2, 1998), available at <http://www.ictor.org/ENGLISH/judgements/AKAYESU/akay001.htm>.

84. *Id.*

85. *Prosecutor v. Delalic*, Judgment, Case No. IT-96-21 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trialc2/jugement/main.htm> [hereinafter *Celebici*].

86. *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgment/fur-tj981210e.htm>.

87. See *Akayesu*, Judgment, Case No. 96-4-T, at para. 12-12B.

88. *Id.* at para. 452.

89. *Id.* at para. 694.

physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>90</sup> This judgment also included a definition of sexual violence, which the judges determined was “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>91</sup> This judgment found that such acts are “not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”<sup>92</sup>

Second, the Trial Chamber found that rape and sexual violence can constitute the factual elements of the crime of genocide “in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>93</sup> Thus, although rape is not specifically listed as a crime of genocide in the statute, it has been held to cause “serious bodily and mental harm” to members of the group and can therefore be prosecuted under the applicable provisions.<sup>94</sup>

The *Celebici* case was next to address crimes of sexual violence. In the *Celebici* indictment, one of the four accused was charged with subjecting two victims to repeated incidents of forced sexual intercourse, a charge which the prosecution argued could be considered torture as defined by the Torture Convention and incorporated into the *Statute of the ICTY* in Articles 2 (grave breaches) and 3 (violations of the laws of customs of war).<sup>95</sup> The Trial Chamber adopted the *Akayesu* definition of rape,<sup>96</sup> and, after seeking guidance from cases from the Commission of Human Rights and the European Court of Human Rights,<sup>97</sup> found that rape could constitute torture.<sup>98</sup> Specifically, the Trial Chamber held that, for a finding of torture under Article 2 or 3 of the *Statute of the ICTY*: 1) there must be an act or omission causing severe mental or physical pain or suffering; 2) the inflicted suffering must be intentional; 3) the act must be performed for a specific purpose such as obtaining information or a confession, punishment, intimidation, or discrimination; and 4) the act or omission must be officially sanctioned by one in an official capacity.<sup>99</sup>

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90. *Id.* at para. 688.

91. *Id.*

92. *Akayesu*, Judgment, Case No. 96-4-T, at para. 688.

93. *Id.* at para. 731.

94. *Id.*

95. Prosecutor v. Delalic, Indictment, Case No. IT-96-21, paras. 24–25 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Mar. 21, 1996), available at <http://www.un.org/icty/celebici/trialc2/jugement/part6.htm>.

96. *Celebici*, Judgment, Case No. IT-96-21, at para. 479.

97. *Aydin v. Turkey*, 50 Eur. Ct. H.R. (ser. A) 1867 (1996) (findings by the courts that rape could constitute torture) (citing *Mejia v. Peru*, Case No. 10, 979 (Mar. 1, 1996)).

98. *Celebici*, Judgment, Case No. IT-96-21, at para. 479.

99. *Id.* at para. 494.

The Trial Chamber ultimately found that rape, “a despicable act which strikes at the very core of human dignity and physical integrity,” satisfies a factual element of torture.<sup>100</sup> Interestingly, the Chamber determined that the crimes were committed against the two victims because they are women, finding that “this represents a form of discrimination which constitutes a prohibited purpose for the offense of torture.”<sup>101</sup> Because gender is not identified in the *Statute of the ICTY* as a basis of group identification that enjoys protection from discrimination, this was a significant finding.<sup>102</sup>

This is not to say that only women are the targets of sex based crimes. In the *Tadic* case, the first trial to be conducted by the ICTY, the accused was convicted for aiding and abetting in the sexual mutilation of a male prisoner.<sup>103</sup> In *Celebici*, the Trial Chamber convicted one of the accused of war crimes and grave breaches of the Geneva Conventions for forcing male inmates to perform fellatio and other sexually humiliating acts on each other, finding that such conduct constituted “at least, a fundamental attack on . . . [the victims’] human dignity.”<sup>104</sup> The Trial Chamber found that the act fulfilled the elements of inhuman treatment under Article 2 and cruel treatment under Article 3.<sup>105</sup> Importantly, the Trial Chamber there noted that this act “could constitute rape” as well, implying that rape could be committed against men or women.<sup>106</sup>

The *Furundzija* Judgment is more recent and builds upon the jurisprudence established by the Tribunals addressing sexual violence. There, the Trial Chamber found that the commander of a special military police unit (ironically called the Jokers) interrogated a woman, and another detainee, while she was beaten on her feet with a baton, and they failed to intervene in any way while the woman was “forced . . . to have oral and vaginal intercourse” with a subordinate officer.<sup>107</sup> The commander was found guilty of two counts of violations of laws or customs of war: torture and outrage upon personal dignity including rape.<sup>108</sup> Further, as stated above, the Trial Chamber found that the

100. *Id.* at para. 495.

101. *Id.* at para. 941. This decision went further than the *Akayesu* Judgment which found only that the victims were targeted as Tutsi women. See *Akayesu*, Judgment, Case No. 96-4-T.

102. The Statute does list gender as a ground on which persecution as a crime against humanity can be committed in Article 7(1)(h).

103. See Prosecutor v. *Tadic*, Opinion and Judgment, Case No. IT-94-1, para. 45 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/Jugement-e/tad-tj970507e.htm>.

104. *Celebici*, Judgment, Case No. IT-96-21, at para. 1066.

105. *Id.*

106. *Id.*

107. Prosecutor v. *Furundzija*, Judgment, Case No. IT-95-17/1, paras. 39-41, 44-46 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgment/fur-tj981210e.htm>.

108. *Id.* at Disposition.

definitions of rape in the *Akayesu* and *Celebici* judgments suffered from a lack of specificity, and resorted to national legal systems to craft a broader definition.<sup>109</sup> Based on its review, the Trial Chamber defined rape as:

(i) [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.<sup>110</sup>

Significantly, this definition includes sexual penetration of the mouth of the victim by the penis of the perpetrator, which would often be classified as sexual assault in many systems, and carry a lower penalty.<sup>111</sup> Finally, the Trial Chamber noted that rape and serious sexual assault should be prosecuted as a grave breach, genocide, and of course, as a crime against humanity as provided in Article 5 of the statute.<sup>112</sup>

The significance of this decision cannot be underestimated. It recognizes that coercion - which the Trial Chambers in *Akayesu* and *Celebici* found is inherent in armed conflict - exists whether directed toward the victim or toward third parties. Further, the definition of rape is more explicit than the prior definitions in the Tribunals and now unequivocally encompasses oral sexual acts.<sup>113</sup>

On July 21, 2000, the Appeals Chamber affirmed the Trial Chamber's findings, challenged by Furundzija, and denied the appeal.<sup>114</sup> I will only mention three issues which were considered. First, Furundzija claimed he was prejudiced because the Trial Chamber relied on evidence of acts that were not charged in the Indictment, including Furundzija's complicity in rapes or sexual assaults by another accused.<sup>115</sup> The Appeals Chamber found that an indictment need only contain a "concise" statement of the facts that the prosecution will rely on; it need not contain every fact.<sup>116</sup> Further, the Appeals Chamber noted that if Furundzija believed that evidence came out during trial that did not fall

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109. *Id.* at paras. 176-84.

110. *Id.* at para. 185.

111. *Id.* at para. 174.

112. *Furundzija*, Judgment, Case No. IT-95-17/1, at para. 172.

113. *See Prosecutor v. Furundzija*, Appeals Judgment, Case No. IT-95-17/1-A (Int'l Crim. Trib. Former Yugo., App. Chamber, July 21, 2000), available at <http://www.un.org/icty/furundzija/appeal/judgment/fur-tj000721-e.htm>.

114. *See id.* at para. 25, 254.

115. *Id.* at para. 25.

116. *Id.* at para. 61.

within the scope of the Indictment, he could have challenged its admission or requested an adjournment to prepare his defense against the charges.<sup>117</sup>

Secondly, Furundzija argued that his sentence was so excessive that it constituted “cruel and unusual punishment.”<sup>118</sup> In support of this contention, Furundzija noted what he saw as emerging sentencing principles in the Tribunal.<sup>119</sup> Specifically, he claimed that the trial decisions of the ICTY thus far indicated that “crimes against humanity should attract harsher sentences than war crimes” and that crimes not involving the death of a victim warranted shorter sentences.<sup>120</sup> Based on this reasoning, and relying on the sentences imposed on Tadic, Erdemovic, and Aleskovski, he argued that his sentence should be a maximum of six years.<sup>121</sup>

The Prosecutor contested the proposed reduction in the sentence, but asserted that it would be beneficial for the Appeals Chamber to establish sentencing guidelines to achieve consistency in sentencing.<sup>122</sup> The Appeals Chamber implied that such a process would be premature, given that there have been only three final sentencing judgments, each of which admittedly altered the sentence imposed by the original Trial Chamber.<sup>123</sup> In addition, the Appeals Chamber noted that there were too many issues regarding sentencing that had not yet been addressed to set such guidelines.<sup>124</sup>

The final issue I will refer to concerned the disqualification of a judge. Furundzija argued that his conviction should be vacated because Florence Mumba, one of the Trial Chamber judges, should have been disqualified.<sup>125</sup> This argument was based upon the fact that prior to joining the Tribunal, Judge Mumba worked with the U.N. Commission on the Status of Women, an organization which, among other things, was concerned with the allegations of mass and systematic rape during the conflict in the former Yugoslavia.<sup>126</sup> Furundzija claimed that this constituted an appearance of bias, although he did not assert actual bias.<sup>127</sup> In rejecting this claim, the Appeals Chamber established guidelines for the disqualification of judges when such a claim is made.<sup>128</sup> The Chamber found that there is an unacceptable appearance of bias where:

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117. *Id.* at 59, 61, 147.

118. *Furundzija*, Appeals Judgment, Case No. IT-95-17/1-A, at para. 216.

119. *Id.* at para. 217.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Furundzija*, Appeals Judgment, Case No. IT-95-17/1-A, at para. 237.

124. *Id.*

125. *Id.* at para. 169.

126. *Id.* at para. 166.

127. *Id.* at paras. 169-70.

128. *Furundzija*, Appeals Judgment, Case No. IT-95-17/1-A, at para. 179.

- i) [A] Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . [or]
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>129</sup>

Based on these criteria, the Appeals Chamber found no bias.<sup>130</sup> It noted that Judge Mumba was serving as a representative of her country and not in her personal capacity, and held that even if Judge Mumba expressed her support of the objectives of the organization, there was no basis for a finding that such an inclination would impede her impartiality in any given case.<sup>131</sup> The Chamber also pointed out that one of the Security Council's reasons for establishing the Tribunal was to bring perpetrators of crimes against women to justice.<sup>132</sup> Accordingly, sharing such goals was insufficient to prove bias.<sup>133</sup>

Each of these judgments devotes significant attention to crimes of rape and sexual violence, showing that, at long last, they should be prosecuted as vigorously as other crimes committed during conflicts. Although rape is expressly enumerated only as a crime against humanity in the *Statute of the ICTY* and the *Statute of the ICTR*, these judgments recognize that rape and sexual violence can also constitute a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide.

### *B. General Contributions of the Tribunals*

Perhaps the most far-reaching contribution of the Tribunals is that their very establishment signaled the beginning of the end of the cycle of impunity. Those responsible for committing or ordering the commission of horrific acts of violence against innocent civilians, simply because of the happenstance of their birth, their ethnicity, their religious beliefs, or their gender, are now for the first time being called to account for their criminal deeds. By ensuring this accounting, the Tribunals concretely show that the international instruments guaranteeing basic human rights are more than merely an aspiration.

The Tribunals have also demonstrated that the rule of law has been an integral part of the peace process; expanded the jurisprudence of international humanitarian law; raised the international community's level of consciousness

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129. *Id.* at para. 189.

130. *Id.* at para. 199.

131. *Id.* at paras. 199–200.

132. *Id.* at para. 201.

133. *Furundzija*, Appeals Judgment, Case No. IT-95-17/1-A, at para. 202.



regarding the need of states to enforce international norms; and accelerated the development of the permanent International Criminal Court. Further, the Outreach Program, which I will discuss in a few moments, offers an important mechanism to help the reconciliation process in the former Yugoslavia.

The Security Council's choice of a court of law as the measure to help to bring about and maintain peace is a victory for the rule of law, the anchor of civil society. In the ICTY's early days, some thought that the prosecution of alleged war criminals was inconsistent with efforts to bring peace to the region. Now, the goals of peace and international criminal justice are no longer seen as mutually exclusive. Rather, they are interdependent and complimentary.

Moreover, the trials in the Tribunals develop a historical record of what happened in the regions of conflict, thus guarding against revisionism. The judgments, which typically detail the factual circumstances of the crime charged, provide an incontrovertible record of the brutality engaged in by ethnic groups pitted against each other by incessant, virulent propaganda. The judgments also have made substantive findings on a myriad of legal issues, most of which had never been considered by a court. For example, the Geneva Conventions of 1949 establish a "grave breaches" regime that prohibits certain types of behavior directed against protected persons or property.<sup>134</sup> The ICTY has held that Article 2 applies only in the context of an international armed conflict. Further, the victims must be regarded as "protected" by the Fourth Geneva Convention.

In the *Tadic* case, the Trial Chamber, by majority, found that the conflict in the Prijedor area of Bosnia was not international after May 19, 1992, the date of the purported withdrawal of the forces of the Federal Republic of Yugoslavia ("FRY"), the Yugoslavian military.<sup>135</sup> The majority also found that the victims were not protected persons.<sup>136</sup> The Appeals Chamber reversed on this point and after a lengthy discussion of the Nicaragua Decision from the International Court of Justice, construed it as requiring only that the Bosnian Serb armed forces were acting "under the overall control of and on behalf of the FRY."<sup>137</sup> Thus, the Bosnian victims were deemed to be in the hands of an armed force of a state of which they were not nationals and thus, were protected persons. The *Blaskic* Judgment follows this approach and has found that the "grave breaches" regime applied.<sup>138</sup> The ICTY also construed broadly laws and customs of war

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134. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 5.

135. Prosecutor v. Tadic, Appeals Judgment, Case No. IT-94-1, para. 607 (Int'l Crim. Trib. Former Yugo., App. Chamber, July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm>.

136. *Id.* at para. 608.

137. *Id.* at para. 162.

138. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, para. 73 (Int'l Crim. Trib. Former Yugo.,

and held that this body of law, known as the "Hague Law," applies to both international and internal armed conflicts.<sup>139</sup> The judgments also have significantly advanced the jurisprudence relating to crimes of sexual violence, an area ignored in international law.

Additionally, the work of the Tribunals has significantly raised the awareness of the importance of enforcing international humanitarian law. It has given the many human rights instruments some real meaning and power. Since the establishment of the Tribunals, the awareness of the need to enforce human rights violations in armed conflicts and the actual prosecution of such crimes has increased. This is an important development because the ad hoc Tribunals cannot possibly handle all of the potential prosecutions growing out of the conflicts in the former Yugoslavia and in Rwanda. Because of limited resources, the Tribunals can simply apply law which has been ignored in a forum free from accusations of bias, thereby developing a body of jurisprudence that can be used by municipal courts in their own trials. Thus, by raising the consciousness of states and developing a body of law that states can apply, the Tribunals pass the torch to national courts which are, or may become, better equipped to handle large numbers of prosecutions.

Another important contribution of the Tribunals is that they have, without question, accelerated the movement to establish a permanent International Criminal Court. The Tribunals have demonstrated that international criminal justice is possible. They are positive proof it is possible to try persons charged with serious violations of international humanitarian law in international courts and that the differences in the civil and common law systems - not to mention the country by country differences even within the same type of system - are not insurmountable obstacles.

Finally, the importance of the Outreach Program cannot be overstated. Increasing the awareness of and combating the misinformation about the ICTY was one of my priorities when I was elected President of the ICTY in November of 1997. Considering the ICTY's extraordinary mandate, I felt that the ICTY must take affirmative steps to make the processes and personalities known and understood, especially by the people in the former Yugoslavia.

Following much debate, the Program was finally established in September of 1999. The Program has a coordinator based in The Hague, with offices in Croatia and Bosnia, through which there are regular contacts with the media, legal professionals, and other groups. To date it has organized weekly television updates on its activities, broadcasted its proceedings, and conducted regular conferences and exchanges of personnel and information between The

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Trial Chamber, Mar. 3, 2000), available at [www.un.org/icty/blaskic/trialc1/judgment/main.htm](http://www.un.org/icty/blaskic/trialc1/judgment/main.htm).

139. Prosecutor v. Tadic, Decision, Case No. IT-94-1, para. 89 (Int'l Crim. Trib. Former Yugo., App. Chamber, Oct. 2, 1995), available at [www.un.org/icty/tadic/appeal/decision-e/51002.htm](http://www.un.org/icty/tadic/appeal/decision-e/51002.htm).

Hague and the region. During my term as President, many of the judges of the Tribunal wanted to visit the region, but for much of that time the conditions on the ground would not permit such visits. Now there have been visits to Sarajevo and Croatia, and the exchanges between the people of the region and the judges have been mutually beneficial.

This is only a first step that must be consolidated and expanded.<sup>140</sup> The United States and the MacArthur Foundation responded to my personal appeal for funding, and various European States have contributed as well. However, the current funding will only take the Program to the end of 2000. I continue to believe that it represents a vital aspect of the Tribunal's work, which is so different than courts of national systems that are integrated in the criminal justice framework of the community. Support for this initiative, both within and outside of the Tribunal must not be eroded. If judgments issued hundreds of miles from the scene of the conflict by an international court are to have an effect on the community, that community must understand and appreciate the work of the Tribunal; this is the goal of the Outreach Program.

### III. CONCLUSION

The critical contribution of the Tribunals has been to foster and enhance the recognition by states of the need to enforce norms of international law prohibiting massive violations of human rights. Judicial mechanisms are now an established element of conflict resolution, and proposals under discussion around the world envision a range of international, national, and mixed Tribunals. Moreover, following the lead of the Tribunals, the culture of impunity is being challenged by states whose national courts are applying international law. Finally, the International Criminal Court would not be so close to reality - getting closer every day - without the influence of both the ICTY and the ICTR.

The judgments of the Tribunals do more than determine the guilt or innocence of the accused. They do more than establish a historical record of what transpired. They do more than interpret international humanitarian law. Rather, the judgments of the Tribunals are evidence of actual enforcement of international norms. This is the best proof that the numerous conventions, protocols, and resolutions affirming human dignity are more than promises. Rather, the rule of law is an important component of the peace process.

It is clear then that we are living through tremendously encouraging times. Yet, how do we situate the progress over the past seven years in light of the amount of bloodshed that has gone unchecked from Iraq to the former Yugoslavia, to Somalia, through Rwanda, Afghanistan, Burundi, Liberia, Sierra

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140. *Justice, Accountability and Social Reconstruction*, *supra* note 9, at 8-9.

Leone, Columbia, the Congo, Chechnya, Indonesia, and the Sudan? The Tribunals have demonstrated that international criminal law is feasible. We have seen that the establishment of international courts of law is now being considered as a policy option to respond to humanitarian crises. No court can prevent all war, and the challenge of the twenty-first century is to utilize options to prevent the wanton destruction of innocent civilians which was characteristic of the twentieth century.