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The International Trial of the Century?  
A “Cross-Fire” Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*  

Michael Scharf** & Valerie Epps***

Introduction

Craig Garrett: On May 25, 1993, the United Nations Security Council established the Yugoslavia War Crimes Tribunal. Three years later, judges have been elected, a prosecutor appointed, rules of procedure promulgated, a courtroom and detention facility erected, over fifty indictments issued, and the first trial—that of Dusko Tadic—is set to commence on May 7, 1996.

We are fortunate to have with us today two experts on the Yugoslavia Tribunal and, more generally, international criminal law: Professor Valerie Epps of Suffolk University Law School and Professor Michael Scharf of the New England School of Law. Professor Epps teaches international law, has published numerous articles in the area of international criminal law, and is currently writing a book on international law specifically designed for undergraduates. Before joining the faculty of the New England School of Law, Professor Scharf served as Attorney-Adviser for U.N. Affairs at the State Department, where he played a key role in formulating the U.S. proposals for the Yugoslavia Tribunal and in drafting the Security Council resolutions leading to its adoption. He is co-author of the recently published book, “An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia.”

In “cross-fire” format, the panelists will address the following four questions: (1) Was the creation of an international tribunal the best response to the atrocities in the former Yugoslavia? (2) What is your

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* This Article is an expanded version of a presentation delivered at the Conference of International Law Journals on March 29, 1996, in Washington, D.C.

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appraisal of the Statute and Rules of the Tribunal? (3) What is your appraisal of the Tribunal's first decisions on the pre-trial motions in the Tadić case? and (4) What is your appraisal of the Tribunal's chances for success?

I. Was the Creation of an International Tribunal the Best Response to the Atrocities in the Former Yugoslavia?

Valerie Epps: It is always salutary to remember that the legal process swings into action when everything else has failed. On the national scene, legislatures pass criminal laws. These laws are intended both to reflect the community's moral consensus and to deter violations. A police force, prosecutor's office, and court system are put in place because history assures us that individuals and groups will violate the law, and that the police force will be unable or unwilling to prevent violations. After the law has been broken, the police set about finding the perpetrators and bringing them before a court. The court process is designed to discover whether suspects did in fact violate the law and, if so, to issue punishment.

In the international arena there is no strictly analogous legislature, but, particularly in the latter half of the twentieth century, the international community has agreed upon a core group of rules that prohibit certain types of behavior. Some of these acts are prohibited regardless of location or circumstances, while other behavior is only prohibited in particular contexts. Grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity are absolutely prohibited, and individual perpetrators are held to be criminally responsible regardless of whether they were acting on orders from a superior. This body of law has not been applied in any systematic way because the international machinery of a police force and court system has been lacking.

The only groups we have at the international level that remotely resemble an international police force are the United Nations peacekeeping

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3. Security Council Resolution 827 establishes the International Tribunal and states its purpose as: prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end... adopt[s] the Statute of the International Tribunal annexed to the [Secretary-General's] report.

S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203, 1204 (1993). The resolution was adopted unanimously on May 25, 1993. The Tribunal's Statute provides that the Tribunal shall have the power to prosecute "persons responsible for serious violations of international humanitarian law" (art. 1); "persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949" (art. 2); "persons violating the laws or customs of war" (art. 3); "persons committing genocide" (art. 4); and "persons responsible for... crimes [against humanity] when committed in armed conflict, whether international or internal in character, and directed against any civilian population" (art. 5), Statute of the International Tribunal, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1192 et seq. (1993) [hereinafter Tribunal's Statute].

4. See Tribunal's Statute, supra note 3, art. 7(4), reprinted in 32 I.L.M. at 1194.
forces that have been put together on an ad hoc basis under the auspices of the Security Council to deal with particular crises, such as Somalia, the Persian Gulf War, and Haiti.

When the Balkan war broke out it was clear that the international community, and more particularly the United Nations Security Council, had little interest in attempting preventative measures apart from an arms embargo.\(^5\) No state was willing to muster a peacekeeping force, either to prevent the spread of war, or to weigh in on one side or another. The war escalated and massive atrocities occurred. The international community first failed to prevent the war and later failed to curtail it. The creation of the International Criminal Tribunal for the Former Yugoslavia by the U.N. Security Council under its Chapter VII powers can thus be regarded as an attempt on the part of the international community to mop up after a massive failure. While the creation of the Tribunal was certainly not the best response to the atrocities, it remained perhaps one of only a few options. Was it the best option? What else might have been done in the wake of failure?

Historically after wars, and particularly civil wars, the options available are: (1) grant everyone amnesty; (2) create a high-level body, often called a "truth commission," to write a report on what happened so that the events are documented; (3) prosecute those who are suspected of violating the law in the local courts; (4) create an international court to try those who have violated the laws of war or other agreed upon important norms.

Each one of the above options has points in its favor and points against it. Amnesty may promote peace because the country does not have to live through the ordeal of lengthy trials that re-enact the horrors of the past. There is also the possibility that trials might be biased because the group in power is likely to prosecute its old opponents and exonerate its supporters. The great drawback to amnesty is that the victims of all the gross violations of law will never have their day in court. The perpetrators will go free and the lesson to be learned is that "all is [indeed] fair" in war, and that no matter what any individual does, there will be no penalty. Grants of amnesty certainly do not deter, and may even encourage, future criminal acts.

"Truth commissions" have been used in a number of states—most notably in El Salvador,\(^6\) and currently in South Africa.\(^7\) Depending upon

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the powers given to them, they may or may not identify the culprits. The reports issued by truth commissions do have the positive effect of documenting for posterity the events that occurred so that they will not be swept under the rug. The criticisms leveled at truth commissions are, however, considerable. The "truth" may be one-sided because the members of the commission are appointed by the group who has gained power. If the commission lists the names of suspects, those suspects have no opportunity to defend themselves.\(^8\) If the commission does not name the offenders, but only reports generally on the atrocities, the guilty remain free without sanction.\(^9\)

Prosecuting the suspects in local court systems has the advantage of not allowing the culprits to remain free, but has the disadvantage of making that nation relive the atrocities, inflaming old hostilities.\(^10\) The court system may well be considered biased as the government will in all probability prosecute its enemies and exonerate its allies. Historically, there are very few examples of governments prosecuting members of their own forces after a war.

The fourth alternative, creating an international criminal court to try the offenders, has seldom occurred. The Nuremberg and Tokyo trials after World War II were not courts created by the international community, but rather victors' courts created by the Allies to try the vanquished. Those courts established important precedents in terms of the substantive offenses for which suspects could be tried, and reaffirmed the concept of individual responsibility for violations of international norms. However, they were not international courts in the sense of being created by members of the international community who were not parties to the conflict. Given the failures of the international community in connection with the Balkan War, the creation of the International Tribunal for the Former Yugoslavia by the Security Council may well have been the best option available.

Perhaps we should wonder why an international tribunal was created for Yugoslavia, but not for numerous earlier large scale atrocities. More generally, we might ask ourselves why it has taken so long for the international community to get around to the creation of international criminal courts. The answer, I think, lies in that all embracing concept of "national sovereignty." States are very reluctant to submit to the jurisdiction of an

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8. The South African Truth and Reconciliation Commission has overcome this objection to some extent. The regular process of criminal indictments goes forward. If the suspect confesses, s/he can apply to the commission for amnesty, and amnesty may be granted provided the suspect admits to all of the offenses that the truth commission lists. The suspect can, however, go forward with a trial and offer a full defense in a regular criminal proceeding. Obviously, the prospect of amnesty for a confession versus the uncertainty of the outcome of a criminal trial may well persuade some suspects to issue false confessions. \(\text{Id.}\)


10. For example, the Ethiopian government is currently conducting trials of the former leaders of the Marxist government that overthrew Emperor Haile Selassie in 1974 and ruled until its ouster in 1991. See generally James C. McKinley Jr., Ethiopia Tries Former Rulers in 70's Deaths, N.Y. Times, Apr. 23, 1996, at A1.
entity over which they do not have total control. Nations may well feel that they have not agreed to the substantive or procedural law which governs the tribunal. They may not agree with the method of electing judges or the types of punishment meted out. It should be remembered that less than one third of states have submitted to the compulsory jurisdiction of the International Court of Justice. Among the permanent members of the Security Council only the United Kingdom currently accepts the court's compulsory jurisdiction, and its acceptance has a raft of exceptions. If a permanent international criminal court were created, it is extremely unlikely, at this juncture, that any of the more powerful nations would allow it mandatory jurisdiction or would opt to submit to its jurisdiction.

MICHAEL SCHARF: To begin with, I take issue with Professor Epps statement that the function of an international tribunal is to "mop up after a massive failure" on the part of the international community and that "the legal process swings into action [only after] everything else has failed." The better view, I believe, is that the very existence of an international criminal tribunal can serve an important preventive function. Richard Goldstone, the Chief Prosecutor of the Yugoslavia Tribunal, recently cited evidence that the existence of the Tribunal deterred human rights violations during Croatian army offensives against Serb forces last year. He said that "fear of prosecution in the Hague led Croatian authorities to issue orders to their soldiers to protect Serb civilian rights when Croatia took control of the Krajina and Western Slavonia region of the country." Thus, the Tribunal should be seen not as an end, but as a beginning, in terms of the role it can play in preventing the next round in the cycle of violence.

Professor Epps mentioned four alternative ways of responding to violations of international humanitarian law: (1) granting amnesty, (2) creating a truth commission, (3) pursuing domestic prosecutions, or (4) creating an international criminal court to try the offenders. As explained below, in the context of the conflict in the former Yugoslavia, the creation of an international tribunal was not only the best choice, it was the only viable option.

While prosecution and punishment can serve as a strong deterrent, the granting of immunity through an amnesty breeds contempt for the law and encourages future violations. History records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolph Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity. After the Nazis exterminated six million Jews

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11. See supra Part I.
12. See id.
14. See supra Part I.
15. Indeed, in a speech to his Commanding Generals, Hitler dismissed concerns about accountability for acts of aggression and genocide by stating, "Who after all is today speaking about the destruction of the Armenians?" Adolf Hitler, Speech to Chief
during the Holocaust, the world community said “never again,” and prosecuted the major Nazi war criminals before the International War Crimes Tribunal at Nuremberg. Yet, the hope of “never again” quickly became the reality of “again and again” as the world community failed to take similar action to bring those responsible to justice when four million people were murdered in Stalin’s purges (1937-1953), five million were annihilated in China’s Cultural Revolution (1966-1976), two million were butchered in Cambodia’s killing fields (1975-1979), thirty thousand disappeared in Argentina’s Dirty War (1976-1983), 200,000 were massacred in East Timor (1975-1985), 750,000 were exterminated in Uganda (1971-1987), 100,000 Kurds were gassed in Iraq (1987-1988), and 75,000 died in El Salvador’s civil war (1980-1992).16

According to Professor Rudi Rummel, during the twentieth century four times as many people have been killed by their own governments than in all the international wars combined.17 The U.N. Human Rights Commission has concluded that immunity is one of the main reasons for the continuation of grave human rights violations throughout the world.18 Indeed, fact-finding reports on Chile and El-Salvador indicate that the granting of amnesty or de facto immunity has led to increased abuse in those countries.19 The evidence strongly suggests that the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein, and Mohammed Aideed, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes. Moreover, failure to prosecute human rights crimes in the former Yugoslavia, which has suffered from an endless cycle of violence and abuse going back over 1,000 years, could serve as a virtual license to repeat the crimes, and would send a signal to other rogue regimes around the world that they have nothing to lose by instituting such repressive measures and abuses.

As Professor Epps points out, in recent years the international community has become quite enamored with the idea of “truth commissions” as an alternative to prosecutions in order to document abuses and facilitate national reconciliation. Although they can play an important role,20 truth

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17. Professor Rudi Rummel documents that as many as 170 million persons have been murdered by their own governments. R.J. RUMMEL, DEATH BY GOVERNMENT 9 (1994).
20. Truth commissions can lay the groundwork for eventual prosecutions, as the Commission of Experts established by U.N. Security Council Resolution 780, U.N.
commissions are a poor substitute for prosecutions. They do not have prosecutorial powers, such as the power to subpoena witnesses or punish perjury. They are inherently vulnerable to politically imposed limitations and manipulation: their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases, and strength of final report are all largely determined by the political forces at play when they are created. When truth commissions name perpetrators, they impose the moral punishment of public condemnation, sometimes combined with the sanction of lustration (the disqualification from public office); yet, because of their institutional limitations, truth commissions do not provide those named as perpetrators with the panoply of rights available to criminal defendants. More importantly, truth commissions lack the transparency of a criminal trial. As the U.S. Supreme Court has observed, "[t]o work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it." 

The most authoritative rendering of truth is possible only through the crucible of a trial that accords full due process. Criminal trials can generate a comprehensive record of the nature and extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out. Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nuremberg, said that one of the most important legacies of the Nuremberg trials following World War II was that they documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." 

In addition to truth, there is a responsibility to provide justice. Holding the violators criminally accountable for their acts is a duty owed to the victims and their families. Prosecuting and punishing the violators would give significance to the victims' suffering and serve as a partial remedy for their injuries. Moreover, prosecutions "help restore victims' dignity and..."
prevent private acts of revenge by those who, in the absence of justice, would take it into their own hands." Many analysts believe that national reconciliation cannot take place as long as justice is foreclosed.

And yet, domestic prosecutions are often not a practical option, as in Rwanda where domestic trials convened by the Tutsi government might be seen as biased against the Hutus, who were responsible for the genocide of 500,000 Tutsis, or in Iraq, where the government of Saddam Hussein cannot seriously be expected to prosecute diligently Iraqi leaders responsible for violations of international humanitarian law during the Persian Gulf War and for the use of poison gas against the Kurds. Similarly, there was no reason to believe that the Bosnian Serb government of Radovan Karadzic would bring someone like Dusko Tadić to trial for murdering and torturing prisoners at the Omarska prison camp in the Serb-controlled area of Bosnia.

This, then, is why the establishment of an international tribunal was the best response to the atrocities in the former Yugoslavia. If the world community is unable to prevent atrocities from occurring, it should at least seek to prosecute the alleged perpetrators in an institution that is fair and is perceived as fair.

Professor Epps asked why an international tribunal was created for Yugoslavia but not for earlier large scale atrocities. The answer has to do with the degree of the atrocities, as well as geography, public pressure, and historic timing. In the summer of 1992, the world learned of the existence of Serb-run concentration camps in Bosnia-Herzegovina, with conditions reminiscent of the Nazi-run camps of World War II. Soon, daily reports of acts of unspeakable barbarity committed in the Balkans began to fill the pages of our newspapers. The city of Sarajevo, which had recently impressed the world as host of the 1984 Winter Olympics, was transformed from a symbol of ethnic harmony into a bloody killing field. For the first time since World War II, genocide had returned to Europe.

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26. Dianne F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2550 n.44 (1991) (citing Hannah Arendt's view that "men are unable to forgive what they cannot punish"). Prosecutions act as a sort of ritual cleansing. A country in which such cleansing remains unfinished will be plagued by continuous brooding and pondering. For example the French historian Henri Rousseau labels the case of postwar France, where the collaboration with the Nazis was never fully tried, as a never ending neurosis. Luc Huyse, Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past, in 1 TRANSITIONAL JUSTICE, supra note 18, at 340.


30. See supra Part I.
international outcry was deafening. And the Security Council, which was recently freed of its cold-war paralysis, was ready to respond.

Finally, let me respond to Professor Epps' assertion that the permanent members of the Security Council would be unlikely to submit their nationals "to the jurisdiction of an entity over which they do not have total control." To some extent, they have already done so. Unlike the Nuremberg Tribunal, whose jurisdiction was restricted to crimes committed by members of the Axis powers, the jurisdiction of the Yugoslavia Tribunal extends to any person, regardless of nationality, alleged to have committed violations of international humanitarian law in the territory of the former Yugoslavia since 1991. Moreover, the Yugoslavia Tribunal is designed to perform its prosecutorial and judicial functions independently of political considerations and is not subject to the authority or control of the Security Council. Thus, there is nothing to prevent the Tribunal from prosecuting Russian, British, or American citizens that have participated as mercenaries in the fighting in the former Yugoslavia, or French, British, Russian, and American peacekeeping troops stationed in the former Yugoslavia for any of the crimes referred to in the Tribunal's Statute.

II. What Is Your Appraisal of the Statute and Rules of the Yugoslavia Tribunal?

MICHAEL SCHEP: As the first international criminal court in history, the Nuremberg Tribunal provides the benchmark for assessing the fairness of the Statute and Rules of the Yugoslavia Tribunal. The Yugoslavia Tribunal itself acknowledged in its first annual report that “one can discern in the statute and the rules a conscious effort to avoid some of the often-mentioned flaws of Nuremberg and Tokyo.” And yet at least one commentator has concluded that the Yugoslavia Tribunal “will likely invite much of the same criticisms that followed the first international war crimes trials.”

In some respects, the Yugoslavia Tribunal is a vast improvement over its predecessor. Its detailed rules of procedure and evidence, for example, represent a tremendous advancement from the scant set of rules that were fashioned for the Nuremberg Tribunal. Further, in contrast to the Nuremberg Tribunal, the Yugoslavia Tribunal prohibits trials in absentia, which

31. See supra Part I.
32. Report of the Secretary-General Containing the Statute of the International Tribunal, reprinted in 2 Morris & Schaff, supra note 2, at 8.
are inherently unfair and are likely to be seen as empty gestures. Whereas defense attorneys at Nuremberg were denied full access to the Nuremberg Tribunal's evidentiary archives, defendants before the Yugoslavia Tribunal are entitled to any exculpatory evidence in the possession of the prosecutor, and both the prosecution and the defense are reciprocally bound to disclose all documents and witnesses prior to trial. Finally, where the Nuremberg Tribunal has been criticized for compelling defendants to make incriminating statements, the Statute of the Yugoslavia Tribunal guarantees every accused the right "not to be compelled to testify against himself or to confess guilt," in addition to a panoply of other rights not recognized under the Nuremberg Charter.

The most often heard criticism of Nuremberg was its perceived application of ex post facto laws, by holding persons responsible for the first time in history for the "crime of aggression," and by applying the concept of conspiracy—never before recognized in continental Europe. The creators of the Yugoslavia Tribunal went to great lengths to avoid a similar perception with regard to the International Tribunal. First, the Security Council adopted a series of resolutions that put the people of the former Yugoslavia on notice that they were bound by existing international humanitarian law, in particular the Geneva Conventions. The resolutions enumerated the various types of reported acts that would amount to breaches of this law, and warned that persons who commit or order the commission of such breaches would be held individually responsible. Second, the jurisdiction of the International Tribunal is defined on the basis of the highest standard of applicable law, customary law, in order to avoid any question of full respect for the principle nullem crimen sine lege. It is particularly noteworthy that the crime of waging a war of aggression, which engendered so much criticism after Nuremberg, is not within the Yugoslavia Tribunal's jurisdiction.

In other respects, the Yugoslavia Tribunal's record is a mixed one. Let us begin with the criticism that Nuremberg constituted "victor's justice." In contrast to Nuremberg, the Yugoslavia Tribunal was created neither by the victors nor the parties to the conflict, but rather by the United Nations, representing the international community of states. The judges of the Yugoslavia Tribunal come from all parts of the world, and are elected by the General Assembly.

On the other hand, the decision to establish the Yugoslavia Tribunal was made by the U.N. Security Council, which has not remained a neutral third party, but rather has been deeply involved in the conflict. The Security Council has imposed sanctions on the side perceived to be most responsible for the conflict, authorized the use of force and air strikes, and

36. Id. at 89.
38. See Tribunal's Statute, supra note 3, art. 21, reprinted in 32 I.L.M. at 1198-99.
sent in tens of thousands of peacekeeping personnel. Its numerous resolutions have been ignored and many of its peacekeeping troops have been injured or killed; some have even been held hostage. Moreover, throughout the conflict, the Security Council has (justifiably) favored the Bosnian Muslims and Croats over the Serbs. Although it imposed sweeping economic sanctions on Serbia and the Bosnian Serbs, such action was never even proposed when Croatian forces committed similar acts of ethnic cleansing in central Bosnia in October 1993. Throughout the conflict, the Council had been quite vocal in its condemnation of Serb atrocities, but its criticism of Muslim and Croatian atrocities was muted.

Although the Yugoslavia Tribunal is designed to be independent from the Security Council, one cannot ignore the facts that the Security Council selected the Tribunal's prosecutor and proposed a short list of judges from which the General Assembly chose. Indeed, given that the battle for control of Bosnia was in large measure a religious war between Bosnian Muslims and Bosnian Serbs, it is astonishing that four of the eleven judges elected by the General Assembly upon the nomination of the Council come from states with predominantly Muslim populations. In contrast, the nominee for the Tribunal's bench from Russia (the one state with the closest historic ties to Serbia) was defeated ostensibly to avoid a pro-Serb bias.

While the Tribunal has jurisdiction to prosecute anyone responsible for violations of international humanitarian law in the former Yugoslavia, the indictments so far have been overwhelmingly against Serbs; not one Muslim was included among the first fifty-two people indicted by the Tribunal. Recently, the prosecutor of the Tribunal announced that he would make a concerted effort to indict a Muslim, to show the parties that the Tribunal was not one-sided. Yet, this patently political move in itself taints the Tribunal's due process.

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44. Georges Michel Abi-Saab (Egypt), Adolphus Godwin Karibi-Whyte (Nigeria), Rustam S. Sidhwa (Pakistan), and Lal Chand Bohrah (Malaysia). None of the judges, however, is a Muslim. Cf. Brutal Conflict: “An Affront to the World’s Conscience,” U.N. Chron., Dec. 1993, at 28.

Finally, noting China's dismal human rights record, one commentator has likened China's participation as a permanent member of the Security Council in the establishment of the Tribunal, the selection of its prosecutor, and the nomination of its judges, to Russia's presence on the Nuremberg Tribunal. As long as the jurisdiction of ad hoc tribunals is triggered by a decision of the Security Council, and the prosecutors and judges are selected by the Council, such tribunals will be susceptible to the criticism that they are not completely neutral. This is one of the reasons why the eventual establishment of a permanent international criminal court is so important.

Nuremberg was also criticized for selective prosecution and failure to bring many guilty individuals to justice. The Yugoslavia Tribunal has a similarly small capacity to conduct trials. "As there are only two Trial Chambers sharing, together with the Appeals Chamber, a single courtroom, a crucial and difficult area of prosecutorial policy is to ensure that only the most appropriate cases are referred to trial." In a way, this criticism is actually magnified with respect to the Yugoslavia Tribunal's approach to prosecutions. Because of lack of evidence and custody over offenders, the Yugoslavia Tribunal has been unable to start with cases against the military and political leaders, as was done in Nuremberg.

Indeed, the first person to be tried before the Yugoslavia Tribunal, Dusko Tadić, was not a senior official, but a lowly part-time prison guard. The office of the prosecutor has justified the decision to begin with the Tadić prosecution as follows: "We think prosecutions of prison guards and others like them have a significant symbolic value and that it is our obligation to pursue some of them." As with Nurembreg, subsequent national prosecutions are expected to deal with the vast majority of those responsible for atrocities in the former Yugoslavia, and it is likely that many will escape the net of justice.

Another criticism of Nuremberg was that those acquitted by the Tribunal were retried and convicted in subsequent proceedings before national courts. The Statute of the Yugoslavia Tribunal, in contrast, expressly protects defendants against double jeopardy by prohibiting national courts from retrying persons who have been tried by the International Tribunal. However, by permitting the Tribunal's prosecutor to appeal an acquittal, the Tribunal itself may infringe the accused's interest in finality which

46. Chaney, supra note 35, at 82. Nuremberg has been criticized on the basis of "unclean hands" because Soviet judges convicted defendants for waging aggressive war and mistreating prisoners, despite the forcible Soviet annexation of the Baltic States and the appalling Soviet treatment of POWs.


49. Id. at 193.

50. Tribunal's Statute, supra note 3, art. 10(1), reprinted in 32 I.L.M. at 1195.

51. Id. art. 25, reprinted in 32 I.L.M. at 1199-1200.
underlies the double jeopardy principle.\footnote{52} 

A final criticism of Nuremberg was that it did not provide for the right of appeal. The Statute of the Yugoslavia Tribunal has been recognized as constituting a major advancement over Nuremberg by guaranteeing the right of appeal and providing for a separate court of appeal. However, the procedure for the selection of judges by the General Assembly did not differentiate between trial and appellate judges, leaving the judges themselves to decide. When they arrived at the Hague, this became the subject of an acrimonious debate, since nearly all the judges wished to be appointed to the appeals chamber, which was viewed as the more prestigious assignment. As a compromise, the judges agreed that assignments would be for an initial period of one year and subject to "rotation on a regular basis" thereafter.\footnote{53}

The rotation principle adopted by the judges is at odds with the provisions of the Tribunal's Statute, which was intended to maintain a clear distinction between the two levels of jurisdiction. Article 12 provides that there shall be three judges in each trial chamber and five judges in the appeals chamber, and article 14(3) expressly states that a judge shall serve only in the chamber to which he or she is assigned. These provisions were intended to ensure the right of an accused to have an adverse judgment and sentence in a criminal case reviewed by "a higher tribunal according to law," as required by article 14 of the International Covenant on Civil and Political Rights (ICCPR).\footnote{54} The purpose of the double degree of jurisdiction principle, under which judges of equal rank do not review each other's decisions, is to avoid "undermining the integrity of the appeals process as a result of the judges' hesitancy to reverse decisions in order to avoid the future reversal of their own decisions."\footnote{55} The rotation principle, therefore, undermines the Yugoslavia Tribunal's appellate process.

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\footnote{52} The U.S. Constitution's prohibition of double jeopardy prevents the appeal of acquittals by the prosecution. The prohibition is not against being twice punished, but against being twice forced to stand trial for the same offense. There are two important rationales for this rule. One rationale is that the trial itself is a great ordeal, and once the defendant has been acquitted the ordeal must end. See United States v. Ball, 163 U.S. 662, 669 (1896). The other is based on the increased risk of an erroneous conviction that may occur if the state, with its superior resources, were allowed to retry an individual until it finally obtained a conviction. See Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. DiFrancesco, 449 U.S. 117, 130 (1980). These rationales are just as applicable to prosecution before an international criminal court as to domestic prosecutions. The International Tribunal's prosecutor, together with state authorities assisting the prosecutor, will have the full resources of the court and several interested states behind it, while defendants and their counsel will be acting alone to refute guilt.


In sum, although the Yugoslavia Tribunal's Statute and Rules generally represent a great improvement over Nuremberg, there are some built-in flaws. As discussed below, several of these flaws have been magnified by the Tribunal's first decisions interpreting the Statute and Rules.

Valerie Epps: This is not the appropriate forum to undertake a comprehensive review of the Tribunal's Statute and Rules but let me pick out a few features that are worthy of comment. Professor Scharf mentioned that the Statute prohibits trials in absentia.\(^{56}\) The U.N. Secretary-General argued that such trials would violate article 14(3)(d) of the ICCPR, which provides that everyone charged with a criminal offense "shall be entitled to the following minimum guarantee[s]... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing..."\(^{57}\) The requirement that the defendant be present is perhaps emphasized by the fact that article 14(1) provides for "a fair and public hearing" but states that:

> [t]he Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or... where publicity would prejudice the interests of justice...\(^{58}\)

No similar provision exists for the exclusion of the defendant, suggesting that the defendant must be present at trial. Nonetheless, the lack of in absentia trials has been criticized. Professor Ruth Wedgwood has argued that article 14 clearly gives defendants "[A] right to be present if they wish to be, and to have full notice of the proceedings... But if the defendant voluntarily chooses to absent himself, I question whether the United Nations is wise—certainly it is not required—to prevent the proof of the offense."\(^{59}\) The point is arguable, but in general I must agree that the specter of in absentia trials is not a pleasant one. Given that the Dayton Accords\(^{60}\) and the Tribunal's Statute\(^{61}\) require all states to cooperate fully with the Tribunal, theoretically there should be no need for in absentia trials except for those defendants who cannot be found.

The prohibition of in absentia trials may be ameliorated by the availability of the so-called "super-indictment." The super-indictment procedure is spelled out in Tribunal rule 61,\(^{62}\) which provides that after an indict-

\(^{56}\) Tribunal's Statute, \textit{supra} note 3, art. 24, \textit{reprinted} in 32 I.L.M. at 1199.

\(^{57}\) ICCPR, \textit{supra} note 54, \textit{reprinted} in 6 I.L.M at 272-73.

\(^{58}\) Id., \textit{reprinted} in 6 I.L.M. at 372.


\(^{61}\) Tribunal's Statute, \textit{supra} note 3, art. 29, \textit{reprinted} in 32 I.L.M. at 1200.

\(^{62}\) The adoption of rules of procedure and evidence is authorized by article 15 of the Tribunal's Statute, \textit{supra} note 3, \textit{reprinted} in 32 I.L.M. at 1196. The Tribunal adopted
ment has been confirmed by a judge of the Tribunal, a warrant for the accused's arrest will be sent to his/her home state. If that state is unable to execute the warrant, the prosecutor must take all reasonable steps to effect personal service or otherwise to inform the accused of the indictment. If the accused has still not surrendered to the Tribunal, the indictment and all supporting evidence must be submitted to the trial chamber in open court. The prosecutor may also examine any witnesses whose statements are part of the record. If the trial chamber is satisfied that there are reasonable grounds to believe that the accused has committed the crimes listed in the indictment, it shall so determine and shall also issue to all states an international arrest warrant for the accused.

The procedures outlined in rule 61 ensure that there will be a public record of the alleged crimes of the defendant, together with supporting evidence. This procedure insures that the accused will become an international pariah, even if s/he eludes arrest.

Two other matters worth mentioning are that the Statute does not provide for a jury system, and that the verdict rendered by the three member trial panel does not have to be unanimous. Though a jury trial is a creature of the common law and is absent in many legal systems, it is seen as a great buffer between the powerful machinery of the state or the international community and the relatively powerless defendant. In the international context the procedure for picking a representative jury would either be so cumbersome as to outweigh its benefits or would literally be impossible. Requiring unanimity of a three-member panel, however, does not seem too much to expect. While it is true that the rule of unanimity for juries has been eviscerated in national courts, this generally involves juries composed of more than three persons. Given the superior education and legal knowledge of the Tribunal's judges, the Statute or Rules should require a unanimous verdict for conviction.

The Tribunal's Statute permits an appeal by the defendant from a guilty verdict, which conforms to a similar requirement of article 14(5) of the ICCPR. What is more remarkable is that the Statute permits appeal by the prosecutor after a verdict of not guilty. Given that the Security Council created the Tribunal and selected the prosecutor, and that the General Assembly selected the judges from a Security Council short list, it would seem fair to let a verdict of not guilty stand without a right of prosecutorial appeal. If indeed there has been some error of law it will not be of the defendant's making and there seems to be no reason to put the defendant through the whole process again.
With respect to sentencing, the most controversial aspect of the Tribunal’s Statute is the lack of the death sentence. Many in the human rights community believe that customary international law already prohibits the death penalty for most crimes, although about one-half of all states still permit such punishment. Before the Balkan War, Yugoslavia imposed the death penalty. When a tribunal similar to that in Yugoslavia was set up for Rwanda, the Rwandan authorities were considerably distressed. They pointed out that alleged war criminals tried in Rwandan national courts could be sentenced to death, whereas offenders handed over to the international court could not.

The pardoning or commutation power articulated in article 28 of the Yugoslav Tribunal’s Statute provides that the president of the Tribunal has the power to commute or pardon anyone convicted by the Tribunal to the extent permitted by the law of the country where the convicted defendant is imprisoned. This provision makes the convict’s eligibility for pardon or commutation depend upon the happenstance of the laws of the country in which s/he is serving a sentence. It may be that the president of the Tribunal will exercise this power sparingly or in a way that results in its relatively uniform application, but it would certainly have been preferable to include a provision for pardon or commutation equally applicable to all prisoners.

The Statute of the Tribunal names four substantive categories of law under which defendants may be charged: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. Each of these categories presents hurdles to prosecution. Common article 3 to the Geneva Conventions of 1949 forbids a variety of activities, even “[i]n the case of armed conflict not an international character.” Article 3 states:

67. Id. art. 24, reprinted in 32 I.L.M. at 1199 (limiting penalties imposed by the trial chamber to imprisonment).
71. If pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Tribunal’s Statute, supra note 3, art. 28, reprinted in 32 I.L.M. at 1200.
72. Id. arts. 2-5, reprinted in 32 I.L.M. at 1192-94.
Persons taking no active part in the hostilities . . . shall . . . be treated humanely . . . [and] the following acts are . . . prohibited at any time and in any place . . .
(a) violence to life and person . . .
(b) taking of hostages . . .
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the . . . carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .

Violations of any of the above provisions would be a useful starting point for prosecutions, but under article 2 of the Tribunal's Statute only "grave breaches" may be prosecuted. A "grave breach" can only be committed against a person protected by the Convention; that is, only a person of a nationality different from that of the perpetrator. Thus, the slaughter or rape of a Bosnian Muslim by a Bosnian Serb is not a grave breach. The appeals chamber has now ruled on the scope of this article and has concluded that it only refers to offenses occurring in the context of international armed conflict. Offenses occurring during a civil war cannot be prosecuted under this article.

The Tribunal's Statute also permits prosecution for violation of the customary laws of war, listing offenses such as "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." It would be a poor military strategist who could not devise some military necessity for attack. Proving that there was no military necessity presents all the inherent difficulties of proving a negative. Some of the more distressing acts of the Balkan war, such as the systematic rape of women, are not specifically mentioned as violations of the laws or customs of war. Although it is clear that the list of offenses in article 3 was not meant to be exhaustive, and although it has been cogently argued that systematic rape does violate the customary laws of war, it would have been better to prohibit such acts explicitly. Rape is, however, mentioned under article 5 as an example of a crime against humanity.

Article 2 of the Genocide Convention defines genocide as the commission of any of a specific list of acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," and the Tribunal's Statute adopts this definition. Proving this very specific intent will be

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74. Id. art. 3.
75. Id. art. 4: "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 . . . ."
76. See infra text accompanying notes 107-08.
77. Tribunal's Statute, supra note 3, art. 3(b), reprinted in 32 I.L.M. at 1192.
78. Bassiouni and Manikas conclude that the omission of crimes of sexual violence from article 3 will make it impossible to prosecute for rape under this article. BAssiouni & Manikas, supra note 69, at 510.
80. Tribunal's Statute, supra note 3, art. 4, reprinted in 32 I.L.M. at 1193.
difficult. For example, it is not enough that members of one of the specified groups are killed. It must also be shown that the killing was carried out with the specific intent to kill the victims because they were members of a national, ethnic, racial, or religious group rather than, for example, simply being the enemy in a war, civil or otherwise.81

It is uncertain whether “crimes against humanity” have been sufficiently defined in a civil war context so as not to run afoul of the condemnation against the application of an ex post facto law.82 At Nuremberg such offenses were limited to those committed “in execution of or in connection with” war crimes and crimes against peace.83 The unknown dimensions of the phrase “crimes against humanity” in the current context raises issues of the sufficiency of prior notice of the nature of the offenses condemned. The appeals chamber has ruled upon this matter and has determined that such crimes can occur in armed conflict both of an internal character and of an international character.84

In general, it would be preferable to have a pre-existing, well-defined substantive statute, together with extant rules of evidence and procedure, as well as an existing court. Obviously no such institution, statute, or rules existed at the time of the outbreak of the Yugoslav war. The hurdles outlined above will have to be overcome or they will operate as a bar or even an insuperable hurdle to the prosecution of those indicted. Deciding how to overcome these obstacles may contribute to the creation of a better defined international criminal legal system, and may help persuade the international community to create a permanent international criminal court.

III. What Is Your Appraisal of the Tribunal’s First Decisions on the Pre-Trial Motions in the Tadić Case?

MICHAEL SCHARF: As mentioned earlier, the first defendant before the Tribunal is Dusko Tadić, who is accused of killing, raping and torturing numerous civilians in the Omarska internment camp. In a preliminary motion, Tadić challenged the jurisdiction of the Tribunal. The prosecution, in turn, filed a motion for protection of the identity of witnesses to be used in the Tadić case. On August 10, 1995, the trial chamber denied the defense motion, and the appeals chamber subsequently upheld the trial.

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81. See Bassiouni & Manikas, supra note 69, at 527-30. The Tribunal’s rule 93 provides that “[e]vidence of a consistent pattern of conduct may be admissible in the interests of justice.” 33 I.L.M. at 535 (1994). Such evidence may permit an inference of intent.

82. In their commentary on article 5, Bassiouni and Manikas state: “Article 5 is a progressive codification of Article 6(c) of the [International Military Tribunal] Charter. Article 5 of the Statute is progressive because it goes beyond the normative provisions of the Charter in several ways.” Bassiouni & Manikas, supra note 69, at 545.


84. See infra text accompanying notes 115-16.
chamber’s decision. That same day, the trial chamber upheld the prosecution’s motion in part, holding that the identity of several witnesses could be withheld indefinitely from the defendant in order to protect them and their families from retribution.

There are some very troubling aspects to the Tribunal’s disposition of these preliminary motions. Let us begin with Tadić’s challenge to the Tribunal’s jurisdiction. In its proposal for the Tribunal’s Statute, the International Committee of the Red Cross, the world’s leading authority on international humanitarian law, “underscore[d] the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict.” Seizing upon this authoritative statement, Tadić challenged the lawfulness of his indictment under article 2 (grave breaches of the Geneva Conventions) and article 3 (violations of the customs of war) of the Tribunal’s Statute on the ground that there was no international armed conflict in the region of Prijedor, where the crimes with which he was charged were allegedly committed.

In what can only be described as a novel interpretation, the Yugoslavia Tribunal’s appeals chamber decided by a four-to-one vote that, although article 2 of the Tribunal’s Statute applied only in international armed conflicts, article 3 applied to war crimes “regardless of whether they are committed in internal or international armed conflicts.” The Tribunal based its decision on its perception of the trend in international law in which “the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”

While distinguished commentators such as Professors Meron and Paust have argued convincingly for acceptance of individual responsibility for violations of the Geneva Conventions and the protocols additional thereto in the context of internal armed conflict, such recognition would constitute progressive development of international law, rather than acknowledgment of an existing rule. In addition to the *ex post facto* criti-

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89. Id. at 54.

cism, there is a second important reason for the Tribunal to exercise greater caution in construing its jurisdiction: states will not have faith in the integrity of the Tribunal as a precedent for other ad hoc tribunals and for a permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of its jurisdiction.

Let us turn next to the decision of the trial court, which held that the identity of several witnesses could be withheld indefinitely from the defendant and his counsel throughout the trial in order to protect the witnesses and their families from retribution. There are two problems with this decision. First, the Tribunal decided to elevate the protection of victims above the accused’s right of confrontation, notwithstanding the fact that article 20 of the Tribunal’s Statute requires that proceedings be conducted “with full respect for the rights of the accused,” and with merely “due regard for the protection of victims and witnesses.” Simply put, the right to examine or cross-examine witnesses cannot be effective without the right to know the identity of adverse witnesses. As one noted commentator has stated, “It is an almost impossible task to cross-examine an adverse witness effectively without knowing that witness’ name, background, habitual residence, or whereabouts at the time of the events to which he testifies.”

Second, the Yugoslavia Tribunal rationalized its decision on the ground that the Tribunal is “comparable to a military Tribunal” which has more “limited rights of due process and more lenient rules of evidence.” It then cited favorably the practice of the Nuremberg Tribunal to admit hearsay evidence and ex parte affidavits with greater frequency than would be appropriate in domestic trials. What the Tribunal apparently failed to realize is that this practice has in fact been a lightening rod for criticism of the Nuremberg Tribunal.

Consequently, the initial jurisprudence of the Yugoslavia Tribunal has, unfortunately, not been above reproach. To paraphrase Justice Robert Jackson, the Chief Prosecutor at Nuremberg, if we pass the defendants in an international trial a poisoned chalice, it is the international community that is ultimately injured. For the record upon which we judge those before the Yugoslavia Tribunal today will be the record upon which history judges the broader effort to prosecute crimes before international tribunals.

92. Leigh, supra note 91, at 236.
93. Decision on the Prosecutor’s Motion, supra note 86, at 15.
94. Id.
VALERIE Epps: Before the trial chamber, Tadić's attorneys mounted a radical attack challenging the legality of the creation of the Tribunal and arguing that the Tribunal lacked primary jurisdiction over national courts as well as subject matter jurisdiction. The trial chamber had dismissed on the merits Tadić's motions relating to primary jurisdiction and subject matter jurisdiction, and had decided that it lacked the power to consider the question of the legality of its own creation. Tadić appealed from that decision and the appeals chamber considered all three issues on their merits.97

Perhaps the most surprising part of the appeals chamber's decision was its willingness to consider the legality of its creation by the Security Council under the Security Council's chapter VII powers. The prosecutor argued that the "Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations," and the trial chamber agreed.98 The appeals chamber considered that issue "beside the point" and tried to reframe the question as "whether the International Tribunal . . . can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own 'primary' jurisdiction over the case before it."99 This is a nice distinction, but it resulted in a thorough investigation by the appeals chamber of the Security Council's powers under chapter VII and articles 39, 40, 41 and 42 of the United Nations Charter. It concluded that "the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter."100 The appeals chamber's interpretation of particular U.N. Charter articles is of less importance than the fact that the chamber considered itself empowered to address such questions.

The tradition of judicial supremacy is well-known and widely revered in the American context,101 but in no other governmental system is the highest court given such broad powers to decide upon the scope of the powers of other branches of government and to pronounce, in cases before it, that the legislature or the executive has overstepped the bounds of its permissible powers. Most systems operate under a parliamentary or executive supremacy system or with strictly limited powers of judicial review.

Though the merits phase in the Lockerbie case is still pending before the International Court of Justice, that court, in its decision on Libya's request for interim measures of protection, made it clear that it was not going to investigate the legality of the Security Council resolutions102 ordering Libya to hand over, either to the United Kingdom or to the United States, the suspects wanted in connection with the bombing of Pan Am

98. Id. at 40.
99. Id.
100. Id. at 48.
Flight 103 over Scotland. Although some members of the court were careful to point out that the case was simply a ruling on the primacy of mandatory Security Council resolutions over other, possibly conflicting, treaty obligations, it remains true that the court could, with little effort, have turned the case into a *Marbury v. Madison* equivalent by ruling on the legality of the Security Council's resolutions. In the *Lockerbie* case, the International Court of Justice chose not to take that route, whereas the appeals chamber in *Tadić* took the issue of the scope of the powers of the Security Council by the horns and ruled that the Security Council did in fact have the power to create the Tribunal. The power to decide that a particular organ has operated within the scope of its mandate implies the power to announce that the organ has overstepped its mandate and has operated illegally.

This is not the forum for a careful analysis of the possible justifications or consequences of a doctrine of judicial supremacy within the U.N. system. Suffice it to say that since the ultimate enforcement of the Tribunal's judgments lies within the power of the Security Council, it would seem unlikely that the U.N. Charter would have intended to vest judicial supremacy in a tribunal created by the Security Council, or that such power should be implied from any possible "inherent" powers. Nor does it seem a sensible allocation of powers.

The appeals chamber's decision on the Tribunal's primacy over national courts is, perhaps, less controversial. The chamber's decision was based on various articles of the U.N. Charter and specific provisions of the Tribunal's Statute. Indeed if a defendant could elude trial by insisting on being tried in national courts, defendants might well end up in highly sympathetic court systems.

The third ground of appeal was based on Tadić's allegation that articles 2, 3 and 5 of the Tribunal's Statute, under which he was tried, only relate to crimes committed in the context of an international armed conflict, whereas Tadić insisted that his alleged crimes occurred in an internal armed conflict. The trial chamber had concluded that "the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts."

The appeals chamber disagreed with the trial chamber on its interpretation of article 2 of the Statute. The appeals chamber recognized that "Article 2 refers to 'grave breaches' of the Geneva Conventions of 1949,

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104. *See*, e.g., U.N. Charter arts. 2(1), 2(7), 24 & 37.
105. *See*, e.g., Tribunal's Statute, *supra* note 3, art. 9(2), reprinted in 32 I.L.M. at 1194.
107. The Tribunal's Statute provides:

*Grave breaches of the Geneva Conventions of 1949*

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of
which are widely understood to be committed only in international armed conflicts." Although the chamber recognized that there may be some indications that the community of states is beginning to change its view on this matter, it nonetheless concluded that article 2 was limited to international armed conflicts.

With respect to articles 3109 and 5,110 the appeals chamber considered the proceedings of the Security Council when it discussed the jurisdiction of the Tribunal, and concluded that the Council believed that the Yugoslav conflict was both an international and an internal armed conflict and "intended to empower the International Tribunal to adjudicate viola-

12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

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

Tribunal's Statute, supra note 3, reprinted in 32 I.L.M. at 1192.
109. Article 3 of the Tribunal's Statute, supra note 3, reprinted in 32 I.L.M. at 1192-93, provides:

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

110. Article 5 of the Tribunal's Statute, supra note 3, reprinted in 32 I.L.M. at 1193-94, provides:

Crimes against humanity

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.
tions of humanitarian law that occurred in either context."\textsuperscript{111} The appeals chamber ruled that "Article 3 is intended to... endow... the International Tribunal with the power to prosecute all 'serious violations' of international humanitarian law"\textsuperscript{112} and that "it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict."\textsuperscript{113} Though the chamber cited historic and contemporary practice extensively, there is an argument to be made that the chamber's view represents the progressive development of the law rather than \textit{lege lata}.\textsuperscript{114} If such is the case, the \textit{ex post facto} argument gains much ground. It is perhaps significant that article 5 indicates that the listed crimes can be prosecuted regardless of whether the conflict is internal or international, whereas article 3 contains no such statement.

Article 5 of the Tribunal's Statute confers jurisdiction over crimes against humanity and specifically provides the power to prosecute for the listed crimes "when committed in armed conflict, whether international or internal in character."\textsuperscript{115} Despite this explicit language, Tadić argued that just as the jurisdiction of the Nuremberg Tribunal over crimes against humanity required that such crimes be committed in the execution of, or in connection with, crimes against peace or war crimes, thus limiting jurisdiction to offenses committed in the context of an international armed conflict, so current customary law also requires a nexus with an international armed conflict. To rule otherwise, he argued, would violate the principle of \textit{nullum crimen sine lege}. The chamber rejected this argument partly because of the specific language of the Statute, and partly because of its conviction that customary law now made it clear that crimes against humanity do not require an international armed conflict context. Although the article 5 proposals submitted by a number of states and bar associations did not seek to require that crimes against humanity be committed in an international context, it is far from clear whether the absence of such a nexus represents the progressive development or crystallization of current customary law.\textsuperscript{116}

Finally, I agree with Professor Scharf that the trial chamber's decision\textsuperscript{117} that the identity of several victims and witnesses could be withheld from the accused and his counsel in order to protect the witnesses and victims is unfortunate, and probably violates article 14(3)(e) of the ICCPR.\textsuperscript{118} Although Tribunal rule 75 provides for the protection of victims

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\item \textsuperscript{111} 35 I.L.M. 32, 57 (1996).
\item \textsuperscript{112} Id. at 62.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} See, \textit{e.g.}, Bassiouni's & Manikas' commentary on article 3. They assume that it will be limited to international conflicts. \textit{Bassiouni & Manikas, supra} note 69, at 510.
\item \textsuperscript{115} See supra note 110.
\item \textsuperscript{116} See \textit{Bassiouni & Manikas, supra} note 69, at 547-48.
\item \textsuperscript{117} \textit{Prosecutor v. Tadić I, supra} note 85.
\item \textsuperscript{118} "[E]veryone [charged with a criminal offense] shall be entitled to... examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." ICCPR, supra note 54, art. 14 (3)(e), reprinted in 6 I.L.M. at 368. See generally Leigh, supra note 91.
\end{enumerate}
\end{footnotesize}
and witnesses, it is arguable that it only intends to permit withholding of identity evidence from the public, not from the accused or his counsel. Further, rule 75 specifically states that protection orders must be “consistent with the rights of the accused.” The dilemma of the Tribunal was acute. Many victims, particularly rape victims, are understandably reluctant to present evidence in open court. The Tribunal does not have a full-fledged, well-funded witness protection program. Although a Victims and Witnesses Unit has been established to assist those who are called to testify, it does not have the ability to protect victims and witnesses once they return home. Perhaps the trial chamber’s decision to allow a witness’ testimony without revealing his or her identity seemed a workable compromise. Such witnesses can be cross-examined, but counsel may be deprived of demeanor evidence and is unable to carry out background investigations. Perhaps the president of the Tribunal should have explained these difficulties to the U.N. Secretary-General and argued in favor of a well-funded witness protection program. Given the financial impecuniosity of the United Nations, however, perhaps he knew that it would be to no avail. Perhaps he also guessed that, given the extreme disruption of victims’ lives that had already occurred, identity protection was the only basis upon which many of them would testify. Because the trial chamber’s decision was procedural and could not be appealed at that point in time, this issue will doubtless be raised on appeal after trial. The appeals chamber will naturally be reluctant to reverse, but if it does so Tadić may have to be retried—not a pleasant prospect for either the accused or the prosecutor.

IV. What Is Your Appraisal of the Tribunal’s Chances for Success?

VALERIE EPPS: Success is a multi-faceted word. In one sense the very existence of the Tribunal is itself a success. The Tribunal has already issued some important decisions on the scope of the substantive law governing the trials and the legitimacy of the Security Council’s powers in creating the Tribunal. If the trials of those currently in custody and those already indicted go forward there will doubtlessly be a large body of rulings that will contribute to the clarification and exposition of international criminal law in the context of armed conflict. That will constitute another success.

The ultimate test of the Tribunal’s success, however, will turn on whether the Tribunal gains custody of the major planners, strategists, and commanders in the war and successfully prosecutes a fair number of them. Convictions of only low-level personnel such as Tadić, although important,

119. 33 L.M. at 527 (1994).
120. Id.
121. There are at present seventy-four people who have been indicted, of whom seven are in custody. Drazen Erdemovic, an ethnic Croat who served in the Bosnian Serb army, was sentenced to ten years in prison for crimes against humanity after he “confessed to taking part in an execution squad and killing scores of unarmed men.” Marlise Simons, War Crimes Panel in First Verdict, N.Y. Times, Nov. 30, 1996, at A1, A8. See generally Stephen Kinzer, Defendant in Bosnian War-Crime Case Is Sent Home, Gravely Ill, N.Y. Times, Apr. 25, 1996, at A7; Theodor Meron, A Trial Without Witnesses, N.Y. Times, Mar. 7, 1996, at A25.
would be a hollow victory, and would taint the Tribunal with the stigma of having delivered unequal justice. The world has lived through too many wars in which only the "little guy" was prosecuted. Radovan Karadzic, the Bosnian Serb political leader, and Ratko Mladic, the Bosnian Serb military commander, have both been indicted but neither is in custody. NATO forces apparently allowed an opportunity to arrest Karadzic to pass, and U.S. Assistant Secretary of State Richard Holbrooke, at the time the chief negotiator for the United States, had to diffuse tensions between the Bosnian government and the Bosnian Serb leadership after the Bosnian government had arrested two suspected Serbian officers and handed them over to the NATO implementation force (IFOR) for delivery to the Tribunal. Without such mediation the peace process might well have collapsed. It is hard to imagine the Tribunal continuing trials if war breaks out again. Continued peace is perhaps a necessary condition for the ultimate success of the Tribunal.

If the Tribunal is judged a success it may well serve as a model for future ad hoc international criminal tribunals, as it has already for the Rwanda tribunal. Tribunals created to deal with particular crises are at the great disadvantage of having to respond to a particular set of atrocities within the framework of a particularized statute and rules. They are also subject to the criticism of only being created for some, but by no means all, crises. Perhaps the final test of the Yugoslav Tribunal's success will be whether the experience with the Tribunal persuades the international community to create a permanent international criminal court, preferably through a multilateral treaty process.

Michael Scharf: According to United Nations Under-Secretary-General for Legal Affairs, Carl August Fleischhauer, the International Tribunal was set up to achieve three fundamental goals: "ending war crimes, bringing the perpetrators to justice and breaking an endless cycle of ethnic violence and retribution." Furthermore, former United States Ambassador to the United Nations, Madeleine Albright, has stated that a primary purpose of the International Tribunal should be to "establish the historical record before the guilty can reinvent the truth." I agree with Professor Epps that to achieve these goals at least some of the "major planners, strategists, and commanders" who are primarily responsible for the crimes must be brought before the International Tribunal.

With the exception of Slobodan Milosevic (the president of Serbia), the Yugoslavia Tribunal has so far not shied away from indicting the responsible "big wigs." Among the first to be indicted by the Yugoslavia

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122. After the Vietnam War, the only member of the U.S. military to be prosecuted was Lieutenant William Calley. U.S. v. Calley, 46 C.M.R. 1131 (1973).
124. Id.
Tribunal were Radovan Karadzic (the Bosnian Serb political leader), Ratko Mladic (the Bosnian Serb military commander), and Milan Martic (the Croatian Serb political leader), whom the Tribunal charged with genocide, crimes against humanity, and war crimes. Bringing such persons to justice in Yugoslavia will be much more difficult than at Nuremberg.

Following World War II, the Allies had physical control of a defeated Germany, suspected war criminals were in allied custody, and prosecutors had access to meticulously kept Nazi documents. The staff of the Nuremberg Tribunal numbered 2,000, "with more than 100 prosecutors and an army of a million soldiers to provide all the necessary support." The Yugoslavia Tribunal's staff is less than a fifth of that size, and NATO's 50,000 peacekeeping forces have neither control of the territory of most of the former Yugoslavia nor access to documents and other evidence present there. Furthermore, unlike Nuremberg, the Yugoslavia Tribunal is not empowered to conduct trials in absentia. The Serbs, in particular, continue to possess the military power to resist court orders for surrender of accused Serbs, and have obstructed United Nations efforts to gain access to evidence needed for indictments.

Even if these "big wigs" are not surrendered to the Tribunal, however, such persons will become international outcasts and virtual prisoners in their own country, given the prospect of arrest if they step outside those borders. Furthermore, high level government officials charged with war crimes and crimes against humanity may find it difficult, if not impossible, to conduct business with other countries. Thus, the procedures for indictment and the issuance of arrest warrants set forth in the Statute and Rules of the International Tribunal may be used to constrain accused persons, even if the accused cannot be arrested and tried immediately. The super-indictment procedure of rule 61, which was described earlier by Professor Epps, will go a long way in establishing the historic record of the atrocities.

In my view the real test of the Yugoslavia Tribunal came at the Dayton peace negotiations in November of 1995. There, the chief prosecutor of the

128. The documents submitted in the course of the Nuremberg trials numbered over 700 million pages and weighed more than 4,000 tons. See John Alan Appleman, Military Tribunals and International Crimes IX (1954).
130. Serbs have repeatedly prevented the U.N. from gaining access to mass grave cites in areas under their control. See Flynn McRoberts, At De Paul, War Is Waged Against Balkan Atrocities, Cm. Trb., Nov. 21, 1993, § 2, at 1, 5.
132. See supra text accompanying note 62.
Yugoslavia Tribunal asked the United States to ensure that surrender of indicted suspects be a condition for any peace accord. The U.S. negotiator, Richard Holbrooke, responded that he would not make such a condition a “show stopper” to the larger peace settlement. Consequently, there was a very real chance that the entire Yugoslavia Tribunal would be bargained away in an effort to stop the war. After all, the United States and United Nations had in the last few years pushed amnesty-for-peace deals in Cambodia, South Africa, and Haiti, and the Security Council had not long before rescinded the arrest order for Somali warlord Mohammed Aideed in an effort to “foster a political dialogue which can lead to national reconciliation.” But the Bosnian government was insistent and, astonishingly, the Serbs ultimately consented to provisions in the Dayton Accords that require their full cooperation with the Tribunal.

Having survived Dayton, the Yugoslavia Tribunal has come too far not to be permitted to finish the job. At this point, the members of the Security Council are keenly aware that the cost of prematurely terminating the Tribunal would be to damage irreparably the credibility of the United Nations, as well as the rule of law. "For, once the world community puts its hand to this particular plough, it can look back only at the peril of surrendering all moral authority to those who have committed unspeakable acts in the cynical expectation that they will never have to answer for them." Finally, I’d like to address the question of whether the Tribunal was right to focus on such a minor sadist for its first case, whereas Nuremberg tried the key Nazi leaders themselves. If, as one newspaper put it, “Mr. Tadić was no more than a monstrous tadpole in a pool of sharks,” why should he have been the subject of the Tribunal’s first prosecution? There are several very good answers to that question. First, Dusko Tadić fell into the hands of the international community when he was arrested in Germany in 1994. Given the nature of his alleged offenses and the massive body of evidence pointing to his guilt, the Tribunal could not just turn a blind eye to the allegations. Second, through the Tadić case the Tribunal has begun to build a pyramid of evidence leading to the principals ultimately responsible for the horror in Bosnia. Third, to the victims of Dusko

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134. Id. at A12.
135. See Scharf, supra note 19, at 1, 37.
136. Id. at 11.
Tadić and his colleagues, to those who suffered as a result of the actions of ordinary prison guards and police officials, it is important that some of their torturers be brought to justice. Only by prosecuting individuals at all levels of responsibility can the victims see that justice has been done. Finally, the Tadić case has provided an opportunity for the Tribunal to iron out the bugs and polish the international legal rules before turning to the bigger fish and more difficult cases.

Historians are likely to rank the trial of Dusko Tadić as among the most important trials of the century. Unlike other renowned trials, the importance of the Tadić case lies not in the status of the defendant, but in the fact that the proceedings constituted an historic turning-point for the world community. For, just as the Nuremberg trial launched the era of human rights promulgation fifty years ago, the Tadić trial has inaugurated a new age of human rights enforcement. As the Yugoslav Tribunal, itself, reflected in its first annual report:

The United Nations, which over the years has accumulated an impressive corpus of international standards enjoining States and individuals to conduct themselves humanely, has now set up an institution to put those standards to the test, to transform them into living reality. A whole body of lofty, if remote, United Nations ideals will be brought to bear upon human beings . . . Through the Tribunal, those imperatives will be turned from abstract tenets into inescapable commands.140
