



Summer 2000

Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court

Susan W. Tiefenbrun

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Susan W. Tiefenbrun, *Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551 (1999).
Available at: <http://scholarship.law.unc.edu/ncilj/vol25/iss3/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court

Cover Page Footnote

International Law; Commercial Law; Law

**The Paradox of International Adjudication:
Developments in the International Criminal
Tribunals for the Former Yugoslavia and Rwanda,
the World Court, and the
International Criminal Court**

Susan W. Tiefenbrun[‡]

I.	Introduction	552
II.	Recent Trends in the Establishment of International Tribunals.....	558
	A. Classification of the International Judiciary	559
	B. Changes in the International Judiciary and Society ..	560
	C. Advantages of International Criminal Court Adjudication Over National Court Adjudication.....	563
	D. Objections to the Establishment of an Ad Hoc International Criminal Court	566
III.	The Accomplishments of the ICTY in Fulfilling its Aim to Foster Peace with Justice.....	569
	A. Procedural Accomplishments of the ICTY	569
	B. Substantive Accomplishments of the ICTY: The <i>Tadic</i> Case	572
	1. The Significance of the <i>Tadic</i> Case and the Expansion of the Definition of Crimes of Humanity to Internal Conflicts and Peacetime Incidents.....	572
	2. The <i>Tadic</i> Case and the Definition of Rape as a Crime Against Humanity, as a Grave Breach of the Geneva Convention, and as a War Crime	574
	3. The <i>Tadic</i> Case and Sexual Violence.....	575

[‡] B.S. 1965, University of Wisconsin; M.A. 1966, University of Wisconsin; Ph.D. 1971, Columbia University; J.D. 1986, New York University. Susan W. Tiefenbrun is an Associate Professor of Law at the Thomas Jefferson School of Law. This paper is a revised and expanded version of the Keynote Address that she delivered at the International Conference on Peace and Justice at the University of San Diego on October 4-7, 1999.

4.	The <i>Tadic</i> Case and the Application of Grave Breaches to Internal Conflicts as well as International Conflicts	577
C.	Substantive Accomplishments of the ICTY: The Significance of the <i>Erdemovic</i> Case and the Defense of Duress and Superior Orders	581
IV.	Shortcomings of the ICTY	582
A.	Failure to Extradite Major Perpetrators.....	582
B.	Failure to Maintain Peace	582
V.	The Accomplishments of the ICTR in Fulfilling its Aims to Foster Peace with Justice	584
A.	The <i>Kambanda</i> Case: Personal Responsibility for Genocide.....	585
B.	The <i>Akayesu</i> Case: Rape and Sexual Violence Defined as Genocide and War Crimes	586
VI.	The Shortcomings of the ICTR	589
VII.	The Accomplishments of the World Court in Settling International Disputes	589
VIII.	What Will the International Criminal Court Accomplish in its Aims to Foster and Maintain Peace Through Justice?	591
IX.	Conclusion.....	593

I. Introduction

The twentieth century was the bloodiest in history and, paradoxically, the most technologically advanced.¹ The international conflicts, barbarity, and systematic abuses of fundamental human rights that took place in this century fly in the

¹ As Judge Gabrielle Kirk McDonald wrote:

The twentieth century is best described as one of split personality: aspiration and actuality. The reality is that this century has been the bloodiest period in history. As improvements in communications and weapons technology have increased, the frequency and barbarity of systematic abuses of fundamental rights have likewise escalated, yet little has been done to address such abuses.

Judge Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 32 (1998). Judge Kirk McDonald is the President of the International Criminal Tribunal for Crimes in the Former Yugoslavia located in The Hague. *See id.*

face of the more than fifty-four international courts and tribunals² that were contemporaneously created to foster and maintain international peace and justice.³

Even in this unprecedented era of judicial expansion and protection of human rights, hate remains pervasive.⁴ It is undiminished by logic or reason and undeterred by laws specifically adopted to restrain humankind's pursuit of sovereignty, liberty, and nationalism through armed conflict.⁵ A number of nations and individuals have resorted to force in order

² See Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999).

³ This is evidenced in U.N. reports from the International Tribunal for the Prosecutions of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991:

The belief that lasting peace can be better secured through justice than through revenge or forgetting was recognized by the Security Council when it created the Tribunal. It established this judicial organ because the atrocities being committed in the former Yugoslavia constituted a threat to international peace and security and in the conviction that the Tribunal's establishment would enable an end to be put to such crimes and would contribute to the restoration and maintenance of peace.

Fourth Annual Report 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, U.N. GAOR, 52d Sess., Agenda Item 49, U.N. Doc. A/52375-S/1997/729 (1997) (visited Mar. 31, 2000) <<http://www.un.org/icty/rapportan/rapport4-e.htm>> [hereinafter *Fourth Annual Report of the ICTY*].

⁴ See Andrew Sullivan, *What's So Bad About Hate: An Unsentimental Reflection on Schoolyard Shootings, Matthew Shepard, Genocide and the Easy Consensus on Hate Crimes*, N.Y. TIMES MAGAZINE, Sept. 26, 1999, at 52 (noting that "hate is everywhere," including the United States where hate crimes increased exponentially between 1985 and 1999).

⁵ The United Nations Charter was adopted in 1945 "to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest." U.N. CHARTER, Preamble. Ironically, discriminatory and racist laws based on the specious theory of eugenics and the superiority of one race over another were enacted in Germany in the 1930s and in Vichy, France in 1940. These laws actually condoned discrimination against Jews and minorities and were a prelude to the genocide that annihilated 6,000,000 Jews. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996); see also Richard H. Weisberg, *Vichy Law and the Holocaust in France: Precipis of a Talk to the Hofstra Conference in LAW & THE ARTS* 81 (Susan Tiefenbrun, ed., 1999).

to reach such legitimate goals as self-determination and identity while others pursue with equal passion the goals of globalism, interdependence, and integration.⁶

The coexistence of reason and passion is a paradox that is expressed in the power of the law that exists alongside undeniable acts of atrocity committed worldwide. Six million Jews were exterminated in World War II. A half of a million Armenians were interned and killed between 1915 and 1921 in a genocide about which few even know. More recently, one million people were savagely annihilated in Rwanda in the course of 100 days while the world watched and chose not to intervene.

How can one explain the atrocities that have taken place in the face of numerous international ad hoc and administrative tribunals established to deter violations of humanitarian law and to keep peace through justice? The Nuremberg Tribunals showed that if perpetrators of horrific crimes remain unpunished, victims will seek revenge.⁷ Despite the teachings of Nuremberg, a culture of impunity prevails today where more than thirty-one indicted war criminals remain at large in the Republika Srpska and in the Federal Republic of Yugoslavia.⁸ These two nations continuously refuse to extradite indictees to The Hague in accordance with their Dayton Accords obligations,⁹ even though such indictees are

⁶ See generally Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 382 (1996).

For some the growing internationalism of recent years has provoked anomie, xenophobia, a white-knuckled clinging to the flotsam and jetsam of identity that floats to the surface whenever a ship of state founders. . . . With the crumbling of the empires and the emergence of immature democracy, ancient blood feuds and tribal hatreds have been unleashed by unscrupulous politicians to aggrandize themselves.

Id.

⁷ See The Honorable Louise Arbour, *History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 13 AM. U. INT'L L. REV. 1495, 1503 (1998). "If there can be no peace without justice, then I believe there can be no real peacekeeping without law enforcement for war crimes." *Id.*

⁸ See *Fourth Annual Report of the ICTY*, *supra* note 3, at 132-136.

⁹ See *id.* Unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) has been benefiting from the cooperation of neighborly states. However, recently the ICTR decided to drop its case against a former official in Rwanda accused of helping to organize the 1994 genocide. See Christopher S. Wren, *U.N. Tribunal Wrong to Free Top Suspect, Rwanda Says*, N.Y. TIMES, Nov. 12, 1999, at A10. This decision angered the Rwandan

guaranteed fair and impartial trials at the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY).¹⁰ The lingering presence of unpunished war criminals in Yugoslavia, some of whom perform important duties¹¹ or hold high office,¹² is evidence of a culture of impunity that acts as a thorn in the side of the victims of war atrocities. It has been said that “[n]othing encourages crime more than impunity.”¹³

Early in the history of Rwanda, German and Belgian colonizers fueled the flames of prejudice and rivalry between the native Hutus and Tutsis.¹⁴ In the post-colonial era, the Rwandans themselves perpetuated prejudicial practices and adopted discriminatory policies that fed the hatred between Hutus and

Government that has decided “to suspend cooperation on other cases . . . a move that could bring new prosecution to a halt.” *Id.*

¹⁰ The ICTY was created in May 1993 by Security Council Resolution 827, to which is annexed the Statute of the ICTY. SC Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/PV.3217 (1993) [approving the Report of the Secretary-General pursuant to paragraph 2. of S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 and ADD.1 (1993), reprinted in 32 ILM 1203 (1993) [hereinafter ICTY Statute].

¹¹ “In the last year [1998], the number of indictees taken into custody in The Hague has more than tripled, from eight to twenty-eight. Many of those indicted for genocide who were at large a year ago are no longer at large. We recognize that our work is not finished, and that much more needs to be accomplished. We share the impatience and frustration arising from the fact that some of the major indictees, including Radovan Karadzic and Ratko Mladic, remain at large.” The Honorable David J. Scheffer, *International Criminal Tribunal for the Former Yugoslavia, Address Before the Conference on War Crimes Tribunals: The Records and Prospects*, in 13 AM. U. INT’L L. REV. 1383, 1390 (1998).

¹² Biljana Plavsic has never been indicted. She is currently the President of the Republic of Srpska, a professor of biology, the political leader of the Bosnian Serbs, the successor of Radovan Karadzic, and an important initiator and proponent of the discriminatory policy of ethnic cleansing. Biljana Plavsic is quoted as saying that ethnic cleansing is a natural phenomenon, not a war crime. See Jonathan Tiefenbrun, *Doctors and War Crimes: Understanding Genocide*, in WAR CRIMES AND WAR CRIMES TRIBUNALS PAST, PRESENT AND FUTURE 127 (Leon Friedman and Susan Tiefenbrun, eds., 1999) [hereinafter FRIEDMAN & TIEFENBRUN].

¹³ Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT’L L. REV. 471, 482 (1997).

¹⁴ See PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 54-62 (1998).

Tutsis.¹⁵ In the spring and early summer of 1994, “a program of massacres decimated the Republic of Rwanda.”¹⁶ “It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.”¹⁷ This genocide, which reportedly resulted in the death of 800,000 people, occurred entirely inside Rwanda and was dubbed an “internal conflict.”¹⁸

Immediately following the massacres, the Rwandan Government advocated the establishment of an international tribunal that would eradicate “the culture of impunity” that characterized Rwandan society.¹⁹ However, the government’s pro-international adjudication attitude was short-lived. Ultimately the Rwandan Government rejected the establishment of the ad hoc tribunal on numerous grounds.²⁰ The Rwandan Government’s reversal of its initial support for international adjudication is not unlike the U.S. reversal of support for the establishment of a permanent International Criminal Court (ICC).²¹ Such policy

¹⁵ See *id.* at 54; Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L. 517, 518-520 (1997) (summarizing the history of discrimination and hatred that existed in Rwanda and that contributed to the causes of the genocide); see also Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, in FRIEDMAN & TIEFENBRUN, *supra* note 12, at 203, 207-208.

¹⁶ GOUREVITCH, *supra* note 14, at 4.

¹⁷ *Id.*

¹⁸ See *id.*

¹⁹ Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 504 (1996).

²⁰ See *infra* notes 90-115 and accompanying text (discussing the Rwandan Government’s reasons for initially advocating and then finally rejecting the establishment of an international tribunal for the adjudication of crimes committed in Rwanda in 1994). See also Ian Fisher, *Crisis Points Up Tough Choices for Tribunal on Rwanda*, N.Y. TIMES, Dec. 19, 1999, at 3 (noting that the conflict between the Rwandan Government and the ICTR still continues today and was most recently manifested in the government’s refusal to cooperate with the ICTR because of the tribunal’s controversial dismissal of a top genocide suspect held in pre-trial detention for an extremely long period of time).

²¹ See generally Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at A6 (reporting that ICTY officials “completed an internal report in late December [1999] that was a legal analysis of the possibility that NATO allies had committed war crimes during their 78-day campaign against Yugoslavia”). The United States’ fear of how an international criminal court would act with regard to American soldiers was recently justified in the attempt to implicate the United States in the NATO bombings over Kosovo. See *id.*

reversals demonstrate the embedded paradox examined in this article.

Despite opposition from the Rwandan Government, the International Criminal Tribunal for Rwanda (ICTR) was established in Arusha, Tanzania in 1994.²² The ICTR got off to a slow start, however, due to governmental corruption, inefficiency, ill will, and general opposition to its existence. Nevertheless, the ICTR has made every effort to meet its charge of establishing peace with justice in Rwanda by eradicating impunity. The fact remains that Rwanda is now and has been at peace since the establishment of the ICTR.

Although we live in an age of unprecedented rationality and scientific progress, we cannot explain the ubiquitous hatred, the proliferation of internal conflicts, and the escalation of wars into genocides. We yearn for world peace; yet national and international criminal courts offer only punishment and retribution in response to inhumane violence.²³ These courts are, however, properly guided by rational justice rather than by revenge.

This article considers the achievements of certain international tribunals as they seek to foster and maintain peace. Part II examines recent trends in the establishment of international tribunals, identifies the major international tribunals, and considers the role they play in eradicating a culture of impunity.²⁴ Part II also examines recent changes in the international judiciary, which reflect changes in society, and discusses the advantages and disadvantages of international adjudication.²⁵ Part III focuses on the procedural and substantive accomplishments of the ICTY.²⁶ Parts III and IV discuss the role that the ICTY played in investigating violations of humanitarian law in Kosovo and the frustrations the tribunal experienced due to a lack of state

²² S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) (Nov. 8, 1994) (with annexed Statute), *reprinted in* 33 I.L.M. 1600 (1994) [hereinafter the ICTR Statute].

²³ See Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135 (1998) (discussing the goals of deterrence, retribution, incapacitation, restoration, and rehabilitation in the criminal justice system in Rwanda).

²⁴ See *infra* notes 32-52 and accompanying text.

²⁵ See *infra* notes 53-115 and accompanying text.

²⁶ See *infra* notes 116-208 and accompanying text.

cooperation.²⁷ Part IV also examines the role of the ICTY in adjudicating major cases and maintaining peace in Yugoslavia in the future.²⁸ Parts V and VI examine the accomplishments and shortcomings of the ICTR.²⁹ After examining both the ICTY's and ICTR's accomplishments, these sections conclude that the international tribunals have positively affected efforts to foster and maintain lasting peace with justice. Part VII looks at the role played by the newly energized International Court of Justice (the World Court) in fostering peace among states.³⁰ Part VIII examines the contribution of the international ad hoc tribunals—the ICTY and the ICTR—as setting the stage for the establishment of a permanent International Criminal Court.³¹ Such a court might serve to deter ethnic hatred and tribal feuds that can result in ethnic cleansing, genocide, and other war crimes common to the twentieth century.

II. Recent Trends in the Establishment of International Tribunals

In order to assess recent trends in international adjudication, this section first examines the nomenclature of the tribunals and their two major classifications.³² It then examines the post-war reformations of more than a dozen international tribunals.³³ To better determine the actual contributions of these tribunals, the section discusses the advantages of international criminal court adjudications over national court adjudications.³⁴ Given the obvious advantages of the uniformity of standards made possible by an international criminal tribunal, this section then inquires into the bases of objections to the establishment of an ad hoc international criminal court and demonstrates that many, if not most, of those objections are unjustified.³⁵

²⁷ See *infra* notes 118-41, 209-18 and accompanying text.

²⁸ See *infra* notes 209-18 and accompanying text.

²⁹ See *infra* notes 219-60 and accompanying text.

³⁰ See *infra* notes 261-78 and accompanying text.

³¹ See *infra* notes 279-89 and accompanying text.

³² See *infra* notes 36-52 and accompanying text.

³³ See *infra* notes 53-70 and accompanying text.

³⁴ See *infra* notes 71-89 and accompanying text.

³⁵ See *infra* notes 90-115 and accompanying text.

A. *Classification of the International Judiciary*

The international judiciary has recently been classified³⁶ into two main groups—international judicial bodies and quasi-judicial dispute settlement or implementation control bodies. International judicial bodies include: courts of general jurisdiction;³⁷ courts of the law of the sea;³⁸ international criminal law/humanitarian law courts;³⁹ environmental courts;⁴⁰ courts of trade, commerce and investments;⁴¹ courts of human rights;⁴² and courts established to carry out regional economic integration agreements in Europe,⁴³ Africa,⁴⁴ the Middle East/Arab Countries,⁴⁵ and Latin America.⁴⁶ Quasi-judicial dispute resolution or implementation control bodies

³⁶ See Romano, *supra* note 2.

³⁷ Courts of General Jurisdiction currently in existence include the International Court of Justice (known as the World Court, located in the Peace Palace in The Hague, and established by the United Nations in 1946) and The Central American Court of Justice “Corte Centroamericana de Justicia” (established in 1991). See U.N. CHARTER, arts. 7.1, 36.3, 92-96; see also 34 I.L.M. 923.

³⁸ The International Tribunal for the Law of the Sea was established in 1982. See UNCLOS art. 287, U.N. Doc. A/CONF.62/121 (1982), reprinted in 21 I.L.M. 1261 (1982).

³⁹ The International Criminal Tribunal for the Former Yugoslavia was established in 1993 by Resolution 827 of the United Nations Security Council. See ICTY Statute, *supra* note 10. The International Criminal Tribunal for Rwanda was created by Security Council Resolution 955 in November 1994. See ICTR Statute, *supra* note 22.

⁴⁰ The International Court for the Environment is now extinct. See Romano, *supra* note 2, at 724.

⁴¹ In 1995 the World Trade Organization Dispute Settlement Understanding created the WTO Dispute Settlement Body, an ad hoc organ, and the Appellate Body, a permanent organ. The WTO Dispute Settlement Body is a permanent arbitral tribunal and resolves major international trade disputes. See *id.* at 719.

⁴² The European Court of Human Rights was created in 1959. The Inter-American Court of Human Rights was established in 1979.

⁴³ *E.g.*, the Court of Justice of the European Communities (1952); the Court of First Instance of the European Communities (1988); the EFTA Court (1944); and the Benelux Economic Union Court of Justice (1974).

⁴⁴ *E.g.*, the Court of Justice of the Common Market for Eastern and Southern Africa (1998), and the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997).

⁴⁵ *E.g.*, the Court of Justice of the Arab Maghreb Union (1989) and the Judicial Board of OAPEC (1980).

⁴⁶ *E.g.*, the Court of Justice of the Andean Community (1984).

include: international administrative tribunals;⁴⁷ inspection panels;⁴⁸ human rights bodies;⁴⁹ non-compliance bodies;⁵⁰ permanent arbitral tribunals and conciliation commissions;⁵¹ and international claims and compensation bodies.⁵² Human rights adjudicative bodies constitute the largest number of international tribunals with implementation controls.

B. Changes in the International Judiciary and Society

Since the post-Cold War period, the international community

⁴⁷ *E.g.*, the United Nations Administrative Tribunal (1949); the International Labor Organization Administrative Tribunal (1946); the World Bank Administrative Tribunal (1980); the Inter-American Development Bank Administrative Tribunal (1981); the Administrative Tribunal of the Organization of American States (1976); the Appeals Board of the Organization for Economic Cooperation and Development (1950); the Council of Europe Appeals Board (1965); the Appeals Board of NATO (1965); the Appeals Board of the European Space Agency (1975); the Appeals Board of the Intergovernmental Committee (1972); and the Appeals Board of the Western European Union (1956).

⁴⁸ *E.g.*, the World Bank Inspection Panel (1994); the Inter-American Development Bank Independent Investigation Mechanism (1995); and the Asian Development Bank Inspection Policy (1995).

⁴⁹ The largest number of international judicial tribunals classified as quasi-judicial bodies having implementation control consists of "Human Rights Bodies." They include: the United Nations Commission on Human Rights (1946); the International Civil and Political Rights Committee (1976); the Committee on Economic, Social and Cultural Rights (1987); the Committee on the Elimination of Racial Discrimination (1969); the Committee against Torture (1987); the Committee on the Elimination of All Forms of Discrimination Against Women (1981); the Committee on the Rights of the Child (1990); the African Commission on Human and People's Rights (1987); the Inter-American Commission on Human Rights (1979); the Committee of Independent Experts under the European Social Charter (1998); the ILO Committee of Experts on the Application of Conventions and Recommendations (1926); the ILO Conference Committee on the Application of Conventions (1926); the ILO Commission of Inquiry (1919); the ILO Governing Body Committee on Freedom of Association (1950).

⁵⁰ *E.g.*, the Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer (1970).

⁵¹ *E.g.*, the Permanent Court of Arbitration (1899); the OSCE Court on Conciliation and Arbitration (1964); the OAU Commission of Mediation, Conciliation and Arbitration (1964); the International Center for the Settlement of Investment Disputes (1966); the NAFTA Dispute Settlement Panels (1994); the North American Commission on Environmental Cooperation (1993); the International Joint Commission (1909).

⁵² *E.g.*, the Iran-USA Claims Tribunal (1980) and the United Nations Compensation Commission (1990).

has extensively reformed nearly one dozen international tribunals.⁵³ For example, more and more international tribunals are granting standing to non-state entities.⁵⁴ In the past, the in personam jurisdiction of most international tribunals was limited to disputes between sovereign states.⁵⁵ The jurisdictional expansion of international tribunals to non-state entities has given rise to the development of international criminal adjudication.⁵⁶ The dazzling array of newly-created and reformed international tribunals in the twentieth century is testament to the unprecedented expansion of the international judiciary and the development of serious interest in the commitment to the protection of human rights.⁵⁷

Law is a reflection of society. The proliferation of international tribunals in the late twentieth century was a response to increasing ethnic hostility and massive destruction that required more widespread and effective dispute resolution mechanisms to keep peace and protect human rights. The more recently created international tribunals such as the ICTY and the ICTR are specifically designed to maintain peace through justice.⁵⁸ Both tribunals have mandates to keep and disseminate accurate historic records⁵⁹ of the crimes committed in the former Yugoslavia and in

⁵³ See Romano, *supra* note 2, at 709-10.

⁵⁴ See *id.* at 710, 739.

⁵⁵ See *id.* at 710.

⁵⁶ See *id.* at 709-10.

⁵⁷ See *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, PROCEEDINGS OF AMERICAN SOCIETY OF INTERNATIONAL LAW FORUM, CO-SPONSORED WITH THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES (L. Boisson de Chazournes ed., 1995).

⁵⁸ See Romano, *supra* note 2, at 718.

⁵⁹ See *Fifth Annual Report 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*, U.N. GAOR, 53rd Sess., Agenda item 48, ¶¶ 297, 299, U.N. Doc. A/53/219-S/1998/737 (1998) (visited Mar. 31, 2000) <<http://www.un.org/icty/rapportan/rapport5-e.htm>> [hereinafter *Fifth Annual Report of the ICTY*].

Yet, it is not enough simply to create a record. Its power lies in its dissemination, most crucially within the former Yugoslavia In hearing the victims' testimonies, it ensures that the ear of history, which has so often been deaf this century, is listening. To those who made them victims, its proceedings demonstrate why justice is better than revenge. Responding within a framework

the territory of Rwanda.⁶⁰ The ICTY seeks to punish the perpetrators of grave breaches of the Geneva Conventions of 1949⁶¹ and thereby deter future violations of the laws or customs of war,⁶² genocide,⁶³ and crimes against humanity.⁶⁴ The ICTR seeks to punish perpetrators of genocide and crimes against humanity, and violators of Article 3 of the Geneva Conventions and Additional Protocol II. The latter relate to crimes committed in internal conflicts and those were perpetrated specifically in the territory of Rwanda.⁶⁵ The subject matter jurisdiction of the ICTR, however, does not include war crimes or grave breaches of the Geneva Conventions—both of which require a connection with an *international* conflict as distinct from the *internal* conflict in

of law to an attack on the human being, and not within a framework of violence and destruction, is the first step in rebuilding a community from the ruins of a society divided by ethnically-based slaughter.

Id.

⁶⁰ *See id.*

⁶¹ *See* ICTY Statute, *supra* note 10, art. 2. Grave breaches of the Geneva Conventions are not provided in the Statute of the ICTR because the crimes perpetrated in Rwanda were committed during an internal rather than an international conflict. Even though grave breaches of the Geneva Conventions of 1949 require a connection with an international conflict, it is “by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.” Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462, 464 (1998) (quoting *Prosecutor v. Tadic*, No. IT-94-1-AR72, Appeal on Jurisdiction, ¶ 141 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996)).

⁶² *See* ICTY Statute, *supra* note 10, art. 3. In comparing the ICTY and ICTR Statutes, it is important to note that violations of the laws of customs of war are not provided for *per se* in the ICTR. *See* Akhavan, *supra* note 19, at 503-4. These are covered instead under Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in Article 4 of the Statute of the ICTR. *See* ICTR Statute, *supra* note 22, art. 4.

⁶³ *See* ICTY Statute, *supra* note 11, art. 4. Note that Article 4 of the ICTY Statute defines “genocide” to include the “conspiracy to commit genocide”; “direct and public incitement to commit genocide”; “attempt to commit genocide”; “complicity in genocide”; but it does not include “rape” or “sexual violence.” *Id.* Rape is included in “crimes against humanity” in both the ICTY Statute and the ICTR Statute. *See id.* art. 5; ICTR Statute, *supra* note 22, art. 3. Genocide is covered in Article 2 of the ICTR Statute. *Id.* art. 2.

⁶⁴ *See* ICTY Statute, *supra* note 10, art. 5. “Crimes against humanity [include] murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; [and] other inhumane acts.” *Id.*

⁶⁵ *See* ICTR Statute, *supra* note 22.

Rwanda.⁶⁶

The territorial and temporal jurisdictions of both ad hoc tribunals are limited.⁶⁷ Their jurisdiction is concurrent with that of national courts that were created to prosecute persons having committed serious violations of international humanitarian law in the territories of Rwanda and the former Yugoslavia.⁶⁸ Although their jurisdiction is concurrent, the ad hoc tribunals have primacy over the national courts.⁶⁹ Because of the temporal jurisdictional limits of these courts, they will both disappear once the perpetrators are tried and convicted.⁷⁰ Therefore, serious crimes that occurred outside of Yugoslavia and Rwanda, before 1991 or after 1994, respectively, may go unpunished unless: (1) new ad hoc tribunals are established to deal with such crimes; or (2) the proposed permanent international criminal court with expanded jurisdictional reach is actually established. The proposed International Criminal Court would be a stable, permanent tribunal for the adjudication of war crimes, crimes against humanity, and genocide, which may arguably not be adequately adjudicated in national courts.

C. Advantages of International Criminal Court Adjudication Over National Court Adjudication

If competent and effective national courts exist⁷¹ to adjudicate

⁶⁶ See Akhavan, *supra* note 19, at 503.

⁶⁷ See ICTR Statute, *supra* note 22, art. 1. Article 7 of the Statute of the ICTR provides that the territorial and temporal jurisdiction of the Court is limited in time to the period beginning on 1 January 1994 and ending on 31 December 1994 and limited in space to the territory of Rwanda and the territory of its neighboring states for serious violations of international humanitarian law committed by Rwandan citizens. See *id.* art. 7. Article 8 of the Statute of the ICTY provides that the territorial and temporal jurisdiction of the ICTY is limited in time to the period beginning on 1 January 1991 and in space to the territory of the former Socialist Federal Republic of Yugoslavia. ICTY Statute, *supra* note 10, art. 8.

⁶⁸ See ICTY Statute, *supra* note 10, art. 9(1); ICTR Statute, *supra* note 22, art. 8(1).

⁶⁹ See ICTY Statute, *supra* note 10, art. 9(2); ICTR Statute, *supra* note 22, art. 8(2).

⁷⁰ See ICTY Statute, *supra* note 10, art. 8; ICTR Statute, *supra* note 22, art. 7.

⁷¹ "In the field of international humanitarian law, some of the most horrendous crimes have been committed with impunity because of shortcomings in the domestic criminal justice systems. However, since Nuremberg the domestic criminal law environment has changed very dramatically." Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and*

war crimes, crimes against humanity, and genocide, what is the purpose of international courts? Regarding the establishment of an ad hoc tribunal for crimes committed in Rwanda, the Rwandan Government outlined four good reasons for its establishment.⁷² But almost as soon as the government expressed enthusiastic support for the international tribunal, it promptly refused to vote for it on bases that have since proven unfounded.⁷³

The first reason to adjudicate genocide and crimes against humanity in an international court rather than in a domestic court is to account for the universality of these crimes.⁷⁴ The Rwandan Government initially favored the establishment of an international tribunal because "the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole."⁷⁵

A second reason for favoring international over domestic adjudication is to dispel any suspicions of vengeful justice on the part of a national court.⁷⁶ The Rwandan Government initially believed that locating a tribunal in a place geographically distant from where the crimes were committed would ensure impartiality and justice.⁷⁷ There are serious disadvantages to creating distance between the locus of the crimes committed and the tribunal adjudicating these crimes, however.⁷⁸ For example, distance is an impediment to the effective dissemination of the court's historic record of events to victims.⁷⁹ The important achievements of the court located in Arusha, which has fairly and impartially sentenced

Results, in FRIEDMAN & TIEFENBRUN, *supra* note 12, at 37; *see also* Fritz Weinschenk, "The Murderers Among Them"—German Justice and the Nazis, in FRIEDMAN & TIEFENBRUN, *supra* note 12, at 137 (discussing the general failure of the German courts to adjudicate the grand majority of war criminals at large in Germany).

⁷² *See* Akhavan, *supra* note 19, at 504-05.

⁷³ *See id.* at 508.

⁷⁴ *See id.* at 504.

⁷⁵ *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States*, U.N. SCOR, 49th Sess., 3453rd mtg., at 14, U.N. Doc. S/PV.3453 (1994) [hereinafter *Rwandan Statement to the U.N.*].

⁷⁶ *See id.*

⁷⁷ *See* Akhavan, *supra* note 19, at 504.

⁷⁸ *See id.* at 508.

⁷⁹ *See id.*

high-level convicted criminals, remain relatively unknown to the public in Rwanda due to an inefficient outreach program and poor communications.⁸⁰

A third reason to adjudicate in an international court is to avoid the culture of impunity that may exist in certain nations.⁸¹ In the atmosphere of impunity that exists in Rwanda, it would be very difficult to build respect for the rule of law among the Rwandan people and to arrive at a true national reconciliation via the domestic court system alone.⁸² When victims are denied justice, they may commit acts of vengeance that can escalate into war.⁸³ The failure to prosecute perpetrators may prevent the reconstruction and reconciliation of society because the criminals "retain their power and influence, preventing the return of refugees and the reinstatement of a pluralistic society."⁸⁴

A fourth reason for establishing an international tribunal is to facilitate prosecution of criminals who may have escaped during the war and found refuge in foreign countries.⁸⁵ This reason is more applicable to the ICTY than to the ICTR because for the first four years of the ICTY's existence foreign states refused to extradite indictees suspected of playing major roles in the Yugoslavian war crimes.⁸⁶

A final reason to prosecute war criminals in an international tribunal is to remove the onus of guilt from the nation as a whole and to place it on the individual criminal.⁸⁷ The failure to attach responsibility to the individuals who perpetrate these crimes may result in the stigmatization of entire societies.⁸⁸ Stigmatization can

⁸⁰ *See id.*

⁸¹ *See id.* at 504-05.

⁸² *See id.*

⁸³ *See generally* McDonald, *supra* note 1, at 33 n.4 (discussing the assassinations in the 1920s of several individuals allegedly responsible for atrocities committed by the government of Turkey against the Armenians).

⁸⁴ *Id.* at 34.

⁸⁵ *See* Akhavan, *supra* note 19, at 505.

⁸⁶ *See Fifth Annual Report of the ICTY, supra* note 59, ¶ 223.

⁸⁷ *See* Howland & Calathes, *supra* note 23, at 157.

⁸⁸ *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 4-23 (1997) (discussing the development and purpose of the international law trend of focusing criminal liability on the individual).

lead to renewed conflicts, which have occurred in Rwanda, Burundi, the former Yugoslavia, and more recently in Kosovo, where wars have been ascribed to unpunished crimes related to historical ethnic hatreds.⁸⁹ Ascribing guilt to an entire society simply fuels the fires of prejudice, which is the root of the committed atrocities.

D. Objections to the Establishment of an Ad Hoc International Criminal Court

Despite the good reasons offered by the Rwandan Government for establishing the ICTR to adjudicate crimes committed in Rwanda in 1994, the Rwandan Government ultimately voted against its establishment for at least the following seven reasons. First, the Rwandan Government was concerned that the jurisdiction of the ICTR was limited and temporal, covering only crimes committed in 1994.⁹⁰ In light of Rwandan history, the Rwandan Government considered this time period to be too restrictive.⁹¹ Its objection reflects the fact that for many years prior to 1994, harsh discrimination, forced carrying of identity cards,⁹² and other forms of prejudice against Hutus existed in Rwanda. The long-term practice of discrimination against the Hutus and the favoritism enjoyed by the elite Tutsis were the underlying causes of a widespread and systematic attack by Hutus, who intended to exterminate the civilian population of Tutsis.⁹³ This extermination ultimately took place in the course of less than one year.⁹⁴

Second, the Rwandan Government objected to the composition and structure of the tribunal, which they viewed as "inappropriate and ineffective" to guarantee speedy trials.⁹⁵ Justice delayed is

⁸⁹ See McDonald, *supra* note 1, at 33-34.

⁹⁰ See *Rwandan Statement to the U.N.*, *supra* note 75, at 14.

⁹¹ See *id.*

⁹² See *id.* "Decades of discrimination—by custom of patrilineal descent and by laws, such as that requiring cards that identified each person by the ethnies, or ethnic group, of Hutu or Tutsi—had led the Tutsi to be regarded as a distinct, stable, permanent group." Diane Marie Amann, *International Decisions: Prosecutor v. Akayesu Case ICTR-96-4-T. International Criminal Tribunal for Rwanda, September 2, 1998*, 13 AM. J. INT'L L. 195, 196 (1999).

⁹³ See *id.* at 195-96.

⁹⁴ See Akhavan, *supra* note 19, at 505.

⁹⁵ See *Rwandan Statement to the U.N.*, *supra* note 75, at 15.

justice denied, they argued.⁹⁶ The Rwandan Government sought a greater number of trial chamber judges.⁹⁷ It also recommended that the tribunal be given its own Appeals Chamber and prosecutor, so it would not have to share such resources with the ICTY.⁹⁸ The sharing of the prosecutor between the two tribunals, located far from each other, was designed to insure a link between them that would further facilitate “a unity of legal approach, as well as economy and efficiency of resources.”⁹⁹ Notwithstanding these laudable goals, the deplorable conditions of pre-trial detention in Arusha are undeniable, and the speediness of ICTR trials would be facilitated by an increase in the number of judges, as provided for in Resolution 955.¹⁰⁰

Third, the Rwandan Government claimed that the meager budget of the tribunal would lead to the prosecution of only minor crimes, like plunder or corporal punishment, which could be adequately handled by internal, national tribunals.¹⁰¹ Furthermore, the government feared that the tribunal’s lack of funds would cripple efforts to prosecute the perpetrators of genocide.¹⁰² This objection proved to be unwarranted. For example, the *Akayesu* and *Kambanda* trials in the ICTR represent milestones in international humanitarian law.¹⁰³ Jean Kambanda is the first person in history to accept personal responsibility for genocide before an international court, and Jean-Paul Akayesu is the first defendant to have been found guilty of genocide and sentenced by an international tribunal.¹⁰⁴ Both defendants were major players in the war. In addition, the *Akayesu* trial represents “the first time an international tribunal has conceptualized acts of sexual violence, including rape, as genocide.”¹⁰⁵

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994)*, U.N. Doc. S/1995/134, at 3, ¶ 9.

¹⁰⁰ *See* ICTR Statute, *supra* note 22.

¹⁰¹ *See Rwandan Statement to the U.N.*, *supra* note 75, at 15.

¹⁰² *See id.*

¹⁰³ *See* Magnarella, *supra* note 15, at 518.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

Fourth, the Rwandan Government also questioned the impartiality of certain judicial candidates.¹⁰⁶ However, the selection criteria for the judges mandated by the statute largely dispel this concern. The trial and appellate chambers of the ICTR must consist of “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”¹⁰⁷

Fifth, the Rwandan Government vigorously objected to the imprisonment of Rwandan criminals outside of Rwanda in remote, comfortable prisons in Norway and other countries which would have the authority to decide issues pertaining to Rwandan detainees.¹⁰⁸ The Rwandan Government claimed that these decisions should be made by the ICTR or by the Rwandan people themselves.¹⁰⁹ Despite protections against such fears, duly provided for in Article 27 of the Yugoslav Statute¹¹⁰ and Article 26 of the Rwanda Statute,¹¹¹ respectively, there is no doubt that detaining and imprisoning suspects and criminals in foreign places vitiates the deterrent effects of adjudication and undermines the goal of a lasting peace through justice.

Sixth, the Rwandan Government also objected to the sentencing disparity between national and international courts.¹¹² Since the ICTR does not permit capital punishment and the Rwandan Penal Code does, genocide perpetrators and persons in positions of leadership appearing before the ICTR might simply be sentenced to jail, whereas lower-level criminals appearing before the national Rwandan courts could be “subjected to the harshness of the death sentence.”¹¹³ Arguably, Rwandans could perceive this sentencing disparity as yet another example of discrimination, which could aggravate the festering hatred that contributed to the initial genocide.

Finally, the Rwandan Government objected to the location of

¹⁰⁶ See *Rwandan Statement to the U.N.*, *supra* note 75, at 15.

¹⁰⁷ ICTR Statute, *supra* note 22, art.12(1).

¹⁰⁸ See *Rwandan Statement to the U.N.*, *supra* note 75, at 15.

¹⁰⁹ See *id.*

¹¹⁰ See ICTY Statute, *supra* note 10.

¹¹¹ See ICTR Statute, *supra* note 22.

¹¹² See *Rwandan Statement to the U.N.*, *supra* note 75, at 16.

¹¹³ *Id.*

the Rwandan Tribunal in Arusha, Tanzania.¹¹⁴ The same objection has been raised with respect to the seat of the ICTY in The Hague—far removed from the locus of the crimes committed in former Yugoslavia.¹¹⁵ In Rwanda and Yugoslavia, media coverage of distant tribunal adjudications remains sparse and often inaccurate. Consequently, the effectiveness of such adjudications as an aid in fostering the eradication of a culture of impunity and in promoting reconciliation has been greatly reduced.

III. The Accomplishments of the ICTY in Fulfilling its Aim to Foster Peace with Justice

In order to assess the accomplishments of the ICTY, this article examines its procedural and substantive contributions to the development of international criminal law by discussing such seminal decisions as *Prosecutor v. Tadic*¹¹⁶ and *Prosecutor v. Erdemovic*.¹¹⁷

A. Procedural Accomplishments of the ICTY

The United Nations Security Council's establishment of the ad hoc tribunal for the former Yugoslavia was of paramount significance on the institutional plane.¹¹⁸ However, the ICTY was slow to begin fulfilling its lofty goal of maintaining peace through justice in the former Yugoslavia. Initially, states refused to extradite the major Yugoslavian war indictees, and the ICTY earned a short-lived but justifiable reputation for prosecuting only the "small fish."¹¹⁹ The ICTY is no longer lacking defendants to try, as states are beginning to cooperate with the tribunal in the adjudication process. For example, Croatia has arranged for the

¹¹⁴ See *id.*

¹¹⁵ See Arbour, *supra* note 71, in FRIEDMAN & TIEFENBRUN, *supra* note 12, at 45. "[T]he ICTY sits in The Hague with respect to crimes committed in the former Yugoslavia. The ICTR sits in Arusha, Tanzania, for crimes committed in Rwanda. In view of the location of the Tribunals we have to be able to bring criminal justice locally." *Id.*

¹¹⁶ See Opinion and Judgment, Case No. IT-94-1-T (May 7, 1997).

¹¹⁷ See Sentencing Judgment, Case No. IT-96-22-T (Nov. 29, 1996).

¹¹⁸ See Meron, *supra* note 61, at 462.

¹¹⁹ See RATNER AND ABRAMS, *supra* note 88, at 187 (quoting interview with Mohamed Sacirbey, Bosnian Ambassador to the U.N., *Charlie Rose* (PBS television broadcast, May 9, 1996)).

surrender to the ICTY of a number of indicted Croatian nationals and Bosnian Croats.¹²⁰ Nevertheless, most of the indicted Bosnian Serbs have yet to be arrested, and the principal leaders responsible for many atrocities are still at large or in hiding.¹²¹ This suggests that the culture of impunity in the former Yugoslavia remains largely intact.

The ICTY has, however, significantly refined its procedural structure both internally and externally. It has improved its operations, developed Rules of Procedure and Evidence, and interpreted and expanded international law through its decisions. When the ICTY first began in 1993, it had neither a physical nor a legal infrastructure.¹²² The tribunal had no means of investigating alleged crimes, no courtroom, no rules of evidence or procedure, no strategies to reach and protect witnesses, no jails to incarcerate sentenced criminals, and little funding to correct these ills.¹²³ States harboring indictees were slow to extradite, or failed to extradite at all, creating a serious impediment to the adjudication of serious crimes committed in the former Yugoslavia.¹²⁴ Moreover there was a general lack of political will for the ICTY to succeed in 1993. Some even claimed that prosecutions were detrimental to the peace process.¹²⁵

Over the past five years,¹²⁶ the ICTY has changed from an inchoate institution lacking a basic structure, staff, resources, and defendants to a fully functioning tribunal that is pursuing twenty-six public indictments against ninety-three indictees.¹²⁷ Twenty-seven indictees are currently in custody, awaiting trial or serving

¹²⁰ See Meron, *supra* note 61, at 462.

¹²¹ See *id.* at 463.

¹²² See Judge Gabrielle Kirk McDonald, *The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses? Speech to the Counsel on Foreign Relations (May 13, 1999)* (last modified Aug. 11, 1999) <<http://www.pict-pecti.org/news/archive/May/ICTY.05.13.criminal.html>>.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ Annual reports provide comprehensive assessments of the procedural accomplishments of the court. See *Fourth Annual Report of the ICTY*, *supra* note 4; *Fifth Annual Report of the ICTY*, *supra* note 59.

¹²⁷ See *ICTY Key Figures*, (last modified Mar. 30, 2000) <<http://www.un.org/icty/glance/keyfig.htm>>.

sentences; ten have been convicted; two have pleaded guilty; two were acquitted; and two indictees died in custody, one from natural causes and the other from suicide.¹²⁸

The ICTY holds trials and appellate proceedings on a regular basis. Between July 28, 1998 and July 31, 1999, the tribunal completed three full trials and one appeal.¹²⁹ As of the latter date, four trials were in progress, one trial awaited judgment, and seven trials and four appeals were pending.¹³⁰

The staff at the tribunal has increased dramatically over the last several years. The number of staff has grown from 197 in 1996 to 368 in 1997,¹³¹ to 511 in 1998,¹³² and to 791 in 1999.¹³³ The budget of the tribunal has surpassed \$96 million.¹³⁴ The tribunal now boasts four courtrooms, three trial and one appellate,¹³⁵ and extensive support facilities, including a detention unit, security service, court support personnel and workspace, and interpretation services.¹³⁶ The tribunal has basic office equipment, a state of the art courtroom, Rules of Procedure and Evidence, Rules of Detention and Related Regulations, a Directive on the Assignment of Defense Counsel, a Directive on Registry, and a Code of Conduct.¹³⁷ Three more judges were added in October 1998.¹³⁸

The increased activity of the ICTY is evident from the number of days the ICTY judges sit in court, which has grown from 3 in

¹²⁸ See *Fact Sheet on ICTY Proceedings* (last modified Mar. 30, 2000) <<http://www.un.org/icty/glance/fact.htm>>.

¹²⁹ See *Report 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*, 54th Sess., Prov. Agenda Item 53, Annex I, U.N.Doc. A/54/187, S/1998/846, ¶¶ 16, 73 [hereinafter *Sixth Annual Report of the ICTY*].

¹³⁰ See *id.*

¹³¹ See *Fourth Annual Report of the ICTY*, *supra* note 3, ¶ 106.

¹³² See *Fifth Annual Report of the ICTY*, *supra* note 59, ¶ 72.

¹³³ See *Sixth Annual Report of the ICTY*, *supra* note 129, ¶ 175.

¹³⁴ See *id.* ¶ 172.

¹³⁵ See *id.* ¶ 2.

¹³⁶ See *id.* ¶¶ 162, 154, 156, and 176.

¹³⁷ See *Fourth Annual Report of the ICTY*, *supra* note 3, art. 173.

¹³⁸ See *Sixth Annual Report of the ICTY*, *supra* note 129, ¶ 2.

1994 to 176 in 1997.¹³⁹ Furthermore,

in addition to some three hundred procedural decisions interpreting [the ICTY's] rules . . . [it has] codified procedures on a range of practical matters, such as a legal aid system, a code of conduct for counsel, the maintenance of a purpose-built detention unit . . . the rights of [detainees], and counseling and support for victim witnesses, for whom the act of testifying is often terribly traumatic.¹⁴⁰

The growth of the tribunal led one observer to remark, "the ICTY is coming of age as a credible forum for the international prosecution of war crimes within its jurisdiction."¹⁴¹ The procedural accomplishments of the ICTY will help lay the groundwork for the permanent International Criminal Court.

*B. Substantive Accomplishments of the ICTY: The Tadic Case*¹⁴²

The ICTY has made significant contributions to the expansion and interpretation of international humanitarian law.¹⁴³ The decisions of the ICTY reflect the development of customary law and its acceptance by states that are now ready to prosecute offenders under a principle of universal jurisdiction.¹⁴⁴

1. The Significance of the Tadic Case and the Expansion of the Definition of Crimes of Humanity to Internal Conflicts and Peacetime Incidents

The seminal *Tadic* case stands for the proposition that crimes against humanity do not require a connection to international armed conflict.¹⁴⁵ Moreover the tribunal's Appeals Chamber

¹³⁹ See Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 60 n.7 (1999) (citing *The Tribunal in Action*, ICTY BULL., No. 20-III-1998, at 17).

¹⁴⁰ See McDonald, *supra* note 1, at 36.

¹⁴¹ *Id.* at 57.

¹⁴² Prosecutor v. Tadic, UN Doc. IT-94-1-T (ICTY May 7, 1997), full text available at www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm; Prosecutor v. Tadic, U.N. Doc. IT-94-1-AR72 (ICTY Oct. 2, 1995).

¹⁴³ See Murphy, *supra* note 139, at 95-96.

¹⁴⁴ See Meron, *supra* note 61, at 464.

¹⁴⁵ See *Tadic*, U.N. Doc. IT-94-1-AR72, ¶ 141.

provided:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 [of the ICTY statute] more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullem crimen sine lege*.¹⁴⁶

Nevertheless, the Appeals Chamber concluded that an armed conflict was a necessary predicate to jurisdiction.¹⁴⁷ Undoubtedly, the redefinition of crimes against humanity to include internal conflicts reflects the increase in internal rather than international conflicts in the second half of the twentieth century.

The *Tadic* judgment reaffirmed that a “single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility, and an individual perpetrator need not commit numerous offences to be held liable.”¹⁴⁸ Although crimes against humanity can only be committed against civilian populations, the *Tadic* court construed the term “civilian population” broadly:¹⁴⁹ “[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”¹⁵⁰ Evidence that “acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not” is sufficient to meet the definition of crimes against humanity.¹⁵¹ More importantly, *Tadic* held that a policy to commit crimes against humanity need

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* ¶ 142; *Tadic*, UN Doc. IT-94-1-T, ¶ 560.

¹⁴⁸ *Tadic*, UN Doc. IT-94-1-T, ¶ 649.

¹⁴⁹ *See id.* ¶¶ 635-44.

¹⁵⁰ *Id.* ¶ 643.

¹⁵¹ *Id.* ¶ 653.

not be a state policy.¹⁵²

After World War II, crimes against humanity, as crimes of a collective nature, could be committed only by states or by individuals exercising state power. The *Tadic* court recognized, however, that "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory."¹⁵³ The definition includes terrorist groups or organizations.¹⁵⁴ The court also held, in a departure from customary law, that all crimes against humanity require discriminatory intent.¹⁵⁵

2. *The Tadic Case and the Definition of Rape as a Crime Against Humanity, as a Grave Breach of the Geneva Convention, and as a War Crime*

Rapes were frequently carried out as means of 'ethnic cleansing' during the conflict in the former Yugoslavia.¹⁵⁶

[T]he ICTY Statute specifically lists rape as a crime against humanity when committed in armed conflict and directed against a civilian population. It is difficult . . . to prove that one such assault is part of an orchestrated plan to carry out mass rapes, which has left the prosecutor typically charging rape as either a grave breach [of the Geneva Convention] or a violation of the laws and customs of war. The ICTY Statute does not expressly mention rape as a grave breach or other war crime; nor do the 1949 Geneva Conventions list rape as a 'grave breach.' Nevertheless, the definition of 'grave breach' (which includes torture, inhumane treatment, and the infliction of great suffering or serious injury to body or health) clearly encompasses rape [S]pecial evidentiary rules have been developed to address cases involving sexual assault.¹⁵⁷

¹⁵² See *id.* 655.

¹⁵³ *Id.* ¶ 654.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* ¶¶ 650-52.

¹⁵⁶ See Murphy, *supra* note 139, at 88.

¹⁵⁷ *Id.* (citing Colloquy, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89 (1994)); see also ICTY Statute, *supra* note 10, art. 5; Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* in FRIEDMAN & TIEFENBRUN, *supra* note 12, at 87.

3. *The Tadic Case and Sexual Violence*

Rape is, arguably, already a crime under international law.¹⁵⁸ Sexual violence should be similarly regarded. “[S]exual violence under international humanitarian law is as normal as rape is in war.”¹⁵⁹ The United Nations provided a legal framework for the investigation and prosecution of sexual violence through the ICTY and the ICTR: the ICTY Statute includes rape as a crime against humanity,¹⁶⁰ and the ICTR Statute includes rape both as a crime against humanity and as a Protocol II crime.¹⁶¹ The Legal Advisor for Gender-Related Crimes to the Office of the Prosecutor of the ICTY and the ICTR observed that while “[m]any people view [the *Tadic* decision] . . . as something of a failure in terms of sexual violence . . . I believe [it] will be a forerunner of the richness of sexual assault jurisprudence.”¹⁶²

The *Tadic* case involved one of the most horrifying examples of sexual violence imaginable. Thirty witnesses testified to the treatment they had received at the hands of their captors, including *Tadic*.¹⁶³ One of these witnesses, Witness H, testified that he

was ordered to lick [Fikret Harambasic’s] naked bottom and G [another detainee] to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. All three were then made to get out of the pit onto the hangar floor and Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasic’s mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasic’s legs and, while the latter struggled, hit and bite his genitals. G then bit off one of Fikret Harambasic’s testicles and spat it out and was told he was free to leave. Witness H was ordered to drag Fikret Harambasic to a

¹⁵⁸ See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 427 (1993) (citing Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, U.S. Dep’t of State, to Sen. Arlen Specter (Jan. 27, 1993)).

¹⁵⁹ Patricia Viseur-Sellers, *Emerging Jurisprudence on Crimes of Sexual Violence*, 13 AM. U. INT’L L. REV. 1523 (1998).

¹⁶⁰ See ICTY Statute, *supra* note 10, art. 5.

¹⁶¹ See ICTR Statute, *supra* note 22, arts. 3, 4.

¹⁶² Viseur-Sellers, *supra* note 159, at 1528.

¹⁶³ See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T (ICTY May 7, 1997), *full text available at* <www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm>.

nearby table, where he then stood beside him and was then ordered to return to his room, which he did. Fikret Harambasic has not been seen or heard of since.¹⁶⁴

No one could identify Tadic as being present at this assault.¹⁶⁵ Witnesses did, however, identify Tadic as being present during beatings that occurred immediately prior to the torture of Harambasic.¹⁶⁶

The court considered the culpability of Tadic for his acts under Article 7(1) of the ICTY Statute addressing direct criminal responsibility.¹⁶⁷ The court reasoned that in order to attach individual responsibility to the defendant, it must first determine whether Tadic's conduct, which the prosecution had proven beyond a reasonable doubt, sufficiently connected him to the crime.¹⁶⁸ The court looked to the Nuremberg *Mauthausen* decision¹⁶⁹ as precedent for this question.¹⁷⁰ The court stated that:

when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well.¹⁷¹

Since "the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon [the victims] and thereby aided and abetted in the commission of the crimes,"¹⁷² the court found him guilty of crimes against humanity for inhumane acts under Article 3¹⁷³ and violations of the law and customs of war for cruel treatment arising from the Harambasic

¹⁶⁴ *Id.* ¶ 206.

¹⁶⁵ *See id.* ¶ 228.

¹⁶⁶ *See id.* ¶¶ 213-23.

¹⁶⁷ *See id.* ¶¶ 661-62.

¹⁶⁸ *See id.* ¶ 673.

¹⁶⁹ *See Mauthausen Concentration Camp Trial (Trial of Hans Alfuldisch and Six Others)*, Vol. XI Law Reports 15.

¹⁷⁰ *See Tadic*, UN Doc. IT-94-1-T, ¶¶ 676, 683.

¹⁷¹ *Id.* ¶ 690.

¹⁷² *Id.* ¶ 730.

¹⁷³ *See id.* ¶ 726.

incident.¹⁷⁴ Tadic's conviction for sexual assault under international law as the result of his encouragement of the act, absent any other active role, is significant.¹⁷⁵

4. *The Tadic Case and the Application of Grave Breaches to Internal Conflicts as well as International Conflicts*

The *Tadic* interlocutory appeal decision in 1995 confirmed the applicability of some principles of customary law to non-international armed conflicts, notably those set forth in The 1907 Hague Convention (IV) Respecting the Laws and Customs of War and annexed Regulations.¹⁷⁶ Dispute arose in the *Tadic* case over whether or not grave breaches of the Geneva Convention, which normally require a nexus with an international armed conflict, and which are usually inapplicable to internal conflicts, could be found on the facts of the *Tadic* case.¹⁷⁷ The Prosecutor initially succeeded in convincing the trial chamber that its jurisdiction over grave breaches of the Geneva Convention was not contingent upon a showing of international armed conflict.¹⁷⁸ On interlocutory appeal, however, the appellate chamber of the ICTY held that Article 2 of the ICTY Statute relating to grave breaches of the Geneva Convention applies only to offenses committed during an international armed conflict.¹⁷⁹

¹⁷⁴ See *id.* ¶ 730.

¹⁷⁵ In *Akayesu*, the ICTR further expanded the adjudication of sexual violence under the rubric of genocide. Prosecutor v. Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998) (visited Nov. 18, 1998) <<http://www.ictt.org/english/judgements/akayesu.html>>. Another case decided by the ICTR, *Kayishema*, also examined the role that sexual violence played in causing death. Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-7-T (May 21, 1999). A third case decided by the ICTY, *Furundzija*, considered the criminal responsibility of a commander charged with conducting an interrogation while the victim was being raped. Prosecutor v. Furundzija, Case No. IT-95-17/FT, ¶ 38 (1998) (visited Nov. 15, 1999) <<http://www.con.org/ICTY/furundzija/trialc2/judgment/main.html>>. These cases, along with *Tadic*, constitute the ICTY's and the ICTR's contributions to the arsenal of sexual violence jurisprudence clarifying and enhancing the protection afforded the international community.

¹⁷⁶ Convention Respecting the Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, 1 Bevens 631, 633.

¹⁷⁷ See Prosecutor v. Tadic, U.N. Doc. IT-94-1-AR72, ¶¶ 557-87 (ICTY Oct. 2, 1995).

¹⁷⁸ See *id.*, ¶¶ 588, 607-8.

¹⁷⁹ See *id.*, ¶¶ 77, 80-82.

The distinction between armed international conflicts and armed intervention in internal conflicts is a contentious one—typical of the choices that the world faces in this era of humanitarian emergencies.¹⁸⁰ The distinction poses a choice between humanitarian intervention in internal conflicts and the protection of self-determination and state sovereignty. The U.N. Charter allows states to use armed force against other states only in two situations: when required or permitted by a resolution of the Security Council pursuant to Article 42,¹⁸¹ or when acting in self-defense, pursuant to Article 51.¹⁸²

Protection of state-sovereignty and territorial integrity are the overriding principles limiting armed intervention to international rather than internal conflicts.¹⁸³ These principles are being eroded by customary law¹⁸⁴ and a counter-movement towards humanitarian intervention¹⁸⁵ and the protection of human rights. To intervene without Security Council sanction, as NATO did in Kosovo, is a violation of international law. Nevertheless, the Secretary General of the United Nations admitted that “shameful inaction,” like the failure to intervene in Rwanda, only invites “future Rwandas and Kosovos.”¹⁸⁶ The movement away from non-intervention and toward human rights protection is manifested by recent political incidents. Examples of such action include the

¹⁸⁰ David Rieff, *Wars Without End?*, N.Y. TIMES, Sept. 23, 1999, at A29.

¹⁸¹ See U.N. CHARTER art. 42.

¹⁸² See *id.* art. 51.

¹⁸³ Aaron Schwabach, *The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia*, 11 PACE INT'L L. J. 405 (1999); Aaron Schwabach, *Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention*, 27 SYRACUSE J. INT'L L. & COM. 77 (1999).

¹⁸⁴ See Editorial, *Kofi Annan's Critique*, N.Y. TIMES, Sept. 22, 1999, at A29. Kofi Annan criticized the NATO bombing of Kosovo but recognized that such regional approaches that lack U.N. endorsement are “bound to continue as long as the Security Council cannot unite. He stopped short of recommending reform of the Security Council's veto powers or its composition which still reflects the balance of world power after World War II.” *Id.*

¹⁸⁵ Christopher S. Wren, *Raise Intervention Abilities, Clinton Urges U.N. Members*, N.Y. TIMES, Sept. 22, 1999, at A18: “I know that some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world,” President Clinton said. *Id.* “We cannot do everything everywhere. But simply because we have different interests in different parts of the world does not mean we can be indifferent to the destruction of innocents in any part of the world.” *Id.*

¹⁸⁶ Rieff, *supra* note 180, at A29.

U.N. intervention in Kosovo, which was clearly not legally authorized under the U.N. Charter, and the intervention in East Timor,¹⁸⁷ which was sanctioned by the Security Council and verbal pronouncements by U.N. Secretary General Kofi Annan,¹⁸⁸ who now claims to support U.N. intervention in internal conflicts.¹⁸⁹ Similarly, the United Nations Security Council voted recently to send peacekeeping forces to Sierra Leone, whose deplorable record on human rights violations calls for humanitarian intervention.¹⁹⁰ Moreover, the United Nations may establish a peacekeeping operation in Congo in the near future. Thus, the tendency in the post-Cold War world is to advocate humanitarian intervention in internal conflicts even if this intervention means infringing on traditional protections of state sovereignty.

By broadening the definition of crimes against humanity to include internal conflicts as well as international conflicts, the

¹⁸⁷ See Barbara Crossette, *Annan Warns Indonesians that Inaction May Lead to Criminal Charges*, N.Y. TIMES, Sept. 11, 1999, at A6: "The Secretary General said he had been stunned by 'thousands of messages' reaching his office accusing the United Nations of abandoning the East Timorese. 'Let me assure you most emphatically that this is not the case,' he said." *Id.*

¹⁸⁸ See *Kofi Annan's Critique*, *supra* note 184, at A26: "Secretary General Kofi Annan made U.N. intervention the subject of a provocative opening speech on Monday. It should focus attention on a growing consensus that the world cannot simply watch mass slaughter when effective action is possible to prevent or stop future Kosovos and East Timors." *Id.*

¹⁸⁹ See Stanley Hoffman, *Principles in the Balkans, But Not in East Timor?* N.Y. TIMES, Sept. 11, 1999, at A25: "In East Timor, where rampaging militias supported by elements of the Indonesian army are terrorizing the population, there's no conflict between the fundamental principles of human rights and a nation's self-determination. Indonesia is an illegal occupier of East Timor, not a legal sovereign. . . . What this crisis points to once again is the need for regional organizations . . . to take over in emergencies like this one and put together a common force . . ." *Id.*

¹⁹⁰ Barbara Crossette, *6,000 U.N. Peacekeepers to be Sent to Sierra Leone*, N.Y. TIMES, October 23, 1999, at A4.

In Sierra Leone, rebels who fought the Government of President Ahmad Tejan Kabbah have been responsible for brutal acts of violence. The rebels chopped off the hands or legs of thousands of civilians, including many children, as warnings or punishment. Thousands of others have died, and a half a million people were driven from their homes.

Id. Amnesty was given to two competing rebel leaders in order to reach a peace agreement in Sierra Leone, but Richard C. Holbrooke said, "Like the Secretary General, we are concerned by the provisions for amnesty. We remain committed to justice and accountability." *Id.*

Tadic court seemed at first to be moving in the same direction as international customary law, a direction which is clearly required in view of the changes regarding the way wars are waged. The *Tadic* lower court tended toward protecting human rights when it decided to expand the definition of grave breaches of the Geneva Convention to include internal conflicts as well as international conflicts.¹⁹¹ However, by refusing to apply grave breaches to internal conflicts, the *Tadic* appellate decision marks a set back in the steady legal tide toward the application of a broader range of war crimes to internal conflicts.¹⁹² In her dissent from the decision on the *Tadic Interlocutory Appeal*, Judge Gabrielle Kirk McDonald noted that "a State-sovereignty-oriented approach has gradually been supplanted by a human-being oriented approach."¹⁹³ She concluded that, given the nature of current wars, the distinction between "international" and "internal" conflicts, which is critical in the application of many important international treaties to current conflicts and which characterizes international humanitarian law, is untenable at the end of the twentieth century.¹⁹⁴ It is interesting to note that in contrast to *Tadic*, the ICTY trial chamber found that there was an international armed conflict in Bosnia through 1992¹⁹⁵ in *Prosecutor v. Mucic and Landzo (Celebici Camp)*.¹⁹⁶

Thus, the Statute for ICTY affirms, and the *Tadic* case reaffirms, that crimes against humanity do not require a nexus with international wars. Both the ICTY and the ICTR criminalize rape as a crime against humanity.¹⁹⁷ One of the most important contributions of the ICTY is to clarify and expand the definition of crimes against humanity as it did in the *Tadic* decision.¹⁹⁸

¹⁹¹ See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T, ¶ 568 (ICTY May 7, 1997), full text available at <www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm>.

¹⁹² See *Prosecutor v. Tadic*, U.N. Doc. IT-94-1-AR72, ¶¶ 77, 80-82 (ICTY Oct. 2, 1995).

¹⁹³ *Id.* ¶¶ 72, 73.

¹⁹⁴ McDonald, *supra* note 1, at 24-35.

¹⁹⁵ Murphy, *supra* note 139, at 68.

¹⁹⁶ See *Prosecutor v. Mucic and Landzo*, Case No. IT-96-21-T, ¶¶ 233-34 (1998), <<http://www.un.org/icty/celebici/trialc2/jugement/main.htm>>.

¹⁹⁷ See ICTY Statute, *supra* note 10, art. 5; ICTR Statute, *supra* note 22, arts. 3, 4.

¹⁹⁸ See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T, ¶ 28-40 (ICTY May 7, 1997), full text available at <www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm>.

C. *Substantive Accomplishments of the ICTY: The Significance of the Erdemovic Case*¹⁹⁹ and the Defense of Duress and Superior Orders

The ICTY has made a significant contribution to the elucidation of some general principles of criminal law, particularly duress and superior orders.²⁰⁰ The holding in *Prosecutor v. Erdemovic* further clarifies the concept of command responsibility. Erdemovic participated in the execution of approximately 1200 unarmed civilian men in a town in eastern Bosnia.²⁰¹ He claimed that he had an obligation to obey the orders of his military superior.²⁰² He asserted that he acted under physical and moral duress, out of fear for his life and for that of his family.²⁰³ He testified that if he had refused to obey the orders, he was told that he would have been killed along with the victims.²⁰⁴ The majority, however, found that duress was not a complete defense “to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives.”²⁰⁵

In short, the work of the ICTY has demonstrated that international investigation and prosecution of persons responsible for serious violations of international humanitarian law are possible and credible.²⁰⁶ Apart from its substantive and procedural legal accomplishments, the ICTY has also had a significant impact on its international relations with states and with certain international organizations like NATO.²⁰⁷ The tribunal depends heavily on NATO for the extradition of indictees and for the

¹⁹⁹ Appeals Judgment, Case No. IT-96-22-A, (1997).

²⁰⁰ See *id.* ¶ 19.

²⁰¹ See *id.* ¶ 10.

²⁰² See *id.* ¶ 8.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T, ¶¶ 588, 697-8 (ICTY May 7, 1997) (McDonald, J., and Vohran, J., Joint Separate Opinion).

²⁰⁶ See Theodor Meron et al., *War Crimes Tribunals: The Record and the Prospects: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1509, 1512 (1998).

²⁰⁷ See Laura Palmer & Christina Posa, Recent Development, *The Best-Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground*, 12 HARV. HUM. RTS. J. 361, 377 (1999).

execution of warrants of arrests.²⁰⁸ NATO's cooperation is essential to the successful functioning of the tribunal.

IV. Shortcomings of the ICTY

After examining the accomplishments of the ICTY, one should realize its shortcomings. The failure to prosecute major war criminals because host nations are not willing to extradite the suspects is but one deficiency. The sentencing of "small fish" rather than principal perpetrators resulted in the failure of the ICTY to quell the unrest in the Balkans, which led to the tragic war in Kosovo.

A. Failure to Extradite Major Perpetrators

Despite the tribunal's obvious successes, the majority of the arrest warrants issued by the ICTY have been completely ignored.²⁰⁹ Twenty-nine publicly indicted persons remain at liberty,²¹⁰ most in the Republika Srpska and others in the Federal Republic of Yugoslavia. Both of these Republics in Yugoslavia refuse to cooperate with the ICTY, and they continue to show disregard for their Dayton Accords obligations.²¹¹ Certain states continue to ignore their legal obligation to pass domestic laws to conform to the obligations of the tribunal under Security Council Resolution 827.²¹² Nevertheless, due to the presence, performance, and power of the ICTY, individuals suspected of international humanitarian violations do face the real possibility of trial and conviction.

B. Failure to Maintain Peace

Recent events in Kosovo suggest that the ICTY has not maintained international peace and security in the territory of the former Yugoslavia. Nevertheless, to attribute that tragedy to the failure of the tribunal as an institution is to disregard the non-

²⁰⁸ See *id.*

²⁰⁹ See United Nations, *Fact Sheet, International Criminal Court for the Former Yugoslavia* (visited April 3, 2000) <<http://www.un.org/icty/glance/fact.html>>.

²¹⁰ See *id.*

²¹¹ See Palmer & Posa, *supra* note 207, at 368-71.

²¹² See Claudio Grossman et al., *International Support for International Criminal Tribunals and an International Criminal Court*, 13 AM. U. INT'L L. REV. 1413, 1432 (1998).

cooperation, noncompliance, and complacency that characterizes the culture of impunity in Yugoslavia and constitutes a cause of the Kosovo conflict. In Yugoslavia and in Bosnia and Herzegovina the continuing presence of many of the individuals who are charged with the responsibility for the conflict have hampered the post-war recovery. NATO began detaining indictees in Bosnia and Herzegovina in 1997; and it continues to do so.²¹³ Now there is widespread acceptance of the tribunal's existence and recognition of its role in the peace process.

The dual role of the Prosecutor of the ICTY is to investigate violations of humanitarian law in the territory of the former Yugoslavia and to prosecute those violations.²¹⁴ Prosecutor Louise Arbour recruited a team of investigators to look into the crimes allegedly committed in Kosovo. Pursuant to Security Council Resolution 1160 (1998) of 31 March 1998, Prosecutor Arbour went to Kosovo but was denied entry.²¹⁵ The government of the Federal Republic of Yugoslavia has flagrantly and continuously ignored the ICTY despite its obligation under the Dayton Accords to cooperate with requests, orders, and arrests. The President of the ICTY wrote to the Security Council four times and appeared before it twice urging immediate action to address Kosovo's non-compliance. The Prosecutor and the President of the ICTY wrote to NATO and to the Peace Implementation Council urging them to oversee the Dayton Accords and to alert the international community in an effort to seek legal means to deter the onslaught of war and to stop the atrocities occurring in Kosovo.²¹⁶

The ICTY lacks a legislative forum and a media outreach program to boost its public relations capacity in The Hague and in the former Yugoslavia. Such institutions would provide adequate means of transmitting, interpreting and implementing the results of the criminal proceedings for the public. As a result of insufficient media coverage and outreach programs, the tribunal currently suffers from anti-tribunal propaganda. The ICTY is portrayed as biased, slow, and inefficient. In the Republic of Yugoslavia the

²¹³ See Palmer & Posa, *supra* note 207, at 378-79.

²¹⁴ See *Fifth Annual Report of the ICTY*, *supra* note 59, ¶ 111.

²¹⁵ See Charles Trueheart, *A New Kind of Justice*, THE ATLANTIC MONTHLY, Apr. 2000, at 81-82.

²¹⁶ See *Fifth Annual Report of the ICTY*, *supra* note 59, ¶ 118.

Serbs claim the tribunal is bent on subjugating them.

In order for the ICTY to reach its goals of maintaining international peace and security, more states must assist the tribunal in bringing indictees to justice and in insuring that the rule of international humanitarian law prevails domestically. Therefore, the ICTY must work with national courts to prosecute the perpetrators, as was done at Nuremberg.²¹⁷ Non-cooperation, noncompliance and complacency only erode the tribunal's efforts to maintain peace through justice rather than by revenge.²¹⁸

V. The Accomplishments of the ICTR in Fulfilling its Aims to Foster Peace with Justice

In order to assess the accomplishments of the ICTR, this paper examines its substantive and procedural contributions to the development of international law which were made possible by two important decisions: the *Prosecutor v. Kambanda* case and the *Akayesu* case.²¹⁹

The ICTR has made significant progress in the prosecution of individuals responsible for the 1994 genocide of Tutsis and moderate Hutus in the territory of Rwanda. The *Akayesu* judgment is of particular historic significance because it defined rape in international law.²²⁰ Rape may constitute genocide under *Akayesu*.²²¹

The tribunal in Arusha has enjoyed recent success partially because it has received cooperation from various countries. Countries have assisted by: arresting accused persons; providing facilities for the incarceration of convicted persons; facilitating transfers of witnesses from their territories to the tribunal; and voluntarily donating financial and other material assistance.²²² Certain countries such as Australia, Austria, Belgium, Norway,

²¹⁷ See *id.* ¶ 295.

²¹⁸ See *id.* ¶ 294.

²¹⁹ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S (Sept. 4, 1998) (visited Nov. 18, 1998) <<http://www.ictr.org/english/judgements/kambanda.html>>; *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998) (visited Nov. 18, 1998) <<http://www.ictr.org/english/judgements/akayesu.html>>.

²²⁰ See *Akayesu*, Case No. ICTR 96-4-T, § 7.8, ¶ 215.

²²¹ See *id.*

²²² See *Press Release from Arusha on March 9, 1999* <<http://www.pict-pecti.org/news/archive/March/ICTRCooperation03.09.html>>.

Sweden, Trinidad and Tobago, and the United States have adopted domestic laws to facilitate their cooperation with the ICTR.²²³

When the President of Rwanda, Juvenal Habyarimana, was assassinated, which some believe to have been engineered by hard-line Hutus, violence erupted in Rwanda and resulted in the rape and mass murder of 800,000 people, mostly Tutsis. In addition to this massacre, the tragedy involved the forced deportation of two million people from within Rwanda's borders, and the exodus of over two million Hutus to Zaire, Burundi, Tanzania, Kenya and Uganda.²²⁴ The rate of slaughter of Rwandan victims was three to four times that of the number of Jews killed in the Holocaust.²²⁵

The ICTR was established to harness international cooperation in order to strengthen the Rwandan national judiciary, which faced the daunting task of trying large numbers of Rwandan suspects.²²⁶ Currently, the ICTR has indicted thirty-five individuals, and twenty-three individuals are in custody, including many of the top officials and principal organizers of the genocide.²²⁷

The ICTR judgments in *Akayesu* and *Kambanda* have made significant contributions to the establishment of a valuable historical record of events that took place in Rwanda in 1994. Both cases contribute to the expansion of international humanitarian law.

A. *The Kambanda Case*:²²⁸ *Personal Responsibility for Genocide*

The case against Rwandan ex-premier Jean Kambanda arose out of the tragic events that took place over a period of 100 days in 1994 during which the unspeakable slaughter of 800,000 Tutsis

²²³ See *id.*

²²⁴ Neil J. Kritz et al, *War Crimes Tribunals: The Record and the Prospects: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1470 (1998).

²²⁵ See *id.*

²²⁶ See *id.* at 471.

²²⁷ See *id.*

²²⁸ Prosecutor v. Kambanda, Case No. ICTR 97-23-S (Sept. 4, 1998) (visited Nov. 18, 1998). <<http://www.ictor.org/english/judgements/kambanda.html>>.

occurred in Rwanda.²²⁹ The ex-premier Kambanda pled guilty to all counts against him and thereby accepted personal responsibility for the genocide his nation committed.²³⁰

Genocide is a specific intent crime, as defined in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide²³¹ and in the Statute of the ICTR.²³² To secure a genocide conviction, a prosecutor must prove that one of the acts listed under Article 2(2) of the ICTR Statute,²³³ such as killing, causing serious bodily or mental harm, was committed against a targeted national, ethnic, racial or religious group with the intent to destroy the group "in whole or in part."²³⁴ Kambanda admitted that the annihilation of the Tutsis as a group was an intentional policy of his government.²³⁵ His confession, which evidenced his government's intentional policy of genocide, will be the basis of future ICTR prosecutions.

B. The Akayesu Case:²³⁶ Rape and Sexual Violence Defined as Genocide and War Crimes

The former Taba bourgmestre—or Mayor—Jean-Paul Akayesu is the first person to have been found guilty of genocide after a trial by an international tribunal. In addition, the *Akayesu* trial represents the first time an international tribunal has conceptualized sexual violence, including rape, as an act of genocide. In both the Statute of the ICTR²³⁷ and the Statute of the ICTY,²³⁸ rape may constitute an element of a crime against humanity. Rape is not included in the definition of genocide in

²²⁹ See *id.* ¶¶ P 39(i)-(xi).

²³⁰ See *id.* ¶¶ 5-7. Counts against him included genocide and crimes against humanity (murder). See *id.* ¶ 3.

²³¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

²³² ICTR Statute, *supra* note 22, art. 2(2).

²³³ *Id.*

²³⁴ *Id.* art. 2(2).

²³⁵ See *Kambanda*, Case No. ICTR 97-23-S, ¶ 39(i)-(xi).

²³⁶ Prosecutor v. Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998) (visited Nov. 18, 1998) <<http://www.ictr.org/english/judgements/akayesu.html>>.

²³⁷ ICTR Statute, *supra* note 22, art. 3(g).

²³⁸ ICTY Statute, *supra* note 10, art. 56.

either Statutes of the ICTY or ICTR.

Jean-Paul Akayesu, a Rwandan national, was born in 1953.²³⁹ He became mayor of Taba commune and remained in that office until 1994²⁴⁰ when he fled to Zambia. He was arrested in Zambia on October 10, 1995.²⁴¹ The final indictment against him contained a total of fifteen counts charging Akayesu with genocide, complicity in genocide, direct and public incitement to commit genocide, extermination, murder, torture, cruel treatment, rape, other inhumane acts and outrages upon personal dignity, crimes against humanity and violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II.²⁴²

In order to decide whether Akayesu was guilty of genocide, the court had to determine if genocide actually occurred in Rwanda. Genocide requires a special intent to destroy—in whole or in part—a national, ethnic, racial or social group. Therefore, it was necessary to determine the meanings of these specific categories, since they were not defined in the Genocide Convention or in the ICTR Statute.²⁴³ The Trial Chamber read the *travaux préparatoires* of the Genocide Convention and concluded that the drafters perceived the crime of genocide as targeting only stable, permanent groups whose membership is determined by birth.²⁴⁴ The problem with this definition is that the Tutsi-Hutu distinction in Rwanda does not fit into any of the categories.²⁴⁵ The Tutsis belong to the same religious groups and national group as the Hutus.²⁴⁶ The Tutsis and Hutus share a common language and culture.²⁴⁷

The Trial Chamber then asked whether the Tutsis constituted a stable and permanent group.²⁴⁸ They did constitute a group referred to as “ethnic” because they were forced to carry identity

²³⁹ See *Akayesu*, Case No. ICTR 96-4-T, § 1.4, ¶ 7.

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *id.* § 1.2, Counts 1-15.

²⁴³ See *id.* § 3, ¶¶ 217-31.

²⁴⁴ See *id.* § 3, ¶ 231.

²⁴⁵ See *id.* § 2, ¶¶ 143-151.

²⁴⁶ See *id.* § 2, ¶ 151.

²⁴⁷ See *id.* § 2, ¶¶ 143-151.

²⁴⁸ See *id.*

cards prior to 1994 on which the word “*ubwoko*,” or “ethnic group,” was referenced.²⁴⁹ The court found that at the time of the alleged events the Tutsis did constitute a stable and permanent group.²⁵⁰ The *Akayesu* court added “stable and permanent groups whose membership is largely determined by birth” to the four existing categories (national, ethnic, racial, and religious group) listed in the Geneva Convention.²⁵¹ The court even considered evidence of subjective societal perceptions in determining group distinctness. Clearly, the *Akayesu* Chamber has significantly expanded the kinds of groups that will be protected under the Geneva Convention.

In June 1997, an amended indictment was submitted adding three more counts of acts of sexual violence that were defined as “forcible sexual penetration of the vagina, anus, or oral cavity by a penis and/or the vagina or anus by some other object, and sexual abuse, such as forced nudity.”²⁵² The Trial Chamber had no difficulty deciding that *Akayesu* was guilty of rape as a crime against humanity.²⁵³ The prosecutor had to show that rape and sexual violence were committed with the specific intent to destroy, in whole or in part, a particular group—in this case the Tutsi women—in order to establish rape as genocide.²⁵⁴ Rape and sexual violence constitute inflictions of “serious bodily and mental harm,” which in part define genocide under Article 2(2) of the Statute of the ICTR.²⁵⁵ The Trial Chamber was satisfied that the acts of rape and sexual violence described by witnesses were perpetrated solely against Tutsi women who were subjected to humiliation, mutilation, and rape often in public and in the Bureau Communal where, ironically, they went for refuge.²⁵⁶ Because of the social stigma of rape and the added ethnic taboo of being violated by a member of the enemy camp, these rapes by Hutus resulted in the tragic destruction of Tutsi women, their families

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *Id.* § 1.2, ¶ 10A.

²⁵³ *See id.* § 7.8, ¶ 215.

²⁵⁴ *See id.* § 7.7, ¶¶ 125-50.

²⁵⁵ *See* ICTR Statute, *supra* note 22, art. 2(2).

²⁵⁶ *See Akayesu*, Case No. ICTR 96-4-T, § 7.8, ¶ 215.

and communities.²⁵⁷ Therefore, sexual violence committed on a mass scale in Rwanda, as it was in Bosnia, was held to be part of a concerted plan to destroy a whole group of defenseless women.²⁵⁸

Judge Pillay of South Africa, the only female judge on the tribunal, served on Trial Chamber I and participated in the *Akayesu* judgement.²⁵⁹ She remarked at the end of this grueling but significant case: "From time immemorial, rape has been regarded as spoils of war . . . now it will be considered a war crime. We want to send out a strong signal that rape is no longer a trophy of war."²⁶⁰

VI. The Shortcomings of the ICTR

The accomplishments of the ICTR far outweigh its shortcomings. Nevertheless, the ICTR has been besieged by complaints of corruption and inadequate facilities. Concerns have been raised that the underdeveloped infrastructure in Arusha, Tanzania hinders the periodic movement of the Prosecutor from the Hague Tribunal to the tribunal in Arusha. Additionally, the ICTR has failed to communicate its accomplishments effectively to the people of Rwanda. These failures, coupled with terrible pre-trial detention delays, have undermined the perceived efficacy of the tribunal.

VII. The Accomplishments of the World Court in Settling International Disputes

The activity of the World Court, or International Court of Justice, has increased dramatically since its formation in 1945.²⁶¹ The World Court, which is located in the Peace Palace in The Hague, is the principal judicial organ of the United Nations.²⁶² It was established pursuant to U.N. Charter Art. 92.²⁶³ This court

²⁵⁷ *See id.*

²⁵⁸ *See id.*

²⁵⁹ *See* Bill Berkeley, *Judgment Day*, WASH. POST, October 11, 1998, at W10.

²⁶⁰ *Id.*

²⁶¹ *See* Susan Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L.J. 1 (1997).

²⁶² *See id.* at 5.

²⁶³ *See id.*

hears disputes only between states.²⁶⁴ In its early years the World Court was severely criticized for being politically motivated rather than impartial.²⁶⁵ Critics called it a weak, even "moribund" forum. In 1985, the United States announced its general dissatisfaction with the World Court, withdrawing its declaration accepting the compulsory jurisdiction of the court.²⁶⁶ Since 1991 the World Court has increased its activity, especially in its advisory capacity, however. In contrast to the dismal picture of the World Court in the 1980s, the 1990s has seen a resurgence of effective adjudication of mainly territorial disputes.²⁶⁷

Since 1946 the World Court has delivered sixty dispute judgments concerning land frontiers and maritime boundaries, territorial sovereignty, the non-use of force, and the non-interference in the internal affairs of state.²⁶⁸ This last issue is of importance both to the development of the current crisis and to requests for U.N. intervention in Kosovo and East Timor. It also has possible implications for the conflict in Chechnya, should the strife there continue to escalate.

At least twenty-four cases are pending before the World Court at the time of this writing, and the General List of cases before the court has never been longer.²⁶⁹ In April 1999, eight new cases were added to the General List, all brought by Yugoslavia against various NATO member states in connection with the NATO air campaign over Kosovo.²⁷⁰

For the first time in the history of international law, the World Court heard a 1996 case involving state-sponsored genocide in which one nation seeks to enforce against another nation the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.²⁷¹ On April 29, 1996 the newly-formed nation of

²⁶⁴ *See id.*

²⁶⁵ *See id.* at 2.

²⁶⁶ *See id.* at 5.

²⁶⁷ *See id.* at 3-4.

²⁶⁸ *See id.*

²⁶⁹ Peter H.F. Bekker, *Recent Developments at the World Court*, ASIL NEWSLETTER, July-Aug. 1999, at 1 (visited March 29, 2000) <<http://www.asil.org/newsletter/julaug99/home.htm>>.

²⁷⁰ *See id.* The states named in these new cases included Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, and the United Kingdom. *See id.*

²⁷¹ *See* William L. Hurlock, *The International Court of Justice: Effectively*

Bosnia-Herzegovina brought testimony before the World Court alleging that the Federal Republic of Yugoslavia (Serbia and Montenegro) committed the crime of genocide during the war that took place in the former Yugoslavia.²⁷² The International Court of Justice ruled on July 11, 1996 that it had jurisdiction to decide the case.²⁷³ On July 29, 1996 the World Court ordered Serbia and Montenegro to answer Bosnia-Herzegovina's allegations of Genocide Convention violations no later than July 23, 1997.²⁷⁴ The court's decision will establish the scope and jurisdiction of international law into the next century, much like the Nuremberg trials did in 1945.

Nuremberg was a military tribunal accused of doing nothing more than doling out "victor's justice."²⁷⁵ In that sense, the ICTY, the ICTR and the World Court are quite different from the Nuremberg Tribunal. No nation until now had ever charged another nation with violating the provisions of the Genocide Convention.²⁷⁶ The International Court of Justice's assertion of jurisdiction under Article IX of the Genocide Convention²⁷⁷ advanced Bosnia-Herzegovina's aim to prove, for the first time in history, allegations of state-sponsored genocide.²⁷⁸

VIII. What Will the International Criminal Court Accomplish in its Aims to Foster and Maintain Peace Through Justice?

On July 17, 1998, the United Nations Diplomatic Conference of

Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia) 12 AM. U. J. INT'L L. & POL'Y 299, 300-301 (1997).

²⁷² Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. (Order for Preliminary Objections), General List No. 91, ¶¶ 12-14.

²⁷³ See *id.* ¶ 47.

²⁷⁴ See Hurlock, *supra* note 271, at 302.

²⁷⁵ See, e.g., Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 151 (1995) (discussing the reputation of military tribunals generally).

²⁷⁶ See Hurlock, *supra* note 271, at 307.

²⁷⁷ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX (visited Apr. 25, 2000) <http://www.unhchr.ch/html/menu3/b/p_genoci.htm>.

²⁷⁸ See Hurlock, *supra* note 271, at 328.

Plenipotentiaries on the Establishment of the International Criminal Court (the Rome Conference) adopted the Rome Statute of the International Criminal Court (Rome Statute).²⁷⁹ A permanent International Criminal Court (ICC) will effectively enforce norms of universal humanitarian law. Further exemplifying the paradox of our times, the United States has refused to sign the Rome Statute, even though for years the United States has demonstrated support for the establishment of a permanent tribunal for the adjudication of violations of humanitarian law.²⁸⁰

The ICTY and the ICTR have paved the way for the establishment of the ICC. The Rules of Procedure and Evidence of both the ICTY and the ICTR can serve as models for the Rules of Procedure and Evidence that must be drafted for the ICC. Rigorous requirements for the ICC judges have been established in the ICC Statute, including expertise in criminal and international law as well as judicial experience.²⁸¹ The goal is to select judges of the highest standards of ethics and impartiality to ensure a fair and expeditious trial.²⁸² For the judges to effectively manage and direct the proceedings of the ICC, the current President of the ICTY encourages that its rules be crafted to achieve flexibility and to afford sufficient discretion to its judges.²⁸³

The International Criminal Court arguably upsets the balance between the long-standing principle of sovereignty, which is firmly implanted in the legal doctrine and political policy of the United Nations, and the equally valid need to provide international humanitarian justice.²⁸⁴ A permanent international criminal court

²⁷⁹ Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9 (July 17, 1998) [hereinafter Rome Statute].

²⁸⁰ See The Honorable David J. Scheffer, *supra* note 11, at 1396.

²⁸¹ See Rome Statute, *supra* note 279, art. 36.3(b)(i), (ii).

²⁸² See *id.* art. 36.3(a).

²⁸³ See Gabrielle Kirk McDonald, Remarks made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia to the Preparatory Commission for the International Criminal Court at The Hague (July 30, 1999) (visited March 29, 2000) <<http://www.un.org/icty/pressreal/p425-e.htm>>. Judge Kirk McDonald observed, "[a] properly functioning permanent court will be humanity's best chance yet to move out of its self-destructive cycle. Justice is a vindication, an historical right, and a deterrent." *Id.*

²⁸⁴ See Patrica A. McKeon, Comment, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535, 535-45 (1997).

would require interference in state sovereignty in order to properly effectuate extradition, fact finding, and resource gathering.²⁸⁵ Protests have been lodged against the two ad hoc international criminal tribunals—the ICTR and the ICTY—for impermissibly encroaching upon the sovereignty of states. These objections were overcome because of the temporary nature and situation specific focus of the tribunals.²⁸⁶

As to the enforcement of ICC judgments, most scholars have tended to divide international crimes into two categories: crimes perpetrated by states (which can and have been adjudicated in the World Court), and crimes perpetrated by individuals (non-state actors). An international criminal court would give the international community the power to act against crimes of universal concern committed by individuals.²⁸⁷

The influence of the two ad hoc tribunals in the establishment of the ICC is evident on many levels. Like the ICTY and the ICTR, the ICC will have concurrent jurisdiction over genocide, war crimes, and crimes against humanity when national courts are unable or unwilling to prosecute such crimes.²⁸⁸ The Rome Statute of the ICC recognizes the importance of the ICTY's *Tadic* decision announcing that the nexus requirement between crimes against humanity and international armed conflict, as provided for in the ICTY Statute, does not reflect contemporary international law. Therefore, crimes against humanity can be adjudicated in peacetime pursuant to the Rome Statute of the ICC.²⁸⁹ Moreover, the inclusion of rape and other forms of sexual violence in Article 7(1) of the Rome Statute reflects the imprimatur of the *Akayesu* and *Tadic* cases and represents a marked improvement over the Nuremberg Charter.

IX. Conclusion

The twentieth century was both the bloodiest and the most technologically advanced century known to man.²⁹⁰ Paradoxically,

²⁸⁵ See *id.* at 561.

²⁸⁶ See *id.* at 545.

²⁸⁷ See *id.* at 535.

²⁸⁸ See Rome Statute, *supra* note 279, arts. 17.1, 17.2.

²⁸⁹ See *id.* arts. 6, 7.

²⁹⁰ See McDonald, *supra* note 1 and accompanying text.

we witnessed the establishment of numerous international tribunals designed to maintain peace, and we saw the systematic erosion of fundamental human rights and the outbreak of mass destruction in a recurring pattern of unspeakable humanitarian emergencies. The recent proliferation of international judicial bodies²⁹¹ reflects the need to address the increased hostility in our international society. The international tribunals have had some positive effects on efforts to foster and maintain lasting peace with justice. The *Tadic* case of the ICTY expanded the definition of crimes against humanity into non-international conflicts.²⁹² Nevertheless, the *Tadic* appellate court reversed the Trial Chamber's decision to apply grave breaches of the Geneva Convention to an internal conflict. This constitutes a legal setback in the trend toward humanitarian intervention.²⁹³ The *Tadic* court did, however, expand the definition of rape and included it as a crime against humanity, a grave breach of the Geneva Convention, and a war crime.²⁹⁴ The *Tadic* court also expanded evidentiary rules for the crime of sexual violence.²⁹⁵ The *Erdemovic* decision refined international law on the issue of command responsibility and the defense of duress and superior orders.²⁹⁶ The shortcomings of the ICTY are in large part due to the refusal of non-cooperative states to extradite major perpetrators,²⁹⁷ which weakens the tribunal's ability to keep peace.²⁹⁸

²⁹¹ See Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 699 (1999) (concluding that the proliferation of international tribunals does not threaten the coherence of the international legal system).

²⁹² See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T, ¶¶ 588, 697-8 (ICTY May 7, 1997).

²⁹³ See *Prosecutor v. Tadic*, U.N. Doc. IT-94-1-AR72, ¶¶ 77, 80-82 (ICTY Oct. 2, 1995); Meron et al., *supra* note 206, at 1515.

²⁹⁴ See *supra* notes 156-98 and accompanying text.

²⁹⁵ See *Prosecutor v. Tadic*, UN Doc. IT-94-1-T, ¶¶ 206-223 (ICTY May 7, 1997).

²⁹⁶ See *id.* ¶¶ 588, 697-8 (McDonald, J., and Vohran, J., Joint Separate Opinion).

²⁹⁷ See Statement by Judge Claude Jorda, President of the ICTY (Jan. 27, 2000), CC/P.I.S./466-E in *The United Nations* (visited March 29, 2000) <<http://www.un.org/icty/pressreal/p466-e.htm>>. "Of the more than 90 accused, sixty-six of whom remain indicted, thirty are still at large . . . we must . . . insist that all the accused be arrested." *Id.*

²⁹⁸ Despite the weakening of the peacekeeping aim, the ICTY continues to sentence war criminals. The ICTY sentenced Goran Jelusic to forty years in prison for theft,

In looking at the accomplishments of the ICTR, the *Kambanda* case established and disseminated an unequivocal record of genocide committed intentionally and systematically against the Tutsi people with the aim of exterminating the Tutsi ethnic group.²⁹⁹ Moreover, the *Kambanda* case is the first time a high-level individual was sentenced for personal responsibility in genocide. In the *Akayesu* case, rape and sexual violence were included as crimes which may rise to genocide or crimes against humanity.³⁰⁰

The World Court, which is the principle judicial organ of the United Nations, has increased its activity dramatically since 1981 and has adjudicated a genocide case committed by one sovereign state against another. This court can only hear cases by one nation against another and usually handles border disputes.

When the two ad hoc tribunals disappear because they have

causing bodily harm, and murder. See *Prosecutor v. Jeliscic and Cestic*, Case No. IT-95-10, ¶¶ 138-39 (1999) (visited Jan. 26, 2000) <http://www.un.org/icty/brcko/tialcl/judgment/jel-tj991214e.htm#_Toc473011913>. He was acquitted of genocide, but found guilty of violations of the laws or customs of war and of crimes against humanity. See *id.* The ICTY also recently unanimously found Milan Vujan, prior counsel of Dusko Tadic, in contempt of the tribunal. See *Judgment of Allegations of Contempt Against Prior Counsel Milan Vujan* in *Prosecutor v. Tadic*, Case No. IT-94-AR77 (visited March 29, 2000) <<http://www.un.org/icty/tadic/appeal/judgment/vuj-aj000131e.htm>>.

²⁹⁹ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, ¶¶ P 39(i)-(xi) (Sept. 4, 1998) (visited Nov. 18, 1998) <<http://www.ictor.org/english/judgements/kambanda.html>>.

³⁰⁰ See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, § 7.8, ¶¶ 157, 215 (Sept. 2, 1998) (visited Nov. 18, 1998) <<http://www.ictor.org/english/judgements/akayesu.html>>. The ICTR continues to function on a high level since the *Kambanda* case was decided. Georges Anderson Nderubumwe Rutaganda, leader of the Hutu militia, son of a diplomat and an urban businessman, was found guilty of genocide, crimes against humanity, and murder. He was sentenced to imprisonment for life on Dec. 6, 1999. See ICTR Press Release, *Rutaganda Convicted of Genocide and Sentenced to Life Imprisonment*, ICTR/INFO9-2-2/6en (Dec. 6, 1999) <<http://www.ICTR.org/>>. On January 27, 2000 the ICTR handed down a guilty verdict in the case of *Prosecutor v. Alfred Musema*, accused of genocide and crimes against humanity (extermination and rape). He was sentenced to life imprisonment. See Kingsley Chieder Moghalu, Spokesman for the ICTR, briefing to the media (Jan. 27, 2000) on *International Criminal Tribunal for Rwanda* (visited March 29, 2000) <<http://www.ICTR.org/>>. The ICTR has convicted 7 persons in total. The Appeals Chamber of the ICTR is scheduled to hear three cases from Feb. 12-17, 2000, including the *Serushago* case, the *Semanza* case, and the *Barayagwiza* case. See *id.* The United States Supreme Court denied a Petition for Writ of Certiorari by Elizaphan Ntakirutimana who was indicted by the ICTR but has been living in Texas since 1996. The U.S. Secretary of State is expected to surrender Ntakirutimana to the ICTR to face trial. See *id.* The ICTR is pleased at these positive developments and the cooperation of neighboring countries with the extradition of suspects. See *id.*

successfully adjudicated the serious violations of international humanitarian law in the territories of the former Yugoslavia and Rwanda, their roles will be taken up by the International Criminal Court. The ICC will have concurrent jurisdiction with national courts and jurisdiction over individuals. Note that the United States has refused to sign the Rome Statute establishing the ICC, even though for many years it has been an active proponent of such a permanent international tribunal.

The paradox of our century is mirrored in the development of international adjudication. On the one hand the world is shocked by the proliferation of criminal atrocities in our global society. On the other hand, the world can boast of a dazzling array of newly-established international judicial bodies, all of which are designed to provide speedy and impartial adjudication of these unspeakable crimes. We speak of peace and offer only punishment as a means to achieve that peace. We tout the virtues of justice, and we live in a culture of impunity. Instead of rehabilitating the criminal mind, we seek retribution and revenge.

But the madness of this century is not the madness that once was—a quest for power and turf. Now is the era of hate and fear of the other. The roots of this hatred spring from systematic victimization, subtle forms of disrespect, and blatant forms of discrimination designed to destroy all sense of self-worth. The international judicial system can and does play a role in the re-education of our hate-filled society, but it must play a more important role in teaching new values and in fostering respect for the rights of others.

The courts are beginning to integrate other disciplines into the legal process by harnessing the knowledge and expertise of professionals in diverse fields of social service. This multi-disciplinary approach to the law should be continued and expanded to create an integrated system. A more integrated system of international adjudication would reinforce respect for human dignity that underlies respect for the rule of law worldwide.