Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia

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PROSECUTOR V. TADIC: LEGITIMIZING THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

I. Introduction

It is said that the first casualty of war is innocence.1 The Bosnian Muslims and Croats confined within the Serbian prison camp of Omarska during the summer of 1992 know all too well the poignant accuracy of this statement. After the beginning of open hostilities in Bosnia-Herzegovina in April 1992, non-Serbs of the Prijedor region of northwest Bosnia were rounded up and forced to march in columns to prison camps. Subjected to brutal living conditions, prisoners were crowded together and fed starvation rations once a day. Both female and male prisoners were beaten, raped, tortured, and murdered by Serbian guards.

According to investigators, chief among these purveyors of misery was Dusko Tadic. A part-time karate instructor and officer in the reserve militia before the breakup of Yugoslavia, Tadic is alleged to have used his talents to inflict immense pain and suffering on the prisoners around him. The horrific crimes he is charged with committing include: summarily executing prisoners, forcing prisoners to drink water from puddles on the ground like animals, discharging the contents of a fire extinguisher into the mouth of a prisoner, and forcing a prisoner to castrate another prisoner with his mouth.

In Prosecutor v. Tadic,2 the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") considered a multifaceted jurisdictional challenge by Dusko Tadic after his indictment for violations of international humanitarian law. In a wide-ranging, comprehensive opinion, the Appeals Chamber held that (1) the International Tribunal had been lawfully established in accordance with the United Nations Charter, (2) the primacy of the International Tribunal over national courts did not wrongly infringe upon the sovereignty of member States, and (3) the International Tribunal had subject matter jurisdiction over the case.

1. Offering a soldier's view of the dropping of the atomic bomb on Hiroshima and Nagasaki in 1945, Paul Fussell notes in a controversial article that "[i]n life, experience is the great teacher." PAUL FUSSELL, THANK GOD FOR THE ATOMIC BOMB AND OTHER ESSAYS 13 (1988). From Fussell's perspective, the experience of "having to come to grips, face to face, with an enemy who designs your death" will profoundly affect one's views on the ethics of war. Id. at 14.
The decision by the Appeals Chamber in *Tadic* represents an important development in the field of international humanitarian law. The *Tadic* decision is significant because it addresses the validity of the creation of an international criminal tribunal by the Security Council, the first such tribunal ever constituted by the global community through the United Nations. The *Tadic* decision is also notable for its ruling on the characterization of the Yugoslav conflict and for the various principles of international humanitarian law applicable to offenses committed in that conflict. Part II of this Note examines the recent conflict in the former Yugoslavia, how the International Tribunal was established in response to the atrocities committed in that conflict, and a brief history of war crimes tribunals. Part III outlines the facts of the subject case, the arguments expounded by each side on appeal, and the decision of the Appeals Chamber. Part IV of this Note examines the rationale of this decision and its impact on the future of the International Tribunal.

II. BACKGROUND

A. Chronology of the Breakup of Yugoslavia

Prior to 1991, the Socialist Federal Republic of Yugoslavia ("Yugoslavia") was composed of six republics—Serbia, Bosnia-Herzegovina, Croatia, Slovenia, Montenegro, and Macedonia—and two autonomous regions—Kosovo and Vojvodina. Although the Republic was held together for thirty-three years by the forceful personality of communist leader Marshall Tito, his death in 1980 precipitated an economic crisis and increased ethnic tensions among the four major ethnic groups of Yugoslavia—Serbs, Bosnian Muslims, Croats, and Slovenes. While the Republic of Serbia consolidated political control over the other republics during the late 1980s, the governing Communist Party crumbled in the face of inter-ethnic squabblings and the general wave of capitalistic euphoria that engulfed Eastern Europe at the end of the Cold War. By 1991, the communists had lost power in Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.

Negotiations between Slovenia, Croatia, and Serbia on a future form of government failed when Serbia rejected a "loose confederation" Slovene-Croat proposal. The more industrialized republics of Croatia and Slovenia objected to subsidizing the weak economy of Serbia and desired a loose democratic confederation, while Serbia wished to retain a strong centralized communist system to ensure

5. *See id.* at 126.
6. *See id.*
economic support. Croatia and Slovenia promptly declared independence on June 25, 1991, and war erupted soon thereafter when the Serb-controlled Yugoslav People's Army attacked Slovenia. Serbs in Croatia and Bosnia began consolidating territory under their control and implementing a policy of "ethnic cleansing." 

On April 7, 1992, the United States recognized Croatia, Slovenia, and Bosnia-Herzegovina as independent sovereign states. That same day, Bosnian Serbs declared their own independent state within Bosnia-Herzegovina, and full-scale war broke out between Serbs, Muslims, and Croats. The Muslims and Croats of Bosnia soon forged an alliance, as Croatia was still fighting Serbs in its own territory. The United Nations was quick to condemn Serbian aggression but reluctant to become bogged down in the mire of a land war. Eventually, the Security Council established an arms embargo against all parties to the conflict and dispatched a U.N. Peacekeeping Force to the area.

B. Events in the Prijedor Region of Bosnia-Herzegovina

Opstina Prijedor is a district in northwest Bosnia, situated between the regional capital of Banja Luka (to the east), the Bosnian-Croatian border towns of Bosanski Novi (to the west) and Bosanski Dubica (to the north), and the town of Sanski Most (to the south). Opstina Prijedor is located within a corridor that connects Serbian dominated areas in the Krajina area to the west and Serbia proper.

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7. See id. at n.45.
8. See id. at 127.
9. This oft-used term refers to the alleged practice of Serbs who "wanted to create a Greater Serbia by ripping out of the map of Croatia and Bosnia-Herzegovina those territories where Serbs lived in large numbers, cleansing them of non-Serbs and attaching them to the country calling itself Yugoslavia." Court TV Library, Developments in the War Crimes Trial of Bosnian Serb Dusko Tadic from May 7-10, 1996 (visited Mar. 4, 1997) <http://www.courttv.com/casefiles/warcrimes/reports/week1.html>.
10. See Hochkammer, supra note 3, at 128. Each of these republics was formally admitted to the United Nations on May 22, 1992. See id. at n.58.
11. See id. at 128.
12. See id.
13. See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991). "The Security Council[s] ... [d]eeply concerned by the fighting in Yugoslavia which is causing a heavy loss of human life and material damage ... [and] constitutes a threat to international peace and security ... [d]ecides ... that all States shall ... immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia..." Id. at ¶ 3.
in the east.\footnote{16}{The Krajina is the traditional name for the area of land that overlaps the border of Croatia and Bosnia-Herzegovina, and has been populated by Serbs for many years. See Michael J. Keegan, Annexure “MK I” to Application for Deferral (visited Jan. 18, 1997) <gopher://gopher.igc.apc. . .adic/Keegan-declaration> [hereinafter Keegan Declaration]. An investigator in the Prosecutor’s Office of the International Tribunal, Keegan describes how the conflict in Croatia focused on “the Serbian claim to the Krajina as an independent Serbian republic with direct ties to Serbia proper.” \textit{Id}.} Thus, Prijedor had a special military significance to Serbs in Bosnia and Croatia. According to a 1991 census, its population was 112,470, of whom 44\% were Muslim, 42.5\% Serb, 5.6\% Croat, and 7.9\% others.\footnote{17}{See Commission of Experts Report, supra note 15, \S IV(A)(1). Thus, the non-Serb population numbered approximately 65,000 people in 1991. According to a population count conducted in June 1993, only 11,914 non-Serbs remained in the Prijedor area. \textit{See id}. Most of the other 52,811 non-Serbs were either killed or deported, with a limited number having fled the region as refugees. \textit{See id}.}

When war broke out in Croatia and Slovenia in the summer of 1991, the Yugoslav People’s Army attempted to mobilize all active and reserve soldiers.\footnote{18}{See Keegan Declaration, supra note 16.} The Muslims and Croats of Bosnia did not honor the mobilization effort, causing “great resentment on the part of the Serbian population.”\footnote{19}{Id.} The federal government began covertly arming the Serbian population with machine guns, automatic rifles, grenades, and ammunition.\footnote{20}{See id.} By early 1992, the Prijedor Serbs had established a shadow government that paralleled the existing Muslim administration, complete with a pure Serbian police force and secret service.\footnote{21}{See id.}

Following the recognition of Bosnia-Herzegovina by the European Community and the United States in April 1992, the Bosnian Serbs declared their own independent state within Bosnia and mobilized for war.\footnote{22}{See id.} Roadblocks were erected on all major roads in Opstina Prijedor, and non-Serbs were directed to turn in their weapons.\footnote{23}{See id.} On the night of April 30, Serbs seized power in Prijedor, taking control of all official buildings and radio stations.\footnote{24}{See id.} Most non-Serbs were dismissed from their jobs and put on “waiting lists” for new positions.\footnote{25}{See id.} On May 4, the new Federal Republic of Yugoslavia ordered the “withdrawal” of all members of the Yugoslav People’s Army. The “withdrawal” was in reality a conversion of most of the
Yugoslav People's Army into the new Bosnian Serb army under the leadership of General Ratko Mladic.  

To protect outlying communities from roaming bands of gunmen, many Muslim villages set up their own roadblocks. On May 22, 1992, a fateful encounter took place at one of these roadblocks. A vehicle containing four Serbs and a Croat was stopped at a Muslim checkpoint outside the village of Hambarine. Words, and then bullets, were exchanged, resulting in the death of two men in the car. Serbian officials thereafter demanded the person responsible for the shooting be turned over within twenty-four hours. As soon as the deadline passed, the Serbs launched a massive artillery and tank assault on Hambarine.

An attack on Prijedor soon followed, with much of the Muslim areas of the city destroyed by wanton pillaging and plunder. Most of the non-Serb residents of Prijedor were “evacuated” to three main camps in the area: Omarska, a former mine complex; Keraterm, a former ceramics factory; and Trnopolje, a complex of buildings including a former school. The primary purpose of the Omarska and Keraterm camps was to incarcerate any male, non-Serb between the ages of sixteen and sixty. Leaders, prominent citizens, or those who had actively resisted in the non-Serb community were sent to Omarska, which was regarded as the harsher of the two facilities. The remaining members of the male population were sent to Keraterm, while women were normally taken to the Trnopolje camp.

When captives arrived at Keraterm and Omarska, they usually endured a regimen of abuse that was strictly administered by the Serbian guards. New prisoners were typically beaten upon arrival, robbed of their possessions, and denied food and water for the first forty-eight to ninety-six hours. Within the first ninety-six hours,
most prisoners were interrogated while being beaten and tortured\textsuperscript{39} with blunt instruments and knives.\textsuperscript{40} Although there were fewer beatings and summary executions at the Trnopolje camp, the women prisoners there were regularly subjected to gang rapes.\textsuperscript{41} When a

\begin{itemize}
\item \textit{39.} See id. The severity of a prisoner's treatment was related to his or her perceived status. Wealthy, intellectual, or politically active captives were subjected to severe torture and generally did not survive. Those who had actively resisted the Serb takeover and had escaped immediate execution were doomed to extremely harsh beatings and abuse. Those prisoners falling into neither of these categories were usually treated less harshly, unless they stood out for some reason. \textit{See id.}

\item \textit{40.} The use of blunt instruments was focused on the joints of the legs, the kidneys, the spine, and the head. \textit{See id.} Knives were typically used to sever tendons in the knees or ankles. \textit{See id.}

\item \textit{41.} \textit{Commission of Experts Report, supra note 15,} § IV(A)(5). The Commission found that the rape of women was prevalent, with girls as young as seven years old and women as old as 65 being raped while in captivity. \textit{See id.} § IV(E)(3). Men were also subjected to sexual assault and mutilation, including being forced to rape women and perform sex acts on guards or each other. \textit{See id.} § IV(F).

Examine the relationship between “ethnic cleansing” and rape, the Commission discerned five distinct patterns. \textit{See id.} § IV(F)(3). The first pattern involved sexual assault committed in conjunction with looting and intimidation of the target ethnic group before widespread fighting broke out. As tensions grew, small groups of men would often break into houses, intimidate and beat the male occupants, and rape the females. Usually a “gang atmosphere” surrounded such events, where all the attackers would participate in the assault. \textit{Id.} One woman interviewed by the Commission was “gang-raped by eight solders in front of her six-year-old sister and five-month-old daughter.” \textit{Id.}

The second pattern consisted of sexual assault committed “in conjunction with fighting in an area.” \textit{Id.} After a town or village was attacked, the inhabitants would be assembled and divided by age and gender. Women would then be raped publicly in front of their detained neighbors. \textit{See id.}

The third pattern of rape entailed sexual assault of people in detention merely because the victorious ethnic group had access to such people. Soldiers, guards, and even civilians were allowed to enter prison camps, pick out women at random, take them away and rape them, and then either kill them or return them to the camp. One witness interviewed by the Commission saw a woman die after being in a coma as a result of about 100 sadistic rapes by guards. Another incident related by an ex-detainee involved male prisoners lined up naked while Serb women undressed in front of them. If any prisoner had an erection, his penis was cut off. \textit{See id.} Another ex-detainee testified about seeing a father and son who shared his cell forced by guards to perform sex acts with each other. \textit{See id.}

The fourth pattern of rape involved sexual assaults against women for the purpose of terrorizing and humiliating them as part of the policy of ethnic cleansing. \textit{See id.} Female prisoners detained for this purpose were often raped, beaten, and tortured in front of other internees. If they became pregnant, they were detained until it was too late to obtain an abortion. One woman who spoke to the Commission stated that she had been detained by a Serbian soldier for six months. She was raped almost daily by three or four soldiers and was told that she would “give birth to a chetnik boy who would kill Muslims when he grew up.” \textit{Id.}

The fifth pattern of rape involved detention of women in hotels for the sole purpose of sexually entertaining soldiers, rather than causing a reaction in the women. \textit{See id.} These women were more often killed than released, unlike other women in prison camps. \textit{See id.}
C. Establishment of the International Tribunal

On May 25, 1993, in response to worldwide outrage over the bloodshed in the Balkans, the United Nations Security Council established an international tribunal to prosecute persons responsible for violations of international humanitarian law in the former Yugoslavia occurring after January 1, 1991. The culmination of a year-long process of United Nations fact-finding and deliberation, Security Council Resolution 827 established the tribunal and adopted a statute governing its structure, jurisdiction, and procedures. It was preceded by a number of resolutions, which, when viewed together, show an evolutionary growth of international activism and awareness. This evolution went through four stages: condemnation, publication, investigation, and punishment.

The Security Council condemned the alleged atrocities occurring in the former Yugoslavia in Resolution 764 on July 13, 1992, declaring international humanitarian law binding on all warring parties and stressing that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are individually

42. See id. § IV(A)(5).

The ad hoc tribunals established by the Security Council to adjudicate violations of international humanitarian law in the former Yugoslavia and Rwanda are not to be confused with the International Court of Justice, a judicial body created by the U.N. Charter to hear disputes between nation-states. See U.N. CHARTER, chap. XIV, art. 92-96.

The Security Council[,] . . . [e]xpressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring . . . [in] the former Yugoslavia[,] . . . [d]ecides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia . . . .

Id.

responsible in respect of such breaches."48 One month later, on August 12, 1992, the Security Council took a second step of publicizing the reported atrocities by unanimously adopting Resolution 771,49 which called upon states and international human rights organizations to collect documentation of human rights abuses and submit them to the Council.50

On October 6, 1992, without waiting for a single report to be submitted or for any recommendations from the Secretary-General, the Security Council took the third step of investigating the alleged atrocities through the adoption of Resolution 780,51 which established a "Commission of Experts" to begin collecting data on human rights violations in Bosnia-Herzegovina.52 The Commission's interim report, which concluded that grave breaches of international humanitarian law had taken place in the former Yugoslavia,53 was the catalyst for the adoption of Security Council Resolution 80854 on February 22, 1993. Resolution 808 proposed the establishment of an international tribunal to punish individuals responsible for such violations through due process of law.55

The structure of the Tribunal consists of three principal organs: the Chambers, the Prosecutor, and the Registry.56 The Chambers are comprised of two three-member Trial Chambers and a five-

48. Id. Resolution 764 stands in sharp contrast with the Security Council's previous references to the carnage in the former Yugoslavia in that it invoked specific international agreements containing enforcement provisions and discussed the obligations of individuals involved in the conflict. See O'Brien, supra note 43, at 641.
50. See id; see also Hochkammer, supra note 3, at 149 ("Resolution 771 also demanded that all military forces active in Bosnia-Herzegovina observe humanitarian law and threatened further Security Council action to ensure compliance.").
52. See id; see also O'Brien, supra note 43, at 641. The commissioners were Professor Frits Kalshoven, Chair; Professor M. Cherif Bassiouni; Commander William J. Fenrick; Judge Keba M'Baye; and Professor Torkel Opsahl. See id. at n.11. The Commission was initially beset with complications, including inadequate staffing, funding, and disagreements over its mandate. See id. at 642. As a result, the Commission was unable to actively investigate violations of international humanitarian law until late January of 1993, when it established a practical work plan to exhume mass grave sites and explore allegations of mass rapes and "ethnic cleansing." See id.
53. See Hochkammer, supra note 3, at 149 n.167.
56. Statute of the International Tribunal, supra note 45, art. 11.
member Appeals Chamber authorized to adjudicate cases. The office of the Prosecutor investigates alleged violations of international humanitarian law, prepares indictments, and prosecutes those individuals indicted. The Registry, responsible for public relations, storing documents and other administrative duties, acts as a combination of a clerk's office and an archive.

D. The History of War Crimes Tribunals

Although precedents for the establishment of an international war crimes tribunal exist in antiquity and the Middle Ages, it is

57. See id. at art. 11(A)(1). The Chambers consist of 11 judges elected by the U.N. General Assembly from a list submitted by the Security Council. See id. at art. 12. Elected on September 17, 1993, the judges are: Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer De Costil (France), Li Haopei (China), Abrielle Kirk McDonald (United States), Elizabeth Odie Benito (Costa Rica), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), and Lal Chand Vohrah (Malaysia). See Hochkammer, supra note 3, at 151 n.182. The President of the Tribunal is Judge Antonio Cassese.

58. Statute of the International Tribunal, supra note 45, art. 16. The Chief Prosecutor is Richard Goldstone, a former South African judge who was a "darling of the antiapartheid forces." Horne, supra note 55, at 6. Offered the position on July 4, 1994, Goldstone almost declined the offer because he was soon to be appointed to South Africa's new eleven-judge Constitutional Court. See id. However, Nelson Mandela, who thought it was important for a South African to accept such a prominent international position, pushed through a constitutional amendment to hold open Goldstone's spot on the high court until his return. See id. at 6-7.


60. Greek mythology describes how the goddess Athena, after a request to judge a dispute between mortals, declared herself unqualified and recommended that "the divine law and the gods themselves should be subject to a human court composed of the 'best of the city,' . . . an 'institution permanente.'" ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 18 (2nd ed. 1962). Ancient Greek history also tells of a Lacedaemonian admiral by the name of Lysander, who called together his allies after the destruction of an Athenian fleet at Aegospotamos in 405 B.C. to determine the fate of prisoners. See id. at 17. Supposedly, the allies acted as a kind of court that heard witnesses and examined evidence before executing all of the prisoners, save the one who had betrayed his side to the Spartans. See id. at 17-18. However, the dearth of even a pretense at such "ordered and reasoned judgment" throughout most of classical history caused Woetzel to conclude that "modern international law has no direct roots in antiquity, and any connection between these two epochs would be extremely vague and tenuous, as far as the law of nations is concerned." Id. at 19.

61. In 1469, the Archduke of Austria was forced, due to financial difficulties, to pledge his possessions on the Upper Rhine to Duke Charles of Burgundy. See id. Duke Charles installed Sir Peter of Hagenbach as Governor of the fortified town of Breisach, one of these possessions. See id. Hagenbach instituted a reign of terror, and his crimes were unique in their ferocity even in those rough and dangerous times. See id. Austria, France, and the towns and knights of the Upper Rhine later united to defeat Duke Charles and his plans for conquest. See id. at 19-20.
the twentieth-century experience after World Wars I and II that sheds the most light on the political and practical difficulties the present-day International Tribunal faces. In 1919, after the First World War, the victorious Allied powers appointed the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to determine the extent to which Axis powers violated the laws of war; assess the level of individual responsibility; and draft a statute for a war crimes tribunal. The Commission recommended that any peace treaty provide for an international tribunal to prosecute war criminals, and defined four categories of acts deemed war crimes: (1) offenses committed in prison camps against prisoners of war; (2) offenses committed by superior officers who issued orders; (3) offenses committed by all persons of authority who failed to stop violations of the laws of war; and (4) any other offenses that national courts should not be allowed to adjudicate.

The Allies incorporated these recommendations to a limited extent into the Treaty of Versailles, requiring Germany to surrender high-ranking military figures for war crimes trials, including the German Kaiser Wilhelm II. However, those treaty provisions relating to war crimes tribunals ultimately proved to be unworkable in the post-war political context. By the end of the war in 1918, pub-

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Hagenbach was captured on May 4, 1474, and was tried in the marketplace of Breisach for the crimes he had committed as Governor. See id. at 20. The court consisted of judges from Austria and allied cities as well as sixteen knights. See id. The court rejected Hagenbach's preliminary objection to the court's jurisdiction and his defense of superior orders, and sentenced him to death. See id. Thus, the trial of Sir Peter of Hagenbach resembles modern war crimes trials, with respect to jurisdictional objections and the plea of superior orders. See id.


63. See Hochkammer, supra note 3, at 133-34. At the end of World War I, the major international treaties relating to the laws of war were the two Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907. See id. at 135 n.100.

64. See id. at 134-35.


66. See Hochkammer, supra note 3, at 131. The formal indictment of the German Kaiser was opposed by the United States, which argued that heads of state were protected by sovereign immunity and were responsible only to their own domestic judicial system. See id. at 135 n.101. Interestingly, the German Kaiser had abdicated control of the German government and fled to the Netherlands after the war. When it became apparent that dissension among the Allies would prevent the Kaiser from ever being arrested, a group of American soldiers led by Colonel Luke Lea, a former United States senator, attempted to abduct the Kaiser and bring him to Paris. See id. at 136 n.105. Although they succeeded in gaining entry to the estate where the Kaiser was residing, they were forced to withdraw after being surrounded by Dutch troops. See id.

67. See id. at 135.
lic enthusiasm for war crimes trials had waned and the victorious Allies found themselves unable to remain united in their commitment to such trials.\(^6\) When civil war and revolution shook Germany, the possible spread of Bolshevism and general unrest became more immediate concerns of the Allies.\(^6\) Because the idea of enforcing the war crimes provisions of the Treaty of Versailles was eventually abandoned by the Allies, Germany was permitted to try accused war criminals itself.\(^7\) These trials, however, conducted in 1921 at Leipzig, resulted in few convictions and light sentences.\(^7\)

It was not until the tragic experiences of World War II that the historic idea of punishing war criminals took real effect.\(^7\) After much internal debate,\(^7\) the Allies signed the London Agreement\(^7\) on August 8, 1945, which established an International Military Tribunal in Nuremburg for the trial and punishment of war criminals of the European Axis.\(^7\) Wary of the unsuccessful precedent set by the World War I efforts to prosecute war criminals, the Allies, particularly the United States, devoted substantial resources to the Nuremburg trials.\(^7\) With the aid of abundant documentation of war crimes maintained by the Axis powers themselves,\(^7\) the International Military Tribunal convicted nineteen of the twenty-two major offenders who were tried.\(^7\)

\(^6\) See id. at 136-37.
\(^6\) See id. at 138.
\(^7\) The Allies originally demanded the surrender of 854 men for prosecution. Eventually, the Allies directed Germany to try 45 men, of whom 12 were actually tried and six convicted. Two of those convicted later escaped prison. See id. at 133 n.89.
\(^7\) Winston Churchill argued that “the method of trial, conviction and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop ... [for] the question of their fate is a political and not a judicial one.” Cable from Winston Churchill to Franklin Roosevelt (August 22, 1944), in 3 Churchill & Roosevelt—The Complete Correspondence 329 (Warren F. Kimball ed., 1st paperback prtg. 1987) (1984). Instead, Churchill advocated that, if such persons are apprehended, “the nearest General Officer will convene a Court for the sole purpose of establishing their identity, and when this has been done will have them shot within one hour without reference to higher authority.” Id. Churchill eventually abandoned his position in light of Josef Stalin's insistence on war crimes trials. See id.
\(^7\) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremburg Charter].
\(^7\) The Allies also organized courts and conducted trials in Tokyo for the prosecution of Japanese war criminals. See generally Richard H. Minear, Victors' Justice: The Tokyo War Crimes Trial (1971) (questioning the validity of the Tokyo war crimes trials).
\(^7\) See Hochkammer, supra note 3, at 141 & n.131.
\(^7\) See id. at 141.
\(^7\) See Mitchell, supra note 72, at 584.
The Nuremburg trials and the charter that authorized them were a turning point in the history of international law and marked a transition "which roughly corresponds to that in the evolution of local law when men ceased to punish local crime by 'hue and cry' and began to let reason and inquiry govern punishment." The Nuremburg Charter identified three types of crimes: (1) crimes against peace, (2) war crimes, and (3) crimes against humanity. At the time of the Nuremburg trials, however, only the laws and customs of war were firmly established in international law; crimes against "peace" and "humanity" were new concepts. Since 1945, international humanitarian law has codified the concept of "war crimes" and "crimes against humanity," making individual criminal responsibility one of the most significant legacies of the Nuremburg trials and providing a legal precedent for the International Tribunal.


80. See Nuremburg Charter, supra note 74, art. 6(a) (defining crimes against peace as "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing").

81. See id. art. 6(b) (defining war crimes as "violations of the laws or customs of war" including, but not limited to "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

82. See id. art 6(c) (defining crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or in persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated").

83. See Hochkammer, supra note 3, at 142. Thus, the Nuremburg trials have been criticized for being an exercise of arbitrary victors' justice, for being unfairly ex post facto, and for violating the criminal law doctrine of nullum crimen sine lege, nulla poena sine lege ("unless there is a law, there can be no crime; unless there is a law, there can be no punishment"). See id. at 142 & n.141 (quoting MINEAR, supra note 75, at 61). See also VISSOUNT MAUGHAM, U.N.O. AND WAR CRIMES (Greenwood Press 1975) (1951) (condemning the prosecution of crimes against humanity and crimes against peace at Nuremburg).

III. THE SUBJECT CASE

Dusko Tadic is a Bosnian Serb accused of participating in the collection, mistreatment, and killing of Bosnian Muslims and Croats in Bosnia-Herzegovina between May 24, 1992, and August 30, 1992. A former cocktail lounge owner and karate instructor, Tadic is married, has two daughters, and by all accounts enjoyed good relations with Muslims and Croats before the war. However, Tadic allegedly became "intoxicated with Serbian nationalistic propaganda" in the months preceding the breakup of Yugoslavia. He banned Muslims from his cafe, and helped compile death lists of intellectuals, politicians, and other prominent Muslims who were to be killed as part of the Serb ethnic cleansing of the Prijedor region.

When hostilities broke out, Tadic became a de facto leader of Serb paramilitary forces, assisting them in "evacuating" Muslims and Croats and marching them to local prison camps. During one such march, Tadic and a group of Serbs allegedly pushed four prisoners out of a column, lined them up against a wall, and shot them. Inside the camp of Omarska, Tadic is said to have routinely beaten, tortured, and executed prisoners. The most infamous incident Tadic is alleged to have committed was assisting a group of Serbs to severely beat four prisoners and forcing one of them to castrate another with his mouth.

Having allegedly looted many Muslim homes during the course of the conflict, Tadic had a lot of cash but no place to spend it. Tadic decided to move to Munich, Germany, where he could spend his new-found wealth and stay with a brother. However, refugees from the prison camps living in Germany identified Tadic to the German authorities, who arrested him in February of 1994. On November 7, 1994, Tadic was indicted in Germany on charges of murder and torture for his activities in Bosnia. On November 8, 1994, the Prosecutor of the International Tribunal formally re-

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85. Dusko Tadic is also known as "Dusan" or "Dule" Tadic. See Indictment of Tadic (visited Jan. 18, 1997) <gopher://gopher.ig.apc.org:7030/00/cases/Tadic/950213-Tadic-indictment>.
86. See id.
88. See id.
89. See Keegan Declaration, supra note 16.
90. See id.
91. See The Defendant and the Charges, supra note 87.
92. See id.
93. See id.
94. See id. See also Horne, supra note 55.
95. See Horne, supra note 55, at 11.
quested that the Trial Chamber ask Germany to defer prosecution of Tadic to the Tribunal. 97 Along with twenty-one other Serbs, he was formally indicted on February 13, 1995, for various violations of international humanitarian law. 98 However, it was not until March 31, 1995, that the German parliament passed a law permitting the transfer of the case to the International Tribunal. 99 On April 24, 1995, Tadic was transferred from Germany to a detention facility run by the Tribunal at The Hague, and on April 26, Tadic plead not guilty, stating, "I did not take part in any of the crimes with which I am charged." 100

On June 23, 1995, the defense filed a preliminary motion seeking dismissal of all charges against the accused based on the International Tribunal’s lack of jurisdiction. 101 The defense challenged the Tribunal’s power to try Tadic on three major points: the improper establishment of the International Tribunal; the improper grant of primacy over national courts; and the lack of subject matter jurisdiction. 102 The Prosecutor disputed each of these points and contended that the Tribunal had jurisdiction over the accused as


Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the national courts of any State ... what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the Prosecutor may propose to the Trial Chamber ... that a formal request be made that the national court defer to the competence of the Tribunal.

Id.

The Prosecutor supported his request with 13 pieces of documentary evidence—maps, newspaper clippings, and photographs—and 19 statements from witnesses scattered throughout Germany, the Netherlands, Norway, Sweden, and Switzerland. See Horne, supra note 55. It has been noted that “[i]n addition to the practical effect of granting the tribunal exclusive jurisdiction, deferral proceedings are a potent public relations tool, permitting the prosecution to air unsubstantiated charges against individuals prior to their indictment and signaling the tribunal’s imminent indictment of those accused in local war crimes proceedings.” Id.

98. See Hochkammer, supra note 3, at 172.

99. See Chronology, supra note 96, at 1.

100. Id.


102. See id.
charged. On August 10, 1995, the Trial Chamber dismissed the defense motion with respect to primacy and subject matter jurisdiction, and refused to examine the validity of its creation by the Security Council. From this judgment the defense filed a timely interlocutory appeal.

The first issue before the Appeals Chamber was to determine which issues raised by the defense motion were properly appealable in an interlocutory proceeding. Based on the distinction drawn by the Trial Chamber between the validity of the creation of the International Tribunal and its jurisdiction, the Prosecutor contended that only the jurisdictional aspects of the defense motion were entitled to interlocutory appeal. The Appeals Chamber rejected "[t]his narrow interpretation of the concept of jurisdiction," finding that "[a]ll the grounds of contestation relied upon by Appellant result... in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction?" Accordingly, with respect to interlocutory appeals, the Appeals Chamber determined that the term "jurisdiction" encompassed an objection based on the invalidity of the Tribunal's establishment, and concluded that it had the power to rule on all aspects of Tadic's motion.

The Appeals Chamber proceeded to consider the substantive merits of the appeal, beginning with Tadic's first argument attacking the validity of the establishment of the International Tribunal.

103. See id. The Government of the United States of America also submitted a brief as amicus curiae. See id.

104. See id.


106. See id. at 39. Pursuant to Article 15 of the Statute of the International Tribunal, supra note 44, the judges of the International Tribunal promulgated rules of procedure and evidence. See Rules of Procedure and Evidence, supra note 97. Rule 73(A)(i) empowers those accused of crimes to make preliminary motions based on lack of jurisdiction; Rule 72(B) provides that "[t]he Trial Chamber shall dispose of preliminary motions in limine and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." Id.

107. Prosecutor v. Tadic, 35 I.L.M. at 38. The Appeals Chamber noted the Prosecutor's concession at oral argument that "Rule 72... is a provision which achieves justice because but for it... one could have the unfortunate position of having months of trial... only to find out at the appeal stage that... there should not have been a trial at all because of some lack of jurisdiction..." Id. at 37. While finding this policy observation to be "by no means conclusive" with respect to whether a challenge to the legitimacy of the Tribunal's foundation was within the meaning of "jurisdiction" as used in Rule 72(B), the Appeals Chamber opined that "in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected." Id. at 38.

108. See id. at 38.

109. See id.
Reaffirming its broad interpretation of "jurisdiction," the Appeals Chamber examined the legitimacy of Tadic's motion in light of two different arguments advanced by the Prosecutor and approved by the Trial Chamber: (1) the Tribunal did not have the authority to review its establishment by the Security Council, and (2) the issues raised by Tadic were non-justiciable "political questions."

Recognizing that the Tribunal's "primary" or "substantive" jurisdiction did not include the express authority to examine its own creation, the Appeals Chamber nevertheless determined that it had "jurisdiction to determine its own jurisdiction" by virtue of its very existence as a judicial body. The Appeals Chamber found such incidental jurisdiction to be a "well-entrenched principle of general international law" that could only be limited by an express provision in its implementing instrument. The Appeals Chamber also rejected the contention that the validity of the Tribunal's establishment was a so-called "political" or "non-justiciable" question.

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110. Refuting the Trial Chamber's implication that jurisdiction was limited to questions of time, space, persons charged, and subject matter, the Appeals Chamber found that "jurisdiction is not merely an ambit or sphere . . . [but rather is] a legal power . . . to state the law . . . within this ambit, in an authoritative and final manner." *Id.* The Appeals Chamber concluded that:

If the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit . . . . This issue is a preliminary to and conditions all other aspects of jurisdiction.

*Id.* at 39.

111. *Id.*

112. *See* Prosecutor v. Tadic, 35 I.L.M. at 40. Article 1 of the International Tribunal's statute is entitled "Competence of the International Tribunal" and provides that "[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." *Statute of the International Tribunal, supra* note 45, art. 1.

113. Prosecutor v. Tadic, 35 I.L.M. at 41. The Appeals Chamber expounded that:

To envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council . . . remaining totally in its power and at its mercy [would be a mistake]. . . . The Security Council not only decided to establish a subsidiary organ . . . , it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

*Id.* at 39.

114. *Id.* at 40.

The principle of "Kompetenz-Kompetenz" in German or "la competence de la competence" in French . . . is a necessary component in the exercise of the judicial function . . . . In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court—as of any other judicial body—is to ascertain its own competence." *Id.* (quoting Advisory Opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. 77, 163 (Advisory Opinion of October 23) (Cordova, J., dissenting)).
Describing the "political questions" doctrine as having "receded from the horizon of contemporary international law," the Appeals Chamber concluded that as long as the case before it turned upon a "legal question capable of a legal answer," it was bound to exercise its jurisdiction regardless of the political implications.\textsuperscript{115}

The Appeals Chamber next addressed the substantive aspects of Tadic's argument that the Tribunal had been unlawfully established. Cautioning that the Security Council's authority was not absolute,\textsuperscript{116} the Appeals Chamber nevertheless observed that the Security Council had wide discretion under Article 39 of the Charter of the United Nations to maintain and restore international peace and security.\textsuperscript{117} Tadic argued that the establishment of an international tribunal was never contemplated by the framers of the Charter as a measure to be taken under Chapter VII.\textsuperscript{118} The Appeals Chamber rejected this argument, finding that the foundation of such a tribunal fell within the powers of the Security Council under Article 41.\textsuperscript{119}

\textsuperscript{115} Id. at 41.

\textsuperscript{116} "The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. . . . Neither the text nor the spirit of the Charter conceives of the Security Council as \textit{legibus solutus} (unbound by law)." Id. at 42.

In supporting this observation, the Appeals Chamber pointed to Article 24 of the U.N. Charter. Article 24(1) confers upon the Security Council the "primary responsibility for the maintenance of international peace and security"; Article 24(2) states that, "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." Id. at 42 (quoting U.N. CHARTER art. 24, paras. 1 & 2). Thus, the Appeals Chamber concluded, "[t]he Charter . . . speaks the language of specific powers, not of absolute fiat." Id.

\textsuperscript{117} Chapter VII of the U.N. Charter is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Article 39 begins Chapter VII and provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER, art. 39.

With respect to the range of measures envisaged under Chapter VII for the preservation or restoration of international peace and security, the Appeals Chamber concluded that "the language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through articles 41 and 42." Prosecutor v. Tadic, 35 I.L.M. at 43.

\textsuperscript{118} See Prosecutor v. Tadic, 35 I.L.M. at 44.

\textsuperscript{119} See \textit{id.} at 44-45. Article 41 provides that:

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

U.N. CHARTER, art. 41.
The Appeals Chamber determined that the establishment of the International Tribunal was a “measure not involving the use of armed force” and that the economic and political examples given were merely illustrative and did not exclude other measures.120

Tadic’s argument that the Security Council, being an executive organ, was inherently incapable of creating a judicial organ was similarly dismissed as stemming “from a fundamental misunderstanding of the constitutional set-up of the Charter.”121 According to the Appeals Chamber, the Security Council exercised both decision-making and executive powers in fulfilling its responsibility to maintain international peace and security.122 Accordingly, the establishment of a judicial organ was merely an instrument for the attainment of this objective and signified neither a “delegation” of Security Council authority nor a “usurpation” of judicial functions properly belonging to some other organ of the United Nations.123

Tadic also challenged the Tribunal’s establishment as being contrary to the fundamental canon of international jurisprudence that an individual charged with a crime be tried by a court that has been “established by law.”124 The defense argued that the words “established by law” meant established by a legislature.125 While finding this construction applicable in the context of national legal systems, the Appeals Chamber concluded that it was inapplicable to an international court constituted under the auspices of the United Nations.126 Rather, the Appeals Chamber found the more sensible

120. See Prosecutor v. Tadic, 35 I.L.M. at 44-45. The Appeals Chamber declined to accept Tadic’s contention that Article 41 measures were measures solely to be undertaken by Member States (which would exclude the establishment of an international tribunal), stating that “[i]logically, if the [United Nations] can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so.” Id. at 45.

121. Id.

122. See id.

123. See id.


125. See Prosecutor v. Tadic, 35 I.L.M. at 46. This “separation of powers” interpretation has been favored by the European Commission of Human Rights and is intended to ensure that the administration of criminal justice is regulated by laws emanating from the legislature, rather than orders issuing from the executive. See id.

126. “It is clear that the legislative, executive and judicial division of powers . . . does not apply to the international setting nor . . . to the setting of an international
interpretation of the phrase “established by law” in the international setting to be the requirement that a tribunal be established in accordance with the “rule of law,” meaning that it be constituted pursuant to “proper international standards . . . provid[ing] all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”

Tadic's second major argument on appeal challenged the purported primacy of the International Tribunal over national courts, asserting that any such primacy unduly infringed upon the sovereignty of states directly affected by the conflict. Diverging from the general principle of international law that individuals have no standing to plead violations of state sovereignty, the Appeals Chamber ruled that this principle had “suffered progressive erosion at the hands of more liberal forces at work in the democratic societies” such that “an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with . . . international law as a defence based on violation of State sovereignty.” Tadic argued that no state could assume jurisdiction to prosecute crimes committed on the territory of another state absent a “universal interest” recognized by international law. The Appeals Chamber

organization such as the United Nations.” Id. Foreseeing this line of reasoning, Tadic contended that “given the differences between the United Nations system and national division of powers, . . . the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter.” Id. at 47. The Appeals Chamber disagreed, finding instead that the Security Council was empowered under Article 41 to establish an international tribunal to restore and maintain international peace and security. See supra notes 116-20 and accompanying text.

127. Prosecutor v. Tadic, 35 I.L.M. at 47.
128. Article 9 of the International Tribunal's statute states:
  1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
  2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Statute of the International Tribunal, supra note 45, at art. 9.
130. See Israel v. Eichmann, 36 I.L.R. 5, 62 (Isr. D.C. 1961) aff’d 36 I.L.R. 277, 291-93 (Isr. S. Ct. 1962) (“The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.”).
132. See id. The Supreme Court of Israel explained in Eichmann that “universal crimes” are those acts which “violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations . . . [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing.” Israel v. Eichmann, 36 I.L.R. at 291-93.
found just such a universal interest, stating that the “offences . . . if proven, do not affect the interests of one State alone but shock the conscience of mankind.”

Thus, the Appeals Chamber affirmed the principle of the International Tribunal’s primacy over national courts.

Tadic’s third argument on appeal attacked the subject matter jurisdiction of the Tribunal, contending that the authority of the Tribunal was limited to crimes committed in the context of an international armed conflict. Tadic argued that there was no armed conflict in the region where the crimes were allegedly committed, or in the alternative, that the alleged crimes occurred during an internal armed conflict. The prosecutor responded that the Tribunal had jurisdiction to adjudicate the alleged crimes, whether the strife was characterized as internal or international.

Tadic’s contention that there did not exist a “legally cognizable armed conflict” rested on a notion of armed conflict that encompassed only the precise time and place of actual hostilities. The Appeals Chamber rejected this line of reasoning, ruling that the temporal and geographical scope of armed conflicts was broad and extended beyond the exact time and place of hostilities. The Appeals Chamber found it sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by various parties to the conflict.

With respect to the characterization of the armed conflict, the Appeals Chamber concluded that the hostilities in the former Yugoslavia...

The United States Supreme Court has noted that the crime of piracy is “an offence against the universal law of society, a pirate being deemed an enemy of the human race.” U.S. v. Smith, 18 U.S. 153, 161 (1820). Other acts traditionally considered to be universal crimes include enslavement and the trade of women and minors, see Prosecutor v. Tadic, 35 I.L.M. at 51, and since World War II, genocide. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

133. Prosecutor v. Tadic, 35 I.L.M. at 51. The Appeals Chamber averred that:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.

Id. at 52.

134. See id. at 53.

135. See id. The defense claimed that the conflict in the Prijedor region was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat. See id.

136. See id.

137. See id.

138. See id. at 54.

139. “[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Id.

140. See id. at 55.
via had both internal and international aspects, that the Security Council had both aspects in mind when it established the International Tribunal, and that the Security Council "intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context." On the basis of that conclusion, the Appeals Chamber proceeded to interpret the three articles of its Statute named in Tadic's indictment.

Regarding Article 2, the Appeals Chamber observed that the "grave breaches" provisions of the 1949 Geneva Conventions created "universal mandatory criminal jurisdiction" among the signatory states only with respect to certain specified acts committed in international armed conflicts. Accordingly, the Appeals Chamber

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141. *Id.* at 57. The Appeals Chamber found that the Security Council's ultimate purpose in establishing the International Tribunal was "bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia" without reference to whether the conflicts were internal or international, thus "detering future violations and contributing to the re-establishment of peace and security in the region." *Id.* at 55. According to this "teleological interpretation of the statute," *id.*, the Appeals Chamber determined that the Security Council had purposely refrained from classifying the armed conflicts in the former Yugoslavia to avoid binding the International Tribunal in its adjudications. See *id.* at 57.

142. Article 2 of the International Tribunal's statute provides:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Convention of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(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.


144. See Prosecutor v. Tadic, 35 I.L.M. at 58. In so holding, the Appeals Chamber noted that "[t]he international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents." *Id.* at 59.
ber concluded that Article 2 of the Statute applied only to offences committed within the context of international armed conflicts, finding such an interpretation "the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2."¹⁴⁵

With respect to Article 3,¹⁴⁶ the Appeals Chamber observed that it was based upon the 1907 Hague Convention (IV),¹⁴⁷ its annexed regulations, and the Nuremburg Tribunal's interpretation of those regulations.¹⁴⁸ While noting that the expression "violations of the laws or customs of war" was a legal term of art confined in the past to interstate armed conflict, the Appeals Chamber decided that the 1949 Geneva Conventions and "the influence of human rights doctrines on the law of armed conflict" had broadened the scope of the expression to include other infringements of international humanitarian law.¹⁴⁹ The court further held that Article 3 was a residual clause that conferred on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4, or 5.¹⁵⁰ Thus, the Appeals Chamber deter-

¹⁴⁵. Id. at 59. The United States had flatly stated in its amicus curiae brief that "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." Id. The Appeals Chamber, while finding this unsupported statement by "one of the permanent members of the Security Council" to be an important indication of the recent trend in state practice towards extending the grave breaches provisions to internal conflicts, nevertheless concluded that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts." Id. at 59-60.

¹⁴⁶. Article 3 of the International Tribunal's statute provides that:

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.

Statute of the International Tribunal, supra note 45, at art. 3.


¹⁴⁸. See Prosecutor v. Tadic, 35 LLM. at 60.

¹⁴⁹. See id. at 60.

¹⁵⁰. See id. at 61. The court opined that the residual nature of Article 3 took effect when there was a serious infringement of a rule of international humanitarian law that entailed, under customary or binding treaty law, individual criminal respon-
mined that the character of the conflict as international or internal was irrelevant to the applicability of Article 3.  

Article 5 of the Statute of the International Tribunal explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. Tadic argued that customary international law required a nexus between such “crimes against humanity” and an international armed conflict, and therefore, Article 5 “constitute[d] an ex post facto law violating the principle of nullum crimen sine lege.” The Appeals Chamber dismissed this argument, finding that it was a “settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.” Accordingly, the Appeals Chamber found that Article 5 could be “invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts.”

IV. LEGITIMIZING THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL AND INTERPRETING ITS GOVERNING STATUTE

The two different approaches taken by the Trial Chamber and the Appeals Chamber with respect to examining the validity of the Tribunal’s establishment by the Security Council illustrate the difficult jurisdictional issues that face international courts. The Trial Chamber held that Tadic’s argument attacking the lawfulness of the Tribunal’s creation was not truly a jurisdictional issue and was therefore

sibility. See id. at 62. The court then engaged in a long discussion concerning which customary rules of international humanitarian law were criminal in nature and applicable to internal armed conflicts. See id. at 62-71.

151. See id. at 71.

152. Article 5 of the International Tribunal’s statute states:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

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

Statute of the International Tribunal, supra note 45, at art. 5.

153. Prosecutor v. Tadic, 35 I.L.M. at 72. Nullum crimen sine lege translates to “unless there is a law, there can be no crime.” See supra note 83.


155. Id. The Appeals Chamber concluded by dismissing Tadic’s interlocutory appeal, thus sending the case back to the Trial Chamber. See id. at 73.
beyond its competence. The Appeals Chamber held otherwise, noting that such a narrow concept of jurisdiction was inconsistent with "a modern vision of the administration of justice."

Central to the Appeals Chamber's reasoning was the practical notion that if the legitimacy of the Tribunal's establishment could be raised on appeal after conviction on the merits, it made sense to deal with such an issue before trial. The practical benefits of this observation with respect to judicial economy are readily apparent. Nevertheless, one scholar has suggested that the Appeals Chamber could have just as easily held that the validity of the Tribunal's establishment was neither a jurisdictional issue nor a justiciable one, thereby forever closing this line of attack from the defendant. In terms of upholding the legitimacy of the International Tribunal, however, the approach of the Appeals Chamber is important because it emphasizes the right of the accused individual. Considering the massive deprivation of liberty that conviction by a criminal tribunal entails, it is "reassuring to know that it finds inherent to the

156. The Trial Chamber declared:

[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal.

Prosecutor v. Tadic (Int'l Crim. Trib. for the Former Yugo. Trial Chamber Aug. 10, 1995) <gopher://gopher.ig.apc.org:7030/00/cases/Tadic/950810-Tadic-decision>. This line of logic was approved in advance by at least one commentator. See O'Brien, supra note 43, at 643 ("The tribunal may—and probably should—decide that it lacks the power to consider the legitimacy of the Security Council's actions to establish it, because this would require that it construe the powers of the Security Council.").


158. See Aldrich, supra note 157, at 64. See also supra note 107.

159. In the United States, certain jurisdictional objections can be made at any time during criminal proceedings. See FED. R. CRIM. P. 12(b)(2) (The prosecution's failure to "show jurisdiction in the court . . . shall be noticed by the court at any time during the pendency of the proceedings."). See also FED. R. CRIM. P. 12(b)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

160. See Aldrich, supra note 157, at 64.

161. See id. at 64-65. One of the criticisms of the Nuremberg trials was that defendants were foreclosed from challenging the authority of the Military Tribunal. See Nuremberg Charter, supra note 74. By affording defendants the opportunity to challenge its authority, the Tribunal may avoid the perception of being a "victors' court" that has plagued the Nuremberg proceedings.
Concerning the validity of its establishment, the Appeals Chamber decided that the Security Council had the power under Article 41 of chapter VII of the Charter to establish a judicial body, and that the Tribunal was constituted with the appropriate procedural safeguards to provide a fair trial. From a literal perspective, the use of the word "may" in Article 41 of the Charter certainly gives the Security Council discretion to choose what measures "not involving the use of force" are to be employed in effectuating its decisions. Article 29 also gives the Security Council the authority to establish such subsidiary organs as it deems necessary for the performance of its functions. "Furthermore, international humanitarian law itself specifies that violations are to be redressed in accordance with due process." Coupled with the Security Council's broad and unique mandate as the global community's flagship institution in preserving and restoring international peace and security, it is not difficult to see why the Appeals Chamber held that the Council can prescribe a judicial measure when such a remedy is best suited to address the specific problem at hand.

It is true that the establishment of the International Tribunal was a step unprecedented by past Security Council or even United Nations action. This observation, rather than supporting the defendant's contention that the establishment of a tribunal was never envisioned by the framers of the Charter, is a testament to the

162. See Aldrich, supra note 157, at 65.
163. See supra notes 116-23 and accompanying text.
164. "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions ..." U.N. CHARTER, art. 41. See supra note 119 for the full text of Article 41.
165. The full text of Article 29 reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions." U.N. CHARTER art. 29.
167. Since the Security Council is explicitly given the power to authorize drastic measures such as the use of armed force or the suspension of commerce between states, one commentator has suggested that "it would be odd if it could not take the lesser, surgical step of ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law." O'Brien, supra note 43, at 643.
168. Prior war crimes trials, including those at Nuremburg, were not conducted under the authority of the United Nations Charter, but rather were conducted by ad hoc tribunals established by victorious states, or by national tribunals. See Sean D. Murphy, The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War, 32 COLUM. J. TRANSNAT'L L. 201, 242 (1994).
169. In evaluating this proposition, it is to be noted that the four key players in the framing of the Charter who subsequently became permanent members of the
political inertia that plagued the Security Council throughout the Cold War era. These “bipolar tensions” frustrated efforts by the Security Council to fulfill its mission, and “thereby preclud[ed] through practice the ‘fleshing out’ of means for implementing Chapter VII, as well as the evolution of these means based on relative success or failure.” 170 With the dissolution of the Soviet Union and the unleashing of democratic forces, a welcome renaissance has occurred in the range of actions taken by the Security Council, which will enable it to better realize its goals in maintaining international peace and security. 171

With respect to the International Tribunal’s subject matter jurisdiction, the Appeals Chamber’s categorization of the nature of the conflict in the former Yugoslavia as internal or international can be described as convoluted at best. Admittedly, the political disintegration of Yugoslavia and its splintering into a handful of sovereign nations does not lend itself to an easy application of norms and principles that rely upon a categorical conception of conflicts as either internal or international. 172 Moreover, the Security Council made several statements prior to the establishment of the International Tribunal that have contributed to the confusion surrounding the issue. On the one hand, the Security Council condemned the presence of troops from Serbia in the territory of Croatia and Bosnia-Herzegovina as a violation of their sovereignty, implying that the strife was not merely internal in nature. 173 On the other hand, the Security Council never explicitly stated that the conflicts in the former Yugoslavia were international.

Given this uncertainty, it is not surprising that the Appeals Chamber found that the Security Council purposely refrained from classifying the armed conflicts as internal or international so as not to bind the International Tribunal in its application and interpretation of the Statute. 174 The Appeals Chamber found support for this finding in the Security Council’s “preoccup[ation] with bringing to jus-

Security Council, that is, the United States, Great Britain, France, and the U.S.S.R., were the same nations that established and conducted the Nuremberg and Tokyo trials, which became a watershed in the evolution of individual criminal responsibility in international law and spawned a human rights revolution.

170. Murphy, supra note 168, at 207.
171. See id. at 286.
tice those responsible for... specifically condemned acts, regardless of context,"175 and a statement made by the Secretary-General that, in establishing the Tribunal, "no judgement as to the international or internal character of the conflict was being exercised."176

Several commentators have strongly argued that the Yugoslav conflicts should be characterized as international.177 Their arguments are not without merit; as pointed out earlier, what was once Yugoslavia began fragmenting in early 1991 into what is now five sovereign, internationally recognized nations.178 Throughout the early 1990s, war between various ethnic groups raged in the territories of Bosnia-Herzegovina and Croatia, with a number of fronts and partisan bands participating on behalf of each nation-state.179 It is not dispositive that some of the combatants are citizens of the same nation-state; the conflict as a whole is clearly international.180 Even under traditional principles of international law, the "unacknowledged, but clear, intervention in the Bosnian conflict by [the Federal Republic of Yugoslavia] on behalf of the Serbs, and against

175. Id. at 56.
176. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 48th Sess., 1162, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter Report of the Secretary-General]. The Appeals Chamber also supported this conclusion by a reduttio ad absurdum argument pronounced as follows: to construe the armed conflict between the Bosnian government and the Bosnian Serbs as an international armed conflict would create the absurd situation that crimes committed by Bosnian government forces against Bosnian Serb civilians would not be "grave breaches" because those civilians, as citizens of Bosnia-Herzegovina, would not be protected persons under the 1949 Geneva Conventions, whereas crimes committed by Bosnian Serbs against Bosnian civilians would be "grave breaches" because the Serbian forces would be considered agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). See Prosecutor v. Tadic, 35 I.L.M. at 57. The Appeals Chamber found that this would be an absurd outcome because it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the Bosnian Muslim government. Id. at 43.

One scholar has criticized this aspect of the Tadic decision, finding it to be "scarcely convincing." See Aldrich, supra note 157, at 66. Aldrich concluded that warfare on the scale that existed in Bosnia-Herzegovina with the involvement of various states should be considered an international armed conflict, intuitively opining that "[t]he artificiality of the appeals chamber's ad absurdum argument becomes clear when one considers that the chamber could have made the same point even were the Bosnian Serbs—still citizens of Bosnia-Herzegovina—fighting alongside divisions of the Belgrade army. Would anyone doubt that such a conflict was international?" Id. at 67.

177. See Aldrich, supra note 157, at 66-67; O'Brien, supra note 43, at 647; Meron, supra note 172, at 81 ("Because of the involvement of foreign actors, most internal conflicts are in fact mixed internal-international conflicts. . . . [Hence] despite their concurrent or successive character as internal, mixed or international, there are valid reasons to consider the entire [Yugoslav] conflict as international and therefore subject to the rules on international wars.").

178. See supra notes 3-12 and accompanying text.
179. See O'Brien, supra note 43, at 647.
180. See id. See also Aldrich, supra note 157, at 66-67.
the Government of Bosnia-Herzegovina, could transform the conflict from internal to international.\textsuperscript{181}

The Appeals Chamber refused to categorize the Yugoslav conflict as either wholly internal or international, concluding that both aspects were present and that "the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts."\textsuperscript{182} The effect of this ruling can best be illustrated by the Appeals Chamber's subsequent rulings on the specific articles named in Tadic's indictment.

The Appeals Chamber concluded that Article 2 of the Statute, referring to the "grave breaches" system of the 1949 Geneva Conventions, only applied to violations committed within the context of an international armed conflict.\textsuperscript{183} Despite indications that this ruling was inconsistent with recent trends in state practice signifying a change in international customary law, the Appeals Chamber seemed reluctant to adopt a progressive interpretation of the "grave breaches" system. Perhaps this reluctance stemmed from the statement in the Report of the Secretary-General that "the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."\textsuperscript{184} In any event, by refusing to categorize the conflict as either internal or international, the Appeals Chamber shifted the burden to the prosecutor to prove that an international armed conflict existed if Tadic is to be charged and convicted with violations of "grave breaches" under Article 2.

Having created problems for the work of the Tribunal by its decision on the characterization of the conflict and on the applicability of Article 2,\textsuperscript{185} the Appeals Chamber "found a savior in Article 3," concluding that it covered all violations of international humanitarian law other than "grave breaches" under the 1949 Geneva Conventions.\textsuperscript{186} Similarly, the Appeals Chamber upheld Article 5 as

\begin{footnotes}
\item 181. Meron, \textit{supra} note 172, at 81.
\item 183. \textit{See id.} at 60.
\item 184. \textit{Report of the Secretary-General, supra} note 176, ¶ 34.
\item 185. Referring favorably to the omission of "crimes against peace" from the Statute of the International Tribunal, one commentator noted "[t]heir inclusion would almost inevitably require the tribunal to investigate the causes of the conflict itself (and the justifications issued by the combatants), which would involve the tribunal squarely in the political issues surrounding the conflict." O'Brien, \textit{supra} note 43, at 645.
\item 186. Aldrich, \textit{supra} note 157, at 67. Interestingly, a commentator opined in 1993 that "[t]he elastic 'but not limited to' language of Article 3 ensures that all relevant, well-established international law falls within the tribunal's jurisdiction." O'Brien, \textit{supra} note 43, at 646. A skeptical mind wonders if this statement was a prophecy or a catalyst for the Appeals Chamber's subsequent ruling.
\end{footnotes}
properly applying to both international and internal armed conflicts and concluded by holding that the Tribunal had subject matter jurisdiction over the case against Tadic. The import of the Appeals Chamber's blanket holding regarding the Tribunal's subject matter jurisdiction is unclear, since Tadic was indicted for grave breaches under Article 2 and the Appeals Chamber opined earlier in its decision that Article 2 was only applicable to international armed conflicts. Was the Appeals Chamber implicitly determining that the conflicts involved in Tadic's indictment were "international"?

The prosecution apparently concluded not, judging by its efforts at the subsequent trial of Tadic to establish that the alleged offenses were committed within the context of an international armed conflict. Thus, the practical effect of the Tadic decision has been to complicate the future work of the International Tribunal by requiring the prosecution to research and argue the characterization of the armed conflicts in which "grave breaches" under Article 2 are alleged to have occurred. Indeed, shortly after the Appeals Chamber decided Tadic, one of the Tribunal's trial chambers involved in a different case found, on the basis of expert evidence, that the conflict in which alleged offenses occurred was international and that Article 2 was therefore applicable. In the subsequent trial of Tadic, the prosecution attempted to duplicate this strategy, putting military historians on the stand who testified that the war in Bosnia was an international armed conflict.

In any event, the establishment of the International Tribunal stands as an important development in the field of international humanitarian law. Support for its establishment has "come from almost every section of the globe." Perhaps "[t]he next logical step is the creation of [an international criminal] court to protect the human rights of all the world's populations." By establishing an

188. See Developments in the War Crimes Trial of Bosnian Serb Dusko Tadic from May 7-10, 1996, supra note 9.
189. See Aldrich, supra note 157, at 68.
191. See Developments in the War Crimes Trial of Bosnian Serb Dusko Tadic from May 7-10, 1996, supra note 9. The first such expert witness was James Gow, a war studies professor at the University of London and a co-producer of the British documentary "Death of Yugoslavia." See id.
193. Pickard, supra note 192, at 459. Indeed, the United Nations recently established a Preparatory Committee on the Establishment of International Criminal Court to study the possibility of creating such an organ. See United Nations, Press Release L/2819: Preparatory Committee on the Establishment of International Crimi-
international criminal court and relying on the rule of law rather than the use of force, the international community would be sending a strong signal to present and future generations that international peace and security can be furthered and maintained while at the same time upholding justice and preserving the dignity of the human person.194

V. Conclusion

The decision of the Appeals Chamber in Tadic is an important judicial affirmation of the authority of the Security Council to establish ad hoc judicial bodies in furtherance of its responsibility as the guardian of international peace and security. By examining the validity of its own creation, the Appeals Chamber has accorded proper respect for the rights of those accused of crimes and has furthered the legitimacy of the International Tribunal. The Tadic decision is also significant for its refusal to characterize the Bosnian strife as either internal or international, and its ruling that the "grave breaches" provisions in Article 2 are only applicable to international armed conflicts. While the Tadic decision may be controversial and spawn future scholarly debate, the legitimization of the International Tribunal undeniably stands as an important development of international humanitarian law that hopefully signifies an evolution from "the law of force" to "the force of law."*  

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* On November 28, 1996, after 78 days in the Trial Chamber, the trial of Dusko Tadic ended. See Court TV Library, The Bosnia War Crimes Tribunal (visited Mar. 22, 1997) <http://www.courttv.com/casefiles/warcrimes>. On May 7, 1997, Dusko Tadic was convicted by the Trial Chamber on eleven of the thirty-one counts of international humanitarian law violations with which he was charged. See U.N. Panel Convicts Bosnian Serb of War Crimes, N.Y. TIMES, May 7, 1997, at A1. A majority of the three-judge Trial Chamber found that the fighting in Bosnia during the spring and summer of 1992 was not an "international conflict," see id., and ruled that eleven charges involving grave breaches of the Geneva Convention were not applicable. See Court TV, The Bosnia War Crimes Tribunal (visited May 8, 1997) <http://www.courttv.com/casefiles/warcrimes>. Tadic was acquitted of nine other counts due to insufficient evidence. See id. Sentencing is scheduled for July 1, 1997. See id. Both the prosecution and the defense intend to appeal the verdict. See U.N. Panel Convicts Bosnian Serb of War Crimes, supra, at A1.