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WAR CRIMES IN THE 21ST CENTURY

Major Marsha V. Mills*

The meaning of the term "War Crimes,"\(^1\) as we know it, is changing radically due to the creation of, and the prosecutions by, the two recently established *ad hoc* International Criminal Tribunals; one to prosecute crimes committed in the former Yugoslavia and another to prosecute crimes committed in Rwanda. The Tribunals' actions today will impact on how future crimes will be charged.

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1. *See generally Dep't of Army, Field Manual 27-10, The Law of Land Warfare* (1956) with Change 1 at § 499 [hereinafter FM 27-10]. "The term 'war crime' is the technical expression for a violation of the law of war by any person, or persons, military or civilian. [Every violation of the law of war is a war crime.]"

As used here the term 'war crimes' refers more generically to the concept of crimes committed during armed conflict. The distinction is made between the grouping of all crimes in armed conflict as war crimes versus the more exact definition of war crimes as violations of the laws and customs of war. Violations of the laws and customs of war is only one of many types of crimes that can be committed in armed conflict and is now included as a serious violation of humanitarian law.
by the international community and which procedures will be used
to do so.

Additionally, international reaction to the work of these two
tribunals will have a critical impact on the establishment of a per-
manent, international criminal court.

For the first time in its history, the United Nations Security
Council (UNSC) has created judicial bodies in response to what it
characterized as threats to international peace and security. Using
its Chapter 7 remedies, the Security Council established the Inter-
national Criminal Tribunal for the Former Yugoslavia (ICT-FY) and
the International Criminal Tribunal for Rwanda (ICT-R) to
help bring peace to these areas. Chapter 7, “Action with Respect to
Threats to the Peace, Breaches of the Peace and Acts of Aggres-
sion,” of the United Nations Charter, suggests options available to
member nations that would aid in the peace process, such as inter-
ruption of economic relations and severance of diplomatic rela-
tions, demonstrations and blockades as measures to ensure
international peace and security.

NEW TRIBUNALS CONTRASTED WITH PREVIOUS ONES

International tribunals have been created in the past. How-
ever, they were created by treaty at the end of a conflict. The trea-
ties involved called for the winners to conduct the trials and
prosecute the losers. Also, treaties were signed by all parties to the
conflict and bound only those parties.

The two current tribunals were created by United Nations
Security Council Resolutions. The conflicts had not ended when
they were established. Possible defendants include all parties to the

(1993) [hereinafter S.C. Res. 827].
[hereinafter S.C. Res. 955].
5. See S.C. Res. 827, supra note 3.
Res. 955 the U.N. Security Council specifically stated: “determining that this situation
continues to constitute a threat to international peace and security, Determined to put an end
to such crimes and to take effective measures to bring to justice the persons who are
responsible for them, Convinced that in particular circumstances of Rwanda, the prosecution
of persons responsible for serious violations of international humanitarian law would enable
conflict and prosecutions will be carried out only by non-parties to the conflict. Because all parties are subject to prosecution and the judging will be done by their international counterparts, it was hoped the tribunals could escape the charge of applying “victor’s justice” as was raised during the Nuremberg trials. However, there have been charges of bias just the same. The Serbs claim they are being unfairly sought out in the Former Yugoslavia and the Hutus claim they alone are being prosecuted in the Rwanda tribunal.

The Appeals Chamber of the ICT-FY rendered its first decision in the case of Dusko Tadic. The decision was the result of an interlocutory appeal challenging the legitimacy of the Tribunal and the primacy of its jurisdiction over national courts. Tadic alleged the UNSC lacked the power to create a tribunal and that only treaties could create international judicial bodies. However, this ignores the fact that all states of the United Nations are parties to the actions of the Security Council, and Council action is the equivalent of a treaty binding on all 185 nations. Article 48 of the U.N. Charter requires all members of the United Nations to carry out the decisions of the Security Council. Unlike those established after W.W. II, these tribunals are criminal rather than military

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7. See War Crimes on Trial (Court TV television broadcast, Sept. 17, 1996).
10. See Agreement for the Prosecution and Punishment of The Major War Criminals of The European Axis, Annex Containing the Charter of the International Military Tribunal,
bodies. This results in a greater emphasis on due process than that inherent in W.W. II military tribunals, which used military due process provisions in existence at that time. Since W.W. II, the international community has adopted the International Covenant on Civil and Political Rights, as well as other international agreements providing substantial rights to accused individuals. These agreements certainly set a minimum standard for any international criminal court. The accused has a right to counsel, a right to cross examine witnesses, a right to remain silent, and the right to present evidence. This panoply of rights is not present in all military courts nor in all civil law countries.

Due to the fact that these are criminal, not military, tribunals, they are not chartered to prosecute war crimes, as such, but rather, to prosecute serious violations of humanitarian law. Humanitarian law includes war crimes but also includes criminal acts committed in time of conflict. The Secretary-General, applying the principle of *nullum crimen sine lege*, requires that the tribunals apply rules of international humanitarian law, which has undoubtedly become part of customary law so that the problem of adherence by some but not all states to specific conventions does not arise. The part of conventional international humanitarian law which has become, without doubt, part of international customary law is that embodied in: The Geneva Conventions of August 12, 1949 for the Protection of War Victims; The Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and the Charter of the International Tribunal of 8 August 1945.

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THE CONTRASTS BETWEEN THESE TRIBUNALS

The ICT-FY and the ICT-R have different mandates as well as different staff and support. The ICT-FY was created in 1993 by the UNSC to prosecute serious violations of humanitarian law committed in the Former Yugoslavia since January, 1991. Its charter provided for prosecution of Violations of the Laws and Customs of War, Crimes against Humanity, Genocide, and Grave Breaches of the Geneva Conventions of 1949. The ICT-FY sits in The Hague, Netherlands, in a modern building which has been remodeled to provide four floors of well-equipped offices. The courtroom is equipped with computers, monitors, CD Rom, stenographers, and interpretation equipment. The combined staff of the ICT-FY is about 170 in number. The U.S. originally contributed approximately 30 people who served as investigators and prosecutors. Approximately 10 remain there now; most are paid by the U.N. as opposed to the U.S. These people came from the Departments of Justice, State and Defense.

The ICT-R was created in 1994 by the United Nations Security Council (UNSC) and given authority to prosecute serious violations of humanitarian law committed in Rwanda or outside Rwanda by Rwandan citizens during 1994. The charter for this court, however, specifically recognized the internal nature of the conflict and so named very limited offenses that it could prosecute. The offenses within the ICT-R’s jurisdiction are Genocide, Crimes against Humanity and Geneva Conventions Common Article 3 and Protocol II, Article 4 violations. The latter is significant because it raises Common Article 3 violations for international consideration for the first time. Common Article 3 violations had previously been considered war crimes and acts that violate basic laws, but they had never been recognized as being punishable by the international community. These types of offenses had been left to national
The ICT-R sits in Arusha, Tanzania, in an unused International Convention Center. In sharp contrast to its Hague counterpart, the courtroom has no modern technology except headsets for simultaneous translation and microphones. There are about fifty people on the staff at the ICT-R. There are four trial attorneys, two of whom come from America. All U.S. team members speak

19. Common Article 3 is intended to provide protection to the victims of non-international war. Strictly speaking, it was not intended to have application outside of internal conflict. The history of the content of the article, however, provides insight into why many scholars and the International Court of Justice (ICJ) extend these types of protections beyond internal conflict. The language of Article 3 was originally intended to serve as a preface to the four Geneva Conventions of 1949. The preface was to serve as a purpose statement for the conventions, setting out the fundamental rights to which all human beings are always entitled. The drafters, however, could not agree upon the exact language or usage. Consequently, the preface was never finalized or used. Later, when discussion turned to protections for persons (not just civilians) within non-international conflict, the preface proponents caused the insertion of the preface's wording into the non-international conflict provision, which became Article 3. The current expansion of Common Article 3's scope of application is consistent with the historical purpose of its wording: to set out a baseline of minimum protections to which all individuals are always entitled, despite the type of conflict; See Oscar M. Uhler, Commentary IV, to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 32-34 (Jean S. Pictet, ed. 1958) [hereinafter Pictet IV]. The ICJ made a concise statement of this “expanded view” when it held that Article 3 provides the “minimum yardstick” of protections to which all human beings are entitled in all conflicts. The ICJ also stated that these protections are reflective of customary international law, as they are “elementary considerations of humanity.” Case concerning Military and Paramilitary Activites in and Against Nicaragua (Nicar v. U.S.), 1986 I.C.J. 14 (June 27), reprinted in 25 I.L.M. 1023, 1073.

Common Article 3 offenses, although not charged in the Dusan Tadic case, were discussed in the court's decision. That decision listed at least three elements that must be present in order to have a Common Article 3 violation. Those requirements are: 1. There must be armed conflict (international or internal); 2. The victim was a person taking a part in the hostilities; and 3. The person committed one of the listed acts in Common Article 3 (murder, cruel treatment, plunder, etc.). Opinion and Judgment, The Prosecutor of the Tribunal against Dusko Tadic, Case No. It-94-1-T, 7 May 1997.


20. Personal observations made by the author while visiting the ICT-R (Sept. 23-26, 1996).
French, an indispensable tool, as this was a former Belgian colony, but they have minimal international law experience.21

JUDGES AND JURISDICTION

There are six judges assigned to each tribunal, in addition to five judges who work for both tribunals as appellate judges.22 The Appellate Chamber is a new concept for an international criminal tribunal. It sits for both tribunals and will hear interlocutory appeals on jurisdiction and post trial issues raised by the prosecution or defense.23 None of the judges may come from the same country.24 The six judges on the trial level sit in panels of three to hear and decide cases. The US is represented by Judge Gabrielle Kirk-McDonald from Texas. She sits on the ICT-FY Tribunal and was the Presiding Judge of the panel hearing the Dusan Tadic case.25 African judges make up half the ICT-R trial bench.26

As is typical in civil law systems, jurisdiction is defined by the Charter given to the Tribunal by the UNSC. This includes the fact that the tribunals have concurrent jurisdiction with national courts.27 This is in keeping with the concept of universal jurisdiction which exists in customary law. Universal jurisdiction,28 or the concept of whoever finds a war criminal has the ability to try that person or to extradite him or her to any other state willing to do so,

22. See S.C. Res. 955, supra note 4, art. 12; S.C. Res. 827, supra note 3, art. 12.
24. Id.
26. See ICT-R Press Release, Official Opening and Extraordinary Session of the International Criminal Tribunal for Rwanda, ICT-R, June, 27, 1995. The Trial Judges of the Rwanda Tribunal are: Mr. Lennart Aspegren (Sweden), Mr. Laity Kamma (Senegal), Mr. Tafazzal Hussain Khan (Bangladesh), Ms. Navanethem Pillay (South Africa), Mr. William H. Sekule (Tanzania), and Mr. Yakov A. Ostrovosky (Russia).
27. See S.C. Res. 955, supra note 4, art. 8; S.C. Res. 827, supra note 3, art. 9.
was codified in the Geneva Conventions.\textsuperscript{29} The Security Council went even further and has given the tribunals primacy in matters of jurisdiction.\textsuperscript{30} This offends some states' concepts of sovereignty, but it is being applied nevertheless. In order to assert primacy, the tribunal requests a deferral in the national action. Requests for deferral have been made for the Lasva Valley cases and the Bosnian-Serb leadership cases in the Former Yugoslavia\textsuperscript{31} and in certain specific cases, such as the Tadic case.\textsuperscript{32} At the ICT-R, Theoneste Bagosora was wanted by Belgium, Rwanda and the ICT-R. Belgium deferred to the ICT-R; Rwanda did not.\textsuperscript{33} Jurisdiction over the person is also required. Trials \textit{in absentia} are not allowed.\textsuperscript{34} These tribunals, unlike those at Nuremberg, require that the accused be brought before the court for trial and imposition of sentence. This provision explains why Dusan Tadic and Jean-Paul Akayesu were the first to be tried in spite of their lack of status or notoriety. They were the first accused over which the tribunals gained custody. The charter provides for Rule 61 Hearings\textsuperscript{35} which some commentators have mistakenly referred to as trials. These hearings, however, are for the purpose of obtaining an international

\begin{itemize}
\item \textsuperscript{29} See S.C. Res 955, \textit{supra} note 4, art. 8; S.C. Res 827, \textit{supra} note 3, art. 9.
\item \textsuperscript{30} See \textit{generally} Application by the Prosecutor for a Formal Request For Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings Respecting Crimes Against the Population of the Lasva River Valley, Case No. IT-95-4-D, ICT-FY, April 21, 1995; Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, Case No. IT-95-5-D, ICT-FY, April 21, 1995.
\end{itemize}
arrest warrant. They are held without the presence of the accused or defense counsel because the accused has not been turned over in spite of requests to do so. The prosecution must show that the accused is the person responsible for offenses named in the indictment, that he is known to be located in a certain state, that a request has been made to the state to make the arrest pursuant to an indictment and warrant forwarded to that state, and that the state has refused or failed to comply with the request. At the conclusion of this testimony, the court may issue an international arrest warrant and forward it to all states for compliance.

International arrest warrants have been obtained in the case of Dragan Nikolvic, the first Serb indicted by the ICT-FY. He is known to be living in the mining town of Vlasenica. He claims to have total control over this town and has indicated to Washington Post journalists that the townspeople will not allow him to be arrested. He remains there today. The three Yugoslav Army officers accused of the attack on Vukovour Hospital are also subjects of international arrest warrants. They, too, are in the hands of Bosnian Serbs and have not been turned over to the Tribunal. In July, 1996, the two senior leaders of the Bosnian Serbs during the conflict, General Ratko Mladic and President Radovan Karadzic, were the subject of a week long Rule 61 proceeding and are now subjects of international arrest warrants.

**DUE PROCESS, RULES OF EVIDENCE, BURDEN OF PROOF AND SENTENCING**

The charter also directs the due process rights of the accused and the procedures to be followed by the tribunals. The charter includes those rights guaranteed by the International Covenant on Civil and Political Rights which requires a fair and public trial, that

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the accused be informed of the nature and causes of the charges, that adequate time be given for preparation of a defense, that trial be without undue delay, that the accused be entitled to counsel, have the right to cross-examine witnesses and have the right against self incrimination. The charter also articulates a presumption of innocence. The burden of proof, which the prosecution must meet, is beyond a reasonable doubt. This high standard of proof is blended with the civil law concept that only a majority of the three-judge panel is required to find the accused guilty.

Hearsay is admissible so long as it can be shown to be reliable and trustworthy. The judges determine if the evidence is reliable and trustworthy, and they cannot make that determination until they hear the testimony and supporting foundation evidence. The judges have said, "Trust us, we are respected jurists, trained in the law, we will determine what is to be given weight and what is to be discarded." According to ICT-R judges, hearsay is commonplace in civil law countries, so trial practice will not be as contentious at the ICT-R as at the ICT-FY. Tadic's attorney filed a blanket motion to exclude all hearsay evidence, near the completion of the prosecution's case, relating to the identification of his client. The court denied the motion. Finally, the statutes of each tribunal give the court power to impose a maximum sentence of life imprisonment. The UNSC was unable to get agreement on the imposition of the death sentence because many countries consider the death penalty inhumane. Others said such a penalty would impose a greater sanction than could be dispensed under domestic law; still others objected to the lack of a death penalty. Rwanda voted against the creation of the ICT-R for this reason, as well as others.

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40. See S.C. Res. 955, supra note 4, art. 20; S.C. Res. 827, supra note 3, art. 21.
41. See ICT-FY Rules, supra note 31, at Rule 87; ICT-R Rules, supra note 31, rule 89.
42. See S.C. Res. 955, supra note 4, art. 22; S.C. Res. 827, supra note 3, art. 23.
43. See ICT-FY Rules, supra note 31, at Rule 89; ICT-R Rules, supra note 31, at Rule 89.
47. See S.C. Res. 955, supra note 4, art. 23; S.C. Res. 827, supra note 3, art. 24.
48. See S.C. Res. 955, supra note 4. UN Security Council Resolution 955 (1994) was adopted by the Security Council November 8, 1994, by a vote of 13 in favor, to 1 against (Rwanda), with 1 abstention (China).
in spite of the fact that they initially lobbied for the court's creation. Rwanda has the death penalty and argued that the Tribunal should provide nothing less. Because the Tribunal is incapable of imposing the death penalty or prosecuting all responsible persons, Rwanda is pursuing its own prosecutions.49

**Cooperation**

Both Tribunals require all states to cooperate,50 which has met with mixed success. The Serbs denied that the ICT-FY has jurisdiction.51 After going through the international arrest warrant procedures and making a record of non-compliance of certain countries, the President Judge of the ICT-FY notified the UNSC of the failures to cooperate.52 Notification by the ICT-FY to the UNSC has occurred three times, to date.53 Only once did the UNSC respond, and that was only to remind all nations of their obligation to cooperate.54 What else can they do? The Tribunals themselves have no enforcement power. They can do no more than notify the UNSC, as provided in their enabling statutes. The UNSC has the option of rendering sanctions or other operations by air, sea or land forces to maintain or restore international peace and security.55 There are additional problems to the insufficient remedies problem, which include the lack of an international will, coupled with reluctance to infringe on state sovereignty. But in the end, neither the tribunals nor the UNSC have effective means of dealing with the issue of non-cooperation.

50. See S.C. Res. 955, supra note 4, art. 28; S.C. Res. 827, supra note 3, art. 29.
51. See War Crimes on Trial, supra note 7.
52. See Letter of President Cassesse to the Security Council bringing to its attention “the refusal of Republic Srpska and Federal republic of Yugoslavia to co-operate with the Tribunal, so that the Council can decide upon the appropriate response.” ICT-R, July 11, 1996 (U.N. Doc. S/1996).
53. See Statement by Judge Antonio Cassese, President, ICT-FY, Florence Mid-Term Conference on the implementation of the Dayton Accord (June 13-14, 1996).
55. See UN CHARTER, supra note 2.
Victim-Witness Protection

A victim-witness protection provision was included in each statute, for the first time ever. While worthy in concept, there are no enforcement powers that allow the tribunals to provide this protection. The victim-witness unit at the ICT-FY consists of two people, and there is no unit for the ICT-R. Initially, Non-governmental Organizations (NGO's) provided some assistance to witnesses, but even their support is limited. To date, the types of victim-witness protection that have been provided include court orders not to reveal the names of witnesses to the public or press; allowing witnesses to testify behind screens; at in camera proceedings, without divulging their names in the trial record; and, in some cases, not providing the witnesses names to defense counsel. In both tribunals names of witnesses have been withheld from defense counsel until just months prior to trial. The first trial set for Rwanda was continued for one month because defense counsel complained he could not adequately prepare a defense without knowing the prosecution witnesses' names. Some witnesses told the court they had been promised new names, homes and identification papers, but no actions in this regard were forthcoming, so they have refused to testify. Witnesses are easier to get for the Former Yugoslavia, since many of them are already refugees. In Rwanda, many witnesses have never been out of their village and have no intentions of leaving. Without some kind of enforcement procedures and powers, the victim-witness unit does not seem to be

56. See S.C. Res. 955, supra note 4, art. 21; S.C. Res. 827, supra note 3, art. 22.
57. Interview with Judge Gabrielle Kirk-McDonald, ICT-FY, in the Hague, Netherlands (May 9, 1996).
62. See Interview, supra note 21.
able to do more than offer verbal support and hand-holding for the witnesses.

INTERNATIONAL TRIBUNALS IN HISTORY

The idea of an international court was first put forth in a real effort after W.W. I. The Treaty of Versailles provided that the Allies would try the Germans for their war crimes. The Germans, when requested to turn over 896 accused for trial, refused. Their refusal was based on the premise that if they were to acquiesce, the fragile peace that had been brokered, would fall apart.63 This same argument was raised by the Serbs during the Dayton peace talks.64 After W.W.I, the Allies eventually agreed to let the Germans try their own. The offenses involved in these trials included torture of prisoners, firing on a medical ship, and attacks on children. The Germans tried only twelve. Six were acquitted and six were found guilty. The maximum sentence imposed was 4 years. This lead to the Moscow Declaration of 1943,65 in which the allies agreed that never again would the defeated be allowed to prosecute their own.

After W.W. II there were several tribunals created to prosecute the losers, the Nuremberg Tribunal, the Subsequent Proceedings at Nuremberg, and the Tribunal for the Far East.66 These tribunals prosecuted crimes against peace, war crimes, and crimes against humanity. Crimes against peace were defined as those acts in which senior political and senior military leaders planned, prepared and initiated war or aggression.67 War crimes were the offenses known at that time to exist as customary law, including treaty law.68 Customary law encompassed those offenses all nations recognized as wrong even in time of war. At the time of the Nuremberg tribunals, 32 said offenses could be articulated. These included acts such as misuse of the Red Cross, maltreatment of dead bodies, mistreatment of POWs, murder, torture, and cruel

68. Id.
Finally, the tribunals had authority to prosecute crimes against humanity. Crimes against humanity could be committed in international or internal armed conflict. In Nuremberg, the crimes were committed against the civilian population and were done in a widespread, systematic manner, motivated by antipathy against national, racial, ethnic or religious affiliation.70

**Developments Since W.W. II**

Since Nuremberg, additional war related offenses have been identified. The Geneva Conventions were ratified in 1949 and included grave breaches of the laws of war as a category of war crimes. Grave breaches are those offenses which are specified in all four Geneva Conventions.71 The eight named breaches72 require an allegation of at least one of the eight grave offenses, that the offense was committed in an international armed conflict, that it was committed against a protected person, was committed by a party to the conflict, and the perpetrator was a member of a state which is a signatory to the conventions.73

The articulation of genocide as a war crime has also developed since W.W. II. The Genocide Convention74 was circulated in 1948

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69. See L. Oppenheim, International Law, Vol. II, Dispute, War and Neutrality 520 (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim]. Customary Law has been described as the fundamental rules of international law that possess “unchallenged applicability.” See generally FM 27-10, supra note 1, ¶ 4. (This is that body of well defined and universally recognized international law, that may not be incorporated into any treaty or convention.)

70. See Karl Arthur Hochkammer, Yugoslav War Crimes Tribunal, 28 Vand. J. Transnat'l L. 119, 134 (1995); see also, London Agreement, supra note 10, “ Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of domestic law of the country where perpetrated.”

71. See Tribunals, supra note 10.

72. See GC, supra note 29, art. 147. Grave Breaches are willful killing, torture or inhumane treatment, biological experiments, willfully causing great suffering or serious injury to body or health, taking of hostages, extensive destruction of property not justified by military necessity, compelling a prisoner of war to serve in the armed forces of his enemy and willfully depriving a prisoner of war of his rights to a fair and regular trial.


and the U.S. ratified it, with reservations, in 1988. Genocide is defined as acts committed with the intent to destroy a national, ethnic, racial or religious group. Genocide can be committed in international or internal conflict. The definition of genocide contained in the Genocide Convention, requires a showing of intent to destroy an entire population. This poses a difficulty for the current tribunals because many who engaged in the killings can also show acts of saving or protecting a member of the group as well. Many claim that while they initially participated in the carnage, they had a change of heart, stopped participating, and some even left the area or country to get away from the killing.  

Prior to the Tadic trial at the ICT-FY and the Akayesu Trial in the ICT-R, neither grave breaches nor genocide had been prosecuted by an international tribunal. The cases before the Former Yugoslavia and Rwanda Tribunals will be cases of first impression for the international community. The Security Council gave neither tribunal the jurisdiction to prosecute crimes against peace. The reasoning was that prosecuting crimes against peace, which involves prosecuting high-level officials on policy issues, would occupy a disproportionate amount of the prosecutor’s time. The areas involved in both these conflicts, the Former Yugoslavia and Rwanda, have been in turmoil for years. Determining who was responsible for the most recent outbreak of violence would be a waste of time. Rather, it was decided that punishing those actually responsible for committing individual atrocities would be more productive. Punishing those responsible for carrying out atrocities is important for peace because it places the blame on individuals rather than on an entire country or on all people in that country. It avoids the notion of collective guilt.  

The doctrine of Command Responsibility has existed for centuries. This principle holds a commander personally responsible for the acts of subordinates if he gave the order to commit crimes, knew his subordinates were committing crimes or were about to commit crimes, or should have known they were committing crimes.

77. See Peter Karsten, Law, Soldiers, and Combat, xiii (1978).
or about to do so and failed to take action to prevent or stop the commission of these acts. The first international prosecution under this principle occurred at the end of W.W. II as a result of atrocities committed by Japanese soldiers as U.S. forces recaptured the Philippine Islands. In 1977, the 1949 Geneva Conventions of August 12, 1949 were amended and for the first time addressed criminal responsibility.

The provisions regarding command responsibility in the current Tribunals' charters (adopting the Additional Protocol II, articles 86 & 87) hold a 'superior' responsible even if the relationship is not a military one. This expansion of command responsibility to a theory of superior responsibility is a substantial change from customary law and from the language in the Geneva Conventions. In spite of the fact that several countries have not signed on to the Additional Protocols, which are said to codify customary law, their provisions have been incorporated as customary international law for the current tribunals.

The ICT-R has charged commune and prefecture civilian leaders as superiors responsible for the acts of their constituents. These leaders have responsibility for the police forces and all that happens within their communes or prefecture. The indictment of Clement Kayishema, Prefect of Kiuye, provides an example of this type of charge. Allegedly, Kayishema ordered people to seek refuge in the Home St. Jean Complex knowing, or having reason to know, that an attack on the complex was about to occur. In fact, the complex was attacked, on Kayishema's orders, which resulted in thousands of deaths and numerous injuries.

78. See FM 27-10, supra note 1, para. 501. "Responsibility for Acts of Subordinates. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The Commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."


81. See S.C. Res. 955, supra note 4, art. 6; S.C. Res 827, supra note 3, art. 7.

82. In the Prefecture, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. The Prefect has control over the government and its
Charges against Andre Ntagerura, Minister of Transport and Communications of the Republic of Rwanda, also allege superior responsibility against a national civilian leader. He allegedly allowed the use of government vehicles to distribute arms and carry military troops throughout the Cyangugu commune.  

ICT-FY INDICTMENTS

The ICT-FY can prosecute violations of the laws or customs of war, crimes against humanity, genocide, and grave breaches of the law of war. Violations of the laws or customs of war for the current tribunals are the equivalent of what was termed war crimes in the Nuremberg Charter. These are those offenses all recognized as illegal even in time of war. In the first indictment issued in November, 1995, Dragan Nikolovic, Commandant of the Susica detention camp, was charged with violation of the laws of war; namely murder, torture and cruel treatment for the deaths, torture, and rapes that occurred at the camp. The first Croatian charged by the Tri-
bunal, Ivica Rajic a/k/a Victor Andric, is charged with firing on a civilian population and willfully destroying villages without military necessity. These charges stem from the shelling of the village of Stupni Do, which had a population of approximately 250. This village openly recognized Bosnia-Herzegovina as its source of leadership. One morning the Croatian Defense Council Group Commander opened fire on the village. The village of Stupni Do was completely destroyed and sixteen villagers were killed.

Dusko Tadic, the first Serb to be tried by the ICT-FY, is charged with violations of the laws of war for the deaths, tortures, and rapes that occurred at Omarska, Trnopolje and Keraterm POW/detention camps. The specific violations are murder, torture, and cruel treatment. Rape was not a violation of the law of war under customary law. Rape or sexual assault could be charged under customary law as cruel treatment or serious bodily injury, but rape, itself, was not a listed offense at customary law. This is true, also, for grave breaches. Rape as a tool of war was not widely recognized until the Gulf War. Since that time there has been a serious movement to have rape specifically included as a war crime.

To date, the most senior Bosnian Serb leaders charged with violations of the law of war include General Ratko Mladic, the military commander of Bosnian Serb forces and President of the Bosnian Serbs, Radovan Karadzic. In their first indictment they are charged with command responsibility for violations of the laws or customs of war for the attack on Sarajevo, attacks on personal and real property, attacks on religious sites and attacks on UN peacekeepers. At the time of the attack on Sarajevo, it was alleged that the city contained only elderly men, women and children, thus the charges of violating the customs of war include prohibited firing on civilian populations and willful destruction of villages without military necessity. In addition, these two are alleged to be responsible for the pillage of personal and real property from the inhabitants of Sarajevo and surrounding villages. People were stopped on the street and had their personal property removed. People going

88. See Indictment, The Prosecutor of the Tribunal against Radovan Karadzic, Ratko Mladic, (July 25, 1995) (No. IT-95-5-I, ICT-FY) [hereinafter the Karadic Indictment].
to detention camps had all personal property removed from them and often were asked to sign “voluntary” statements turning their real property over to the Serbs. Others were guaranteed their own or their family members release from camps if they would sign these voluntary statements. Often the Serbs filmed these soon to be refugees or detainees loading their own goods onto Serb vehicles to substantiate claims that the giving up of the items was “voluntary.” The two leaders are charged with shelling 27 religious sites as well. Firing on institutions dedicated to religion has long been recognized as a violation of the law of war. Finally, in the same indictment the leaders are charged with taking UN peacekeepers hostage. These peacekeepers were also used as human shields against the UN air attacks. Using civilians as human shields was not a violation of the law of war under customary law so those acts are charged as cruel treatment, a violation of article 147 of the Geneva Convention for the Protection of Civilians.89

The ICT-FY also has the ability by charter to prosecute crimes against humanity.90 Examples of these charges include the same facts alleged against the detention camp commanders and against Dusko Tadic: the deaths, torture, and rapes at the camps. For these same acts, they are charged with murder, torture, and inhumane acts, which are crimes against humanity.91

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89. See London Agreement, supra note 10.
90. See S.C. Res. 827, supra note 3, art. 5. Opinion and Judgment, The Prosecutor of the Tribunal against Dusko Tadic, (May 7, 1997)(No. IT-94-1-T). The court sets forth the requirements necessary to establish a crime against humanity pursuant to the Charter of the ICT-FY as follows: 1. Is one of the enlisted serious inhumane acts (murder, rape, enslavement, deportation, persecution for political, racial, national, religious or ethnic persecutions, etc.); 2. The act is committed in the context of or related to armed conflict (not limited to “while in conflict”); 3. at the time of the offense by the accused, there was an ongoing widespread (large scale) or systematic (manner) attack directed against the civilian population to include all non-combatants)(some kind of discrimination needs to be present); 4. the accused knew or had reason to know he/she was participating in an attack on the widespread or systematic population (knowledge of the wider context of the acts); 5. There is individual criminal responsibility. Discrimination was not historically required for crimes against humanity, but the court said it looked at the discussions of the Security Council and the report of the Secretary General, and there was clearly an intent to include discrimination as an element. The discrimination need not be stated policy but can be a “de facto” group. There must, however, be a plan, and once that plan is in effect then a single act if linked to the plan can be a crime against humanity. The ICT-R Charter does not require that a crime against humanity be committed in armed conflict, as does the ICT-FY Charter.
91. See Tadic Indictment, supra note 87.
ity, however, require a showing of a pattern of attacks on people as a result of their political, ethnic, or religious affiliation.

A story told by Cherif Bassiouni, Expert on Mission for the UN to investigate crimes in the Former Yugoslavia, illustrates crimes against humanity: A Serb soccer player, a hero to his country, married a Muslim woman. They had two teen-age daughters. Five Serb soldiers sought him out in his home and broke both his legs using their rifle butts because he had married a Muslim. All five soldiers raped the wife in the presence of her husband and daughters, and then slit her throat. Then they proceeded to rape the daughters and slit their throats as well. These atrocities occurred against this “regular” family because of the parents’ mixed ethnic marriage. Crimes like these happened to Muslims throughout Bosnia. As crimes against humanity, these acts are chargeable as persecution, rape, and sexual assault. The Tribunal’s statute defines rape as a crime against humanity. This is the first time rape has been specifically recognized as any kind of war crime offense.

The second indictment against the two Bosnian Serb leaders, Mladic and Karadzic, accuses them of crimes against humanity for the events which have come to be known as the “March of Life and Death.” This includes the highly reported incident in which Muslims, most of them said to be civilians but accompanied by combatants as well, were forced to leave Potcari, a designated UN safe area. They lined themselves up in column formation, those with weapons interspersed with unarmed civilians, to march towards Tuzla, a Muslim held city.

Before going very far, they were ambushed by Serbs using armored personnel carriers, tanks, artillery and anti-aircraft weapons. Many surrendered only to be killed by their captors, in spite of their clear non-combatant status. Estimates claim that as many as 7000 people died in the ambush. Their bodies are in many of the mass grave sites located throughout the Nova Kasaba and Kravica

93. See S.C. Res. 827, supra note 3, art.5.
area.  

Tribunal investigators, digging up bodies in these areas have found bodies with hands tied behind their backs and holes in the back of their heads. Some Muslims survived this attack only to be shelled later in the area of Cerska. Mass graves are located there as well. Muslims who stayed behind in the UN safe area were removed under the supervision of General Mladic. The men were separated from the women and children and placed on buses. UN peacekeepers were told they were being taken to other areas for safekeeping. In fact, the men were taken to a school in Bratunac where they were killed, and buried in mass graves. These graves were the sites noted by US surveillance cameras. Those who survived the carnage at Braunac were taken to Karakaj, where they were beaten, killed, and buried. A Serb soldier who participated in these killings said he took his orders from General Mladic himself. The soldier, Drazen Erdemovic, has been indicted and is the first indictee to plead guilty at the Tribunal. He has testified that he participated because he was told that if he did not join in the killing, he could join those being killed. It is interesting to note in this context that the defense of superior orders is specifically prohibited in both tribunals. This defense, however, can be raised at the time of sentencing as a factor favoring sentence mitigation.

One more example of crimes against humanity charged by the ICT-FY are the charges against the three Yugoslav Army officers alleged to be responsible for the attack on the Vukovur Hospital. These officers allegedly entered the hospital, removed all non-Serb

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100. See War Crimes on Trial (Court TV, July 4, 1996).
101. See Dobbs and Spoiler, supra note 95.
105. See S.C. Res. 955, supra note 4, art. 6; S.C. Res. 827, supra note 3, art. 7.
personnel, including patients, medical staff, guards protecting the hospital, and a few political activists hiding there, and transported them to Eastern Slovenia, Croatia, where they killed them and buried them in a mass grave. This site was located by investigators in October, 1996, and it was confirmed that it contained bodies from Vukovur Hospital.

Genocide is another of the four main offenses that can be charged by the ICT-FY. Initially, commentators believed that genocide would be charged in most of the indictments. This has not been the case. The burden of proof required to show an intent to destroy an entire group has limited the number of genocide charges. Genocide is charged mainly in the indictments against senior leaders and in the hideous offenses. Genocide has been charged in both indictments issued against Mladic and Karadzic.

It is charged in their first indictment under the theory of command responsibility for the atrocities committed at seven detention camps throughout Bosnia. In the second indictment, both leaders are charged with command responsibility and personal responsibility for the acts of genocide committed against those who remained in the UN safe area and were transported to Bratunac and Karakaj, as well as for the deaths of those in the “March of Life and Death.”

Grave Breaches constitute the fourth major type of offense chargeable at the ICT-FY. Eight offenses are named in the Geneva Conventions as serious violations and duplicate what are also violations of the laws and customs of war. However, the ele-

108. See S.C. Res. 827, supra note 3, art. 4.
109. See Karadzic Indictment, supra note 88.
111. See S.C. Res. 827, supra note 3, art. 2. Elements required to establish a grave breach were included in the Opinion and Judgment, The Prosecutor for The Tribunal against Dusko Tadic, (May 7, 1997) (No. IT-94-1-T). Those facts said to be required to establish a grave breach include: 1. One of the eight listed acts must have been alleged; 2. There is an international armed conflict or an occupation; and 3. The act was committed against a protected person or property. Disagreement on the court exists as to whether or not victims can be nationals of the party committing the acts or the occupying power, therefore, giving them status as “protected persons.” Judge Gabrielle Kirk-McDonald filed a dissenting opinion on this issue. Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, The Prosecutor of the Tribunal against Dusko Tadic, (May 7, 1997) (No. IT-94-1-T).
ments of the offenses differ. Grave Breaches require an international armed conflict, but also require that the offense be named in the Conventions, be committed by a party to the Conventions and be committed against a "protected person." Protected persons are those that are out of combat but find themselves on the battlefield and who the Conventions name as requiring specific protections. Grave Breaches have been charged in a majority of the indictments to date. Conduct charged as Grave Breaches includes willful killing, torture, extensive destruction and appropriation of property, not justified by military necessity, and taking of hostages.113

ICT-R INDICTMENTS

As a result of the characterization of the conflict in Rwanda as internal in nature as opposed to international, the charter for the ICT-R provides for different offenses.114 Grave Breaches and violations of the laws and customs of war require an international armed conflict. Rwanda’s conflict was an internal armed conflict of an ethnic and political nature. It resulted in the death of several thousand Tutsi’s and supporters of the Hutu liberal policies.115 The ICT-R expands what has customarily been viewed as matters to be prosecuted in an international forum. The ICT-R has jurisdiction to prosecute genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II.116

Genocide is the most common charge at the ICT-R to date, with all 21 indictments including a form of the genocide charge.117 Theoneste Bagosora, one of the most senior persons indicted, took

112. See Pre-Trial Brief, supra note 73. 1 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, 7 (1986). Protected persons are those protected by the provisions of the fourth Geneva Convention, relating to the protection of civilians. These individuals are those who, at any given moment and in any manner whatsoever, find, themselves, in the hands of a party to the conflict or Occupying Power of which they are not a national.
114. See S.C. Res. 955, supra note 4.
116. See S.C. Res. 955, supra note 4, art. 2-4.
on official and *de facto* control of the military and political affairs in Rwanda upon the death of President Habyarimana. Allegedly, he took no actions to protect the Belgian peacekeepers although he knew their safety had been threatened. He is alleged to have known Tutsis were being killed at roadblocks and of the selective assassination of community leaders and of leaders of the political opposition, yet did nothing to stop the violence. He knew that the terms of the Arusha Accords for power sharing were being thwarted and yet took no steps to facilitate their implementation. Bagosora is charged with genocide for the killing and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy the ethnic or racial group. He is charged for acts of genocide both as a superior responsible for knowing and not acting to stop the behavior of subordinates and as an individual for acts he personally committed.

Crimes against humanity charged in the ICT-R indictments are primarily based on allegations of persecution, extermination, and murder. These charges appear in all indictments, as well. Examples of acts charged as crimes against humanity include those of Jean-Paul Akayesu, a burgermeistre (mayor) of the commune of Taba, who allegedly conducted house to house searches, interrogating and beating individuals to obtain information on three specific influential people. While conducting the searches he and others burned the homes of family members of those being sought and killed three brothers of one of them. Also five teachers were killed by locals following Akayesu’s exhortation to kill all intellectual and influential people.

The charges of Common Article 3 violations by the ICT-R are truly precedent setting. What they are proposing is that humanitarian law as applied to internal armed conflict is now subject to international jurisdiction. This imposes a standard on sovereigns that requires enforcement by the sovereign or by the international community. From a review of the indictments, it appears that this offense is charged when the individual indicted had personally ordered specific deaths or personally committed the act. For exam-

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ple, Georges Anderson Nderubumwe Rutaganda, a businessman, allegedly took survivors of an attack on the ETO school to a gravel pit near a primary school and released them only if they could produce evidence that they were Hutu. If they could not, they were killed by grenades or shot to death. Those who tried to escape were killed by machete. In addition, Rutaganda allegedly ordered that Tutsis be taken to a river and thrown in. He also allegedly killed several individuals himself. For these acts he is charged with violations of Common Article 3(4) (a) which prohibits acts causing "violence to life, health, physical, or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment."

OBLIGATION TO SEARCH FOR, PROSECUTE, OR EXTRADITE WAR CRIMINALS

Universal jurisdiction is the name for a state's obligation to search for, prosecute, or extradite war criminals. It gives any country coming in contact with an alleged war criminal the right to exercise jurisdiction over him. This obligation existed in customary law. The obligation to punish grave breaches, and to search for, prosecute, or extradite persons alleged to have committed grave breaches is included in humanitarian law, as defined by the Tribunals. The right to exercise jurisdiction by one party to the Geneva Conventions in lieu of another has been explained as one country standing in the stead of all others. UN resolutions calling for all states to cooperate with the ICT-FY initially cited that Geneva Convention provision. Later the call for all states to comply with their obligations to cooperate with the Tribunal and in particular their obligation to execute arrest warrants transmitted to them by the Tribunal was cited in UNSC Resolution 1022 (November 22, 1995), which states that requests and orders of the Tribunal constitute an essential aspect of implementing the Peace Agreements. This provision was also cited by then Chief Prosecutor,

121. See RESTATEMENT, supra note 28.
122. See S.C. Res. 955, supra note 4; S.C. Res. 827, supra note 3.
124. See Justice Goldstone, Commencement Address to U.S. Military Graduates in Mannheim, Germany (May 26, 1996). In the speech Justice Goldstone stated that the parties
Justice Goldstone, when he insisted that IFOR troops arrest and transfer to the Tribunal those individuals who were subjects of ICT-FY arrest warrants.125

The Dayton Accord126 signed in December, 1995 required all parties to the agreement to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.127 IFOR is required to perform its security tasks and, when requested, to provide assistance to the UNHCR and other international organizations in fulfilling their humanitarian missions.128 Goldstone argued that this would include searching for and extraditing individuals subject to an ICT-FY arrest warrant. Many countries, however, including the U.S., interpret the obligation to search for and extradite, as stated in the Conventions, to apply only if the individual searched for is within the state’s own territory.129 Sovereignty issues cloud this principle on all sides.

The obligation to turn alleged war criminals over to the Tribunal was further clarified in February, 1996, when eight Bosnian Serbs were arrested by the Muslim-led Bosnian government.130 Allegedly, they killed civilians in the Sarajevo area, but none of the arrested were among the 52 suspects indicted, to that point, by the ICT-FY. Eventually, the Tribunal requested that General Djukic and Colonel Krsmanovic be detained and transferred to the court to the Dayton Peace Accord accepted an international law obligation to execute warrants of arrest.

125. See S.C. Res. 827, supra, note 3, “establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all states to take whatever steps are required to implement the decision. In practical terms, this means...to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and service of documents.”


for further investigation. Ultimately, General Djukic was indicted for the intensive attack on civilians in Sarajevo. The colonel was sent back to the Bosnian government. A short time later, General Djukic was released on bail and subsequently died of cancer. This incident, however, caused a great deal of conflict among the parties to the peace accords and threatened the delicate peace process. Thereafter, the parties agreed that only those alleged war criminals already indicted by the ICT-FY were to be detained and transferred to the tribunal.

In keeping with its obligation to turn indicted war criminals over to the tribunals, the U.S. redefined the term “war criminal” by amending Chapter 209 of Title 18 of the United States Code. Chapter 209 allows for the extradition of Nazi war criminals and those indicted by the International Criminal Tribunals for the Former Yugoslavia and Rwanda. This provision will be utilized in the case of Elsaphane Ntakirutimana, who was picked up in Laredo, Texas on September 27, 1996 on a warrant issued by the ICT-R. Ntakirutimana, a Hutu and former Seventh Day Adventist priest, had been living in Texas for approximately six months. He is one of the eight initial war criminals indicted by the ICT-R in December, 1995.

There are many who doubt that the senior leaders responsible for the acts constituting serious violations of international humanitarian law will ever be brought to justice. Many of the indictees who are the subject of international arrest warrants are known to

136. See Indictment, Prosecutor for the Tribunal v. 8 unnamed accused (Dec. 12, 1995)(No. ICT-R-96-1-I, ICT-R). By order of Judge Pillay, Nov. 28, 1995, the disclosure of the identities of the accused, pursuant to Rule 53 (B) of the Rules of Procedure and Evidence of the Tribunal, are not to be released until further ordered by her.
flaunt their presence to authorities but have not been arrested. But it must be remembered that there is no statute of limitations applicable to war crimes. Just as many Nazi war criminals are being arrested today and tried for crimes committed 50 years ago, so too will the ability to prosecute those responsible for the serious violations of humanitarian law committed in the Former Yugoslavia and Rwanda exist without end. This is the greatest factor which will contribute to an enduring peace.

The prosecution of these serious violations of international humanitarian law by the two UNSC created tribunals are establishing precedent for the international community. When (or if) a permanent international court is created, the rules, procedures and articulation of offenses used in these courts will be the baseline for that court. It will take time to see what works and what does not. As suggested by the judges appointed to these Tribunals, we should take a “wait and see” approach before insisting on a permanent court. Just as these tribunals have made substantial revisions and expansion on the rules, procedures and offenses used at Nuremberg, so may we wish to revise the rules, procedures and offenses developed by these courts.

What we formally considered to be war crimes, punishable by an international court, have taken on a whole new meaning, by including them within the term serious humanitarian law violations. These humanitarian law violations go beyond the established principles considered to be the rules of war and have made them applicable to all armed conflict. It remains to be seen, through tribunal decisions, whether the law as applied by these tribunals is and will remain the future customary law. As the 21st Century approaches, it becomes more difficult to distinguish war crimes from ordinary crimes committed in conflict.
