International Criminal Law

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International Criminal Tribunal for the Former Yugoslavia*

I. Introduction

The International Criminal Tribunal for the former Yugoslavia (Tribunal) was established on May 25, 1993, pursuant to United Nations Security Council Resolution 827. The mandate of the Tribunal is to "prosecut[e] persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. . . ."[1] The Statute of the International Tribunal (Statute), submitted by the U.N. Secretary-General and approved by the Security Council on May 25, 1993, provides the jurisdiction, organization, and general procedural parameters within which the Tribunal operates.

In its formative period, extending roughly from the time of its creation in May 1993 to 1995, the Tribunal was largely devoted to seating its judges,[2] appointing its Prosecutor,[3] and promulgating its Rules of Procedure and Evidence.[4] It also began investigating alleged offenses falling within its jurisdiction. As of October 1996, those investigations had resulted in the filing of eighteen indictments against 75 defendants.

By mid-1995, and continuing throughout 1996, the work of the Tribunal was no longer

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1. S.C. Res. 827 (1993).

2. The Tribunal consists of three organs: the judicial organ, called the "Chambers," the Prosecutor, and the Registry. Statute, art. 11. There are a total of eleven judges, comprising two three-judge trial chambers and one five-judge appellate chamber. *Id.*, art. 12. The President of the Tribunal, elected from among the judges, is Judge Antonio Cassese of Italy. *See id.*, art. 14.

3. Justice Richard J. Goldstone of South Africa served as the Prosecutor for the Tribunal from August 15, 1994, to September 30, 1996. Mr. Goldstone's successor is Justice Louise Arbour of Canada, who assumed the office of Prosecutor on October 1, 1996.

4. The Tribunal's Rules of Procedure and Evidence were adopted on February 11, 1994. They have been modified and amended on several occasions since that time.

limited to formative and investigative matters. Proceedings in several prosecutions progressed to stages requiring the Tribunal to consider for the first time its legitimacy and jurisdiction, to apply and interpret its own Rules of Evidence and Procedure, and to impose sentence on its first convicted defendant.

After providing necessary background information concerning the establishment of the Tribunal and the Statute under which it exists, this article will provide an abbreviated cross-section of cases now pending in the Tribunal, focusing on significant proceedings and rulings of the Tribunal during the latter period of 1995 through 1996.

II. Establishment of the Tribunal

The Tribunal is a creature of the United Nations Security Council, having been established pursuant to Chapter VII of the United Nations Charter.[5] Chapter VII authorizes the Security Council to identify the existence of a threat to international peace and security, and to determine what measures should be taken in response to that threat.[6] Security Council Resolution 827, which established the Tribunal, specifically found that the events in the former Yugoslavia constituted a threat to international peace and security and determined that the establishment of the Tribunal would "contribute to the restoration and maintenance of peace."[7]

III. The Statute of the International Criminal Tribunal for the Former Yugoslavia

The Statute of the Tribunal consists of 34 articles addressing jurisdiction, internal structure and certain procedural issues. Certain portions of the Statute that address jurisdiction and the rights of the accused, victims, and witnesses are pertinent to the discussion of recent developments at the Tribunal that is contained in Section V, *infra*.

A. Jurisdiction

Articles 1 through 9 of the Statute provide the Tribunal with its jurisdiction. Jurisdiction is defined in terms of subject matter, geographic location, period of time, and personal versus command criminal responsibility. Geographically and temporally, the Tribunal is empowered to prosecute conduct occurring within the territory of the former Yugoslavia after January 1, 1991.[8]

Articles 2 through 5 provide the Tribunal with its subject matter jurisdiction, identifying four distinct offenses which the Tribunal has the power to prosecute. Article 2 authorizes the Tribunal to prosecute grave breaches of the Geneva Conventions of 1949. Article 3 provides for prosecution of those persons violating the laws or customs of war. Article 4 addresses the crime of genocide.[9] Article 5 provides jurisdiction to prosecute "crimes against humanity."[10]

Article 7 of the Statute defines criminal responsibility vis à vis the status of the offender.

5. S.C. Res. 827 (1993).
6. U.N. Charter, ch. VII.
7. S.C. Res. 827 (1993).
8. Statute, art. 8.
9. Genocide is defined as the committing of certain acts such as killing or causing serious bodily or mental harm "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." *Id.* at art. 4.
10. Crimes against humanity include murder, enslavement, imprisonment, rape, or persecutions on political, racial, or religious grounds which are directed against civilians during the course of an armed conflict. *Id.* at art. 5.

Under Article 7, those persons who directly plan, order, or commit any of the offenses contained in Articles 2 through 5, or aid and abet in their commission, are individually responsible for those offenses.[11] In addition, Article 7 specifically provides for "command responsibility" liability, assigning criminal responsibility to superiors who know or have reason to know of prosecutable acts and who fail to prevent such acts from occurring.[12] Article 7 eliminates the defense of "superior orders," by which an accused may seek to avoid responsibility on the grounds that he was acting under orders.[13] Article 7 provides that an accused's status as a Head of State or government official is no defense, and may not be considered in mitigation of punishment.[14]

B. Procedural Protection for the Accused, Victims, and Witnesses

Articles 20, 21, and 22 of the Statute of the Tribunal relate to conduct of trial and rights of the accused, victims, and witnesses. Article 20 requires the Trial Chamber to ensure that the trial proceedings are fair and expeditious, and are conducted "with full respect for the rights of the accused and due regard for the protection of witnesses."[15] Article 21 provides procedural protections for the accused. These include the presumption of innocence,[16] the right to be fully informed of the nature of the charges, appointment of counsel for indigent accused persons, the right to examine adverse witnesses and to subpoena defense witnesses, and the privilege against self-incrimination.[17]

One unique provision that distinguishes the Statute of the Tribunal from other documents governing the conduct of criminal prosecutions is Article 22. Article 22 directs the Tribunal to

> provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.[18]

The concern for the protection of witnesses and victims shown in Article 22 reflects the Security Council's intent that the Prosecutor may include rape and sexual assault as predicate offenses to prosecute serious violations of international humanitarian law as set forth in Articles 2 through 5.[19] This represents an advancement in international humanitarian law, as rape and sexual assault in the course of an armed conflict historically have not been prosecuted as war crimes. The Nuremberg Charter contains no reference to rape. Article 5 of the Statute, on the other hand, specifically identifies rape as a predicate offense of crimes against humanity.

11. *Id.* at art. 7, ¶ 1.

12. *Id.* ¶ 3. This provision also imposes command responsibility liability on those who learn that prosecutable crimes have occurred and who fail to punish those directly responsible.

13. *Id.* ¶ 4. That an accused acted on superior orders may be considered as a mitigating factor at the time of imposition of sentence. *Id.*

14. *Id.* ¶ 2. Paragraphs 2 and 4 of Article 7, negating the Head of State and superior orders defenses, are consistent with the treatment of those defenses in the Nuremberg war crimes trials following World War II. *See* Nuremberg Charter, arts. 7, 8.

15. Statute, art. 20, ¶ 1.

16. *Id.* art. 21, ¶ 3.

17. *Id.* art. 22, ¶ 4.

18. *Id.* ¶ 4(a) through (g). As noted in the *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia* (Task Force of the ABA Section of International Law and Practice 1993) at 30, Article 21(e) of the Statute affords an accused the "right to examine" adverse witnesses, but does not provide the broader "right to confrontation" that is generally recognized in common law systems.

19. *See also* Rule 96, Rules of Procedure and Evidence, barring both consent as a defense to a charge of sexual assault and the admission of prior sexual conduct of the victim.

As will be discussed in Section V.D., *infra*, the tension between Article 21 (rights of the accused) and Article 22 (victims and witnesses) quickly precipitated what is viewed as one of the most significant procedural rulings of the Tribunal to date, weighing the accused's right to a fair trial against the interest of victims and witnesses in remaining anonymous.

IV. Dayton Peace Accords

On November 21, 1995, the parties to the Balkan conflict initialed the Dayton Peace Accords. In Article IX of the Dayton Accords, the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia each pledged to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.[20] Although not all parties to the Agreement appear to have fully honored their obligations under Article IX,[21] the fact that the Dayton Peace Accords implicitly recognize the Tribunal as necessary to the restoration of peace and security in the former Yugoslavia is an indication of the significance and independence the Tribunal has acquired in its three and one-half years of existence.

V. Survey of Selected Prosecutions

By mid-October 1996, eighteen indictments had been issued by the Tribunal against seventy-five defendants.[22] As of December 31, 1996, seven defendants were being detained near The Hague, Netherlands, where the Tribunal is seated. The remaining defendants were at large. Twenty-seven of the seventy-five defendants were in a position of authority, and are charged under the "command responsibility" prong of Article 7, ¶ 3. This Section describes recent proceedings and rulings of the Tribunal in four of its pending cases.

A. Prosecutor v. Radovan Karadzic and Ratko Mladic, Case Nos. IT-95-5-R61 and IT-95-18-R61

Of those charged with command responsibility liability, the most prominent are Radovan Karadzic and Ratko Mladic. Karadzic, president of the Bosnian Serb administration, and Mladic, commander of the Bosnian Serb army, are jointly accused in two separate indictments filed during 1995 with grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.[23]

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20. The preamble to the Dayton Accords notes that the Republika Srpska, the Serb entity in Bosnia-Herzegovina, had previously authorized the Federal Republic of Yugoslavia to sign the Accords on its behalf.

21. In remarks to the U.N. General Assembly on November 16, 1996, Tribunal President Antonio Cassese decried the lack of cooperation of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Republica Srpska (the Serb entity in Bosnia-Herzegovina) in failing to turn over indictees to the International Tribunal. *See* U.N. GA Press Release 9166, 59th meeting (1996).

22. *See* Third Annual Report of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. A/51/292-S/665 (1996).

23. *See* Prosecutor v. Radovan Karadzic and Ratko Mladic, Case No. IT-95-5-R61. This 16-count indictment, confirmed on July 25, 1995, is divided into three parts. Part 1 charges Karadzic and Mladic with offenses committed in connection with crimes against the civilian population and places of worship throughout Bosnia-Herzegovina. Part 2 is based on a sniping campaign against civilians at Sarajevo, Bosnia-Herzegovina. Part 3 charges the defendants in connection with the taking of United Nations peacekeepers as hostages and using them as human shields during late May and June 1995. The indictment alleges this was done to prevent NATO airstrikes against the Bosnian Serb military. A second indictment against Karadzic and Mladic was confirmed on November 16, 1995. Both were charged with violations of the laws or customs of war, genocide, and crimes against humanity in connection with mass executions at Srebrenica. Prosecutor v. Karadzic and Mladic, Case No. IT-95-18-R61.

In the most widely publicized proceedings of the International Tribunal to date, the Tribunal held hearings in July 1996 on the pending indictments against Karadzic and Mladic under Rule 61 of the Tribunal's Rules of Procedure and Evidence. Under Rule 61, in cases in which a defendant eludes service of the indictment and the process of the Tribunal, a judge may require the Prosecutor to disclose in open court all of the evidence on which the indictment was based.[24] If the Trial Chamber finds that there are "reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine."[25] Upon its finding of reasonable grounds, the Trial Chamber must then issue an international arrest warrant for the accused.[26]

A Rule 61 proceeding is not to be considered as a trial *in absentia*.[27] Rule 61 is nonetheless an innovative device which provides a mechanism for public disclosure of evidence acquired during the investigation of an indictee who has thus far eluded the Tribunal. Rule 61 proceedings provide a forum in which victims may testify publicly, furthering perhaps the victims' own healing process. An accused whose indictment is approved at the conclusion of Rule 61 hearings bears the stigma of being an international fugitive and is thereafter confined to the geographical boundaries of whatever State shelters him.

In June and July 1996, Rule 61 hearings were held on the indictments against Radovan Karadzic and Ratko Mladic. On July 11, 1996, the Trial Chamber found that there existed "reasonable grounds" to believe that Karadzic and Mladic had committed the crimes alleged in the indictments against them, and issued international warrants for their arrest.

B. Prosecutor v. Milan Martic, Case No. 95-11-R61

Milan Martic was the president of the Republic of Serbian Krajina (RSK). This indictment, confirmed on July 25, 1995, alleges that on May 2 and May 3, 1995, Martic ordered unlawful rocket attacks against the civilian population of Zagreb, Croatia (Counts 1 and 3), in retaliation for an offensive launched against RSK forces by Croatian armed forces. Counts 2 and 4 charge Martic for those same attacks under a command responsibility theory. Following a Rule 61 hearing held on February 27, 1996, in which four witnesses testified, the Trial Chamber found reasonable cause to believe that Martic had committed the offenses with which he was charged.

C. Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T

Drazen Erdemovic was charged on May 29, 1996, with violations of the laws or customs of war and crimes against humanity. The indictment alleges that Erdemovic participated as a member of the Bosnian-Serb Army in a mass execution of Bosnian Muslims from Srebrenica on July 16, 1995. Erdemovic was turned over to the Tribunal by authorities of the Republic of Yugoslavia. Erdemovic pled guilty on May 31, 1996, to the charge of crimes against humanity, stating that he would have been killed by his own forces had he refused to participate in the executions. On July 5, 1996, Erdemovic testified as a prosecution witness in the above-mentioned Rule 61 hearings attending the pending indictments against Radovan Karadzic and Ratko Mladic. On November 29, 1996, Erdemovic was sentenced to a ten-year term of imprisonment. He is the first defendant to be sentenced by the Tribunal.

24. Rule 61(A), (B), Rules of Procedure and Evidence.
25. *Id.* at Rule 61(C).
26. *Id.* at Rule 61(D).
27. The Tribunal's Statute and Rules do not provide for trials *in absentia*.

D. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T

Dusko Tadic was charged in an indictment filed on February 13, 1995, with individual criminal responsibility for grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity. Tadic is accused of killings and beatings at three work camps in which Muslim civilians were detained, and with deportation and prosecution of Muslim and Croat residents of the Prijedora region of Bosnia.

Tadic is the first defendant to go to trial at the Tribunal. The trial lasted from May 7, 1996, to November 28, 1996. The Trial Chamber is expected to return its verdict during early 1997.[28] The Tribunal's decisions on two pretrial motions, one filed by Tadic and the other filed by the Prosecutor, are among the most significant rulings of the Tribunal to date.

1. *Legitimacy of the Tribunal; Primacy; Subject Matter Jurisdiction*

Tadic raised three challenges to the power of the Tribunal to prosecute him.[29] Tadic first argued that the "establishment of the Tribunal is legally unfounded."[30] He suggested that the Tribunal could not be established by UN resolution, but rather was required to be formed by treaty, another consensual act of nations, or by amendment of the United Nations Charter.[31]

Next, Tadic challenged the primacy jurisdiction of the Tribunal, by which the Tribunal may request that a State defer to its competence to prosecute.[32] Tadic argued that Bosnia-Herzegovina and the Bosnian Serb Republic are independent States fully competent to prosecute those offenses occurring in their territory, and that the Tribunal's primacy jurisdiction was an unwarranted invasion of the domestic jurisdiction of those States.[33]

Tadic's third challenge was to the Tribunal's subject matter jurisdiction over the charges contained in his indictment. Tadic argued that the offenses with which he was charged, grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity (Articles 2, 3, and 5 of the Statue, respectively), only apply in *international* armed conflicts. He argued that the conflict in Bosnia-Herzegovina "concerns certain groups of the population inside this territory only and is therefore an internal armed conflict."[34]

In a decision filed on August 10, 1995, Tadic's Trial Chamber rejected each of his arguments. Relying first on three decisions of the International Court of Justice, the Trial Chamber held that the Tribunal had no authority to review the propriety of the Security Council's establishment of the Tribunal.[35] The Trial Chamber further observed that the Tribunal had been created

28. The Statute and Rules of the International Tribunal do not provide for jury trials. Under Rule 87 of the Rules of Procedure and Evidence, "a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt."

29. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Defence Motion on the Jurisdiction of the Tribunal (Motion on Jurisdiction).

30. *See id.* at 2.

31. *Id.* at 2-8.

32. *See* Statute, art. 9, ¶ 2.

33. Brief in Support of Motion on Jurisdiction, at 8-10.

34. *Id.* at 11.

35. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Decision on the Jurisdiction of the Tribunal, at 6-7 (Decision on Jurisdiction). The Trial Chamber relied on *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (Advisory Opinion, July 20, 1962); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (Advisory Opinion, June 21, 1971); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya vs. United States), 1992 I.C.J. 114, 176 (Provisional Measures Order of April 14, 1992).

pursuant to Chapter VII of the United Nation's Charter, based on the Security Council's finding that events in the former Yugoslavia constituted a threat to international peace and security. Relying in part on the United States Supreme Court decision in *Baker v. Carr*,[36] the Trial Chamber held that the Security Council's finding that events in the former Yugoslavia constituted a threat to peace was a nonjusticiable, political question inappropriate for judicial review.

> The making of a judgment as to whether there was an emergency in the former Yugoslavia that would justify the setting up of the International Tribunal under Chapter VII, is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving consideration of high policy and of a political nature.[37]

The Trial Chamber then disposed of Tadic's argument that the Tribunal's primacy jurisdiction under Article 9(2) of the Statute was an improper invasion of State sovereignty. The Trial Chamber again determined that it was not competent to review the Security Council's act granting primacy jurisdiction over that of national or domestic courts.[38] The Trial Chamber held that Tadic lacked standing to raise the issue of primacy because he was not a State, observing that the States with the closest ties to the case, Bosnia-Herzegovina and the Federal Republic of Germany, had unconditionally deferred to the jurisdiction of the Tribunal.[39]

The Trial Chamber then disposed of Tadic's claims that the Tribunal lacked subject matter jurisdiction of the offenses based on Articles 2, 3, and 5 of the Statute of the Tribunal. The Trial Chamber rejected the premise that none of those crimes applied in his case because there was no international armed conflict. The Trial Chamber held that internationality is not an essential element of the crimes alleged.[40]

Tadic filed an interlocutory appeal of the Trial Chamber's Decision on Jurisdiction. The five-judge Appellate Chamber affirmed the decision of the Trial Chamber on October 2, 1995.[41] However, the Appellate Chamber did not accept all of the reasoning of the Trial Chamber in reaching its decision. The Appellate Chamber disagreed with the Trial Chamber regarding the competency of the Tribunal to review the Security Council's establishment of it. The Appellate Chamber held that the Tribunal has "incidental jurisdiction" to consider whether the Security Council's establishment of the Tribunal was lawful and in compliance with the United Nations Charter.[42] "We are authorized to exercise this power of judicial review of the actions of a political body, the Security Council, merely to the extent necessary to satisfy ourselves that the Tribunal has authority to adjudicate."[43] The Appellate Chamber also rejected the Trial

36. 369 U.S. 186, 217 (1962).

37. Trial Chamber Decision on Jurisdiction, at 11.

38. *Id.* at 18.

39. The crimes Tadic was accused of committing occurred within the geographical territory of Bosnia-Herzegovina. Tadic was residing in Germany at the time of his arrest. *See id.*

40. *Id.* at 19-32.

41. Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appellate Chamber Decision on Jurisdiction). The decision, excepting separate opinions, is reproduced in its entirety at 7 CRIM. L.F. 51 (1996). A more detailed description and analysis of the decision may be found in Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L. L. 64 (1996).

42. Appellate Chamber Decision on Jurisdiction, at 9.

43. Statement of Tribunal President Cassese accompanying release of Appellate Chamber Decision on Jurisdiction, October 2, 1995.

Chamber's holding that consideration of the legitimacy of the Tribunal was a nonjusticiable political question.[44]

Regarding the Tribunal's primacy jurisdiction over the national courts, the Appellate Chamber fully affirmed the Trial Chamber decision that primacy did not violate the concept of State sovereignty.[45]

Turning finally to Tadic's challenge to the Tribunal's subject matter jurisdiction under Articles 2, 3, and 5 of the Statute, the Appellate Chamber again applied different reasoning than the Trial Chamber to arrive at the same result. The Appellate Chamber agreed with Tadic as to Article 2 of the Statute, holding that for grave breaches of the Geneva Conventions the alleged offenses must have been committed in an international armed conflict.[46] The Appellate Chamber affirmed the decision of the Trial Chamber which held that internationality is not required to prosecute offenses under Article 3 (violations of the laws/customs of war) and 5 (crimes against humanity).[47] The October 1995 Appellate Chamber decision on jurisdiction cleared the way for the *Tadic* trial to begin on May 7, 1996.

2. *Ruling on Protective Measures for Certain Victims and Witnesses*

In another notable decision, the *Tadic* Trial Chamber granted a prosecution motion seeking imposition of measures to protect prosecution witnesses and victims of offenses alleged in the indictment.[48] The measures sought were intended to protect certain victims from retraumatization in testifying, or to enable witnesses to testify without fear of retribution. The measures included a request that the identity of four prosecution witnesses not be disclosed whatsoever to Tadic or his counsel, and that three of those witnesses testify via voice and image altering devices.[49] Tadic opposed this request, asserting that his right to a fair trial would be undermined if he was prevented from knowing the identity of those witnesses.[50] Thus, the Tribunal was called upon for the first time to attempt to reconcile the rights of the accused with the rights of victims and witnesses.

The preliminary inquiry by the Trial Chamber in ruling on the Prosecutor's Motion for Protective Measures was to what extent the Tribunal was bound by interpretations and decisions of other judicial bodies in weighing the accused's right to a fair trial against the rights of victims and witnesses. Tadic's position was that the decisions of judicial bodies such as the European Court of Human Rights, which interprets the procedural guarantees afforded to accused persons under the European Convention on Human Rights, establish a minimum standard which must be observed in all criminal proceedings, including those of the Tribunal. Tadic argued that the measures sought by the Prosecutor for witness anonymity fell below that minimum standard.[51]

The Trial Chamber disagreed, relying on a variety of factors to determine that the International Tribunal is a unique judicial entity operating under unique conditions, and that it must therefore

44. "The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called 'political' or 'non-justiciable' nature of the issue it raises." Appellate Chamber Decision on Jurisdiction, at 11.

45. *Id.* at 25-34.

46. *Id.* at 44-48.

47. *Id.* at 53, 73.

48. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Decision on Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Decision re Protective Measures).

49. *Id.* at 4-5.

50. *Id.* at 6.

51. *Id.* at 6, 10.

be free to balance the rights of the accused and the rights of victims and witnesses.[52] The Trial Chamber noted that the Tribunal is the first international criminal tribunal ever established by the United Nations, and is the only judicial body drawing on both common law and civil law systems.[53] The Trial Chamber relied on those provisions contained in the Statute of the International Tribunal and its Rules that specifically provide for the protection of witnesses and victims. Article 22 of the Statute, for example, requires the Tribunal to provide in its Rules of Procedure and Evidence for the protection of victims and witnesses.[54] The Trial Chamber noted that neither the International Covenant on Civil and Political Rights, nor the European Convention on Human Rights, explicitly provides for the protection of victims and witnesses.[55]

The Trial Chamber then considered the Prosecutor's request that the identity of four witnesses remain anonymous. It first observed that a fair trial must not only be fair to the accused, but must also be fair to the prosecution and the witnesses.[56] The Trial Chamber noted that there exists significant precedent to support the derogation of certain procedural rights of accused persons in cases of national emergency and armed conflict:

> The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed, is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. . . . The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principal of the right to a fair trial are not wholly without qualification.[57]

The Trial Chamber held that the Statute and Rules of the Tribunal permit the identity of a witness to be kept anonymous, relying on the following five-part test employed by the English Court of Appeal in *R. v. Taylor*:[58]

1. there must be real fear for the safety of the witness or his/her family;
2. the evidence sought must be sufficiently relevant and important so that it would be unfair to the prosecution to require the prosecutor to proceed without it;
3. the Trial Chamber must be satisfied that there is no prima facie evidence, such as existence of a significant criminal record or status as an accomplice, that the anonymous witness is untrustworthy;
4. the ineffectiveness or nonexistence of a witness protection program; and
5. no less restrictive measures short of anonymity which could secure the witness's testimony.[59]

The *Tadic* Trial Chamber then laid down procedures designed to ensure a fair trial in the event that a witness testifies anonymously:

1. The judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony;
2. The judges must know the identity of the witness, in order to test the reliability of the witness;

52. *Id.* at 15.
53. *Id.* at 11-12.
54. *Id.* at 12-13.
55. *Id.* at 14.
56. *Id.* at 25.
57. *Id.* at 26.
58. R. v. Taylor, Transcript of Decision at 17 (CT) App. Crim. Div. (1994).
59. Decision re Protective Measures at 27-28.

3. The defense must be afforded ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts;
4. The witness's identity must be released when there are no longer reasons to fear for his or her safety.

In adopting these procedures, the Trial Chamber relied substantially on a decision of the European Court of Human Rights[60] and a provision of the German Criminal Code of Procedure.[61]

Applying the above factors to the case at hand, the *Tadic* Trial Chamber determined that the Prosecutor satisfied his burden of showing that it was necessary for four witnesses to testify anonymously. The Trial Chamber ordered that the voices and images of three of those witnesses be altered during their trial testimony.[62]

One of the Trial Chamber judges, Judge Ninian Stephen of Australia, filed a separate opinion disagreeing with the decision to grant anonymity to two of the prosecution witnesses. Judge Stephen's decision relied substantially on language contained in Articles 20, 21, and 22 of the Statute. He observed that Article 20(1) requires that trial be conducted fairly and "with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Judge Stephen noted the "marked contrast" in the language requiring "full respect" for the rights of the accused and "due regard" for the protection of victims and witnesses.[63] Turning to Article 21 (setting forth the rights of the accused) and Article 22 (directing the Tribunal to provide in its rules for the protection of victims and witnesses), Judge Stephen noted that under Article 21(2), the accused's right to a "fair and public hearing" is made subject to Article 22. Significantly, Judge Stephen noted, the remainder of Article 21, including the accused's right to examine adverse witnesses, is specifically not made subject to Article 22.[64] Judge Stephen concluded that "the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21. . . ."[65,66]

VI. Conclusion

Observers will view 1996 as the first full year in which the International Criminal Tribunal for the former Yugoslavia emerged from its formative period, entering an operational phase in which the prosecution of individual cases gave rise to unprecedented developments in international humanitarian law. These developments include refinement of the applicability of international humanitarian law in relation to armed conflicts, the attempt to reconcile the rights of

60. *See* Kostovski v. Netherlands Criminal Proceedings, 12 EHRR 434 (1990), ¶ 42 ECHR Series A, Vol. 166, 23 (1989). It should be noted that in *Kostovski*, the European Court of Human Rights held that the accused's right to a fair trial and to examine witnesses under Article 6, paragraphs (1) and (3) of the European Convention on Human Rights was violated by the use at trial of two anonymous witness statements acquired during the investigation.

61. *See* Article 68, German Criminal Code of Procedure (STPL).

62. Decision re Protective Measures, at 34-35.

63. *See* Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Separate Opinion of Judge Stephen), at 9.

64. *Id.* at 9.

65. *Id.* at 11.

66. For differing views on the legitimacy of the use of anonymous witness testimony in the Tribunal, *see* Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L. L. 236 (1996) (disapproving anonymity), and *amicus curiae* brief of Christine Chinkin on Protective Measures for Victims and Witnesses, submitted in Prosecutor v. Dusko Tadic, Case No. IT-94-1-T (Int'l Crim. Trib. for Former Yugo.), *reprinted in* 7 CRIM. L.F. 179, 189 (1996) (supporting anonymity).

the accused and the rights of victims and witnesses, and the creation of a public body of evidence against accused war criminals who remain beyond the reach of the Tribunal. Despite the importance of these developments, it may be that the most significant recent development concerning the Tribunal is the fact that its role in the restoration of peace and security in the former Yugoslavia was affirmed by the parties to that conflict themselves, in the Dayton Peace Accords of November 1995.

International Criminal Tribunal for Rwanda*

The International Criminal Tribunal for Rwanda (ICTR) was established pursuant to United Nations Security Council Resolution 955 in November 1994.[67] Like the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICTR is an *ad hoc* tribunal with limited temporal and territorial jurisdiction, empowered to prosecute persons responsible for serious violations of international law committed in and around Rwanda during the one-year period of January 1, 1994, to December 31, 1994.[68]

The Statute of the ICTR, which supplies jurisdiction, structure, and certain procedural features of the ICTR, was adopted as an Annex to Security Council Resolution 955. While a reading of the Statute of the ICTR reveals that it is closely patterned after the Statute of the ICTY in organization and content, a significant difference concerns subject matter jurisdiction. Both Tribunals have jurisdiction to prosecute genocide and crimes against humanity.[69] The ICTY has jurisdiction to prosecute violations of the laws or customs of war,[70] while the ICTR does not. The ICTR on the other hand has jurisdiction to prosecute serious violations of article 3 common to the Geneva Conventions of August 12, 1949, for the Protection of War Victims (Common Article 3) and the Additional Protocol II to that Convention, which was adopted in 1977.[71] The ICTY has jurisdiction to prosecute grave breaches of the Geneva Conventions of 1949, but not violations of Common Article 3 or the Additional Protocol II of 1977.[72]

Formation of the ICTR was executed in two separate phases. The first phase involved the appointment of the Deputy Prosecutor[73] and appointment of investigators and trial prosecutors. The second phase involved the election of judges by the Security Council[74] and further staffing. Pursuant to Security Council Resolution 977, approved on February 22, 1995, the official seat of the ICTR is Arusha, Tanzania.[75]

*Douglas Stringer is the author of this report also. Please see page 611 for complete biography.

67. S.C. Res. 955 (1994).

68. *See* Statute of the International Tribunal for Rwanda (Statute for the ICTR), arts. 1, 7. For prosecutable acts committed outside Rwanda in the neighboring states, the ICTR has jurisdiction over Rwandan citizens only. *Id.*

69. *See* arts. 4 and 5 of the Statute of the ICTY, and arts. 2 and 3 of the Statute of the ICTR.

70. *See* art. 3 of the Statute of the ICTY.

71. *See* Statute of the ICTR, art. 4.

72. *See* Statute of the ICTY, art. 2.

73. Article 15(3) of the Statute of the ICTR provides that the Prosecutor of the ICTY shall also serve as the Prosecutor for the ICTR. A separate Deputy Prosecutor is appointed to prosecute ICTR cases.

74. Article 12 of the Statute of the ICTR provides that the U.N. General Assembly shall elect the Tribunal's six Trial Chamber judges. The Appellate Chamber of the ICTY serves also as the Appellate Chamber of the ICTR. *See* Article 24 of the Statute of the ICTR, art. 12(2).

75. S.C. Res. 977 also established a suboffice for the ICTR located at Kigali, Rwanda.

The ICTR has since its inception been required to operate under significant financial and logistical constraints.[76] These difficulties were compounded by the disclosure in October 1996 that U.N. officials had begun investigating allegations that a senior U.N. official working within the Registry of the ICTR was intentionally impeding its work.[77] There have also been concerns for the safety and security of ICTR staff and prosecution witnesses.[78]

As of November 1996, the ICTR had indicted 21 persons, and 14 of those individuals were in custody awaiting trial.[79] Among the indictees are Theoneste Bagosora, who was indicted on August 9, 1996.[80] Mr. Bagosora is alleged to be a principal architect of the ethnic attacks against the Rwandan Tutsi population that followed the death of Rwandan President Juvenal Habyarimana in an airplane crash on April 6, 1994. The indictment charges Mr. Bagosora, who was the Director of the Cabinet of the Rwandan Ministry of Defence, with genocide, crimes against humanity, and serious violations of Common Article 3. The indictment alleges that Mr. Bagosora assumed *de facto* control of the military and political affairs of Rwanda shortly after the death of the Rwandan president, and that through his acts and omissions Bagosora brought about the deaths of members of the Rwandan Tutsi population as well as ten Belgian soldiers who were disarmed and executed by forces of the Rwandan Presidential Guard. Mr. Bagosora was arrested in Cameroon in March 1996 and is now in the custody of the ICTR awaiting trial.

Trials of a number of additional indictees who are in the custody of the ICTR are scheduled to begin in early 1997.

The U.S.-U.K. Supplementary Extradition Treaty and the Political Offense Exception*

The first invocation of a novel defense against extradition of Irish fugitives ended in August 1996 with the return of James Joseph Smyth to the Maze Prison outside Belfast.[81]

Smyth and 38 others had escaped from the Maze in 1983.[82] Smyth had been serving a twenty-year sentence following his 1978 conviction in a Diplock court—a nonjury system established to hear charges related to the political violence in Northern Ireland—for attempted

76. *See* Press Statement by the Prosecutor of the International Criminal Tribunal for Rwanda, ICTR/INFO-9-2-2-04, April 4, 1996. "At the present time, the Prosecutor has on his staff in Kigali only 24 investigators. There is a chronic shortage of interpreters, and there are no analysts. The office is seriously under-staffed and under-resourced."

77. *U.N. Probing Irregularities at Rwanda War Crimes Unit*, WASHINGTON POST, October 31, 1996.

78. *See* U.S. Department of State Dispatch, October 14, 1996, at 5.

79. *See id.*

80. Prosecutor v. Theoneste Bagosora, Case No. ICTR-96-7-I.

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81. *See* Jim Herron Zamora, *Escapee Smyth Sent Back to N. Ireland.: Extradited from S.F. to Finish Sentence for Attempted Murder*, S.F. EXAMINER, Aug. 19, 1996, at A2. In 1993 a black man's efforts to use the defense was rebuffed on the ground that the defense was drafted to apply to discrimination in Northern Ireland, not in the entire United Kingdom. *In re* Extradition of Howard, 996 F.d 1320 (1st Cir. 1993).

82. Matter of Requested Extradition of Smyth, 61 F.3d 711, 713 (9th Cir. 1995) *(Smyth II), reb'g*, 863 F. Supp. 1137, 1137 (N.D. Cal. 1994) *(Smyth I), reb'g denied*, 72 F.3d 1433 *(Smyth III), cert. denied*, 116 S. Ct. 2558 (1996) *(Smyth IV)*.

murder of a prison officer.[83] In 1992 U.S. authorities arrested Smyth at his home in San Francisco, and the United Kingdom requested his extradition.[84]

At this point Smyth's case diverged from those of Irish fugitives earlier found in the United States. In the late 1970s and early 1980s several had argued that the 1972 U.S.-U.K. Extradition Treaty barred extradition because their offenses fell within the political offense exception, one of few exceptions to the traditional rule that courts will not inquire into the fairness of the requesting country's justice system.[85] In the most publicized Irish case, Joseph Doherty had admitted both Irish Republican Army membership and participation in an ambush that resulted in the death of a British Army captain.[86] Yet the U.S. District Court in Manhattan, commenting that "the facts of this case present the assertion of the political offense exception in its most classic form," denied extradition.[87] Two other relators similarly succeeded.[88]

Angered at these successes and voicing concern that continued application of the political offense exception could foster terrorism, the Reagan and Thatcher administrations negotiated a Supplementary Treaty abolishing the exception for many crimes.[89] The U.S. Senate gave its advice and consent in 1986, but only after inserting Article 3(a), which set forth a new defense:

> Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would,

83. *Smyth II*, 61 F.3d at 712-14.

84. *Id.* at 713.

85. See BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 27, 36-46 (1991). The political offense exception stated: "Extradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested Party as one of a political character. . . ." Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, 230, T.I.A.S. No. 8468, art. V(l)(c)(I); on the relation between the exception and the rule of noninquiry, see *Smyth II*, 61 F.3d at 714 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476(2) (1986)). *Cf.* John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C.J. INT'L L. & COM. REG. 401 (1990) (discussing other exceptions to rule).

86. Matter of Doherty, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

87. *Id.* at 276-77. The court applied the exception to Doherty's case because: his offense did not relate to mass bombing or some other violation of international law; he acted not for himself but for a disciplined political organization; and his target was not a civilian but a soldier. *Id.* at 274-77.

The nonextradition order could not be appealed. United States v. Doherty, 615 F. Supp. 755, 756 (S.D.N.Y 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1996). Eventually, however, Doherty was deported to the United Kingdom and returned to prison. Craig R. Whitney, *LP-A. Guerrilla Is Back in a Familiar Belfast Jail*, N.Y. TIMES, Feb. 21, 1992, at A5; *see* I.N.S. v. Doherty, 112 S. Ct. 719 (1992).

88. Invocation of the exception succeeded in *In re* McMullen, No. 3-78-1899 M.G. (N.D. Cal. 1979), *reprinted in* 132 Cong. Rec. 16,585 (1986); *In re* Mackin, No. 86 Cr. Misc. I (S.D.N.Y. Aug. 13, 1981), *appeal denied*, 668 F.2d 122 (2d Cir. 1981); and Matter of Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), but not in Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). *See* Kelly D. Talcott, Comment, *Questions of Justice: U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States–United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME L. REV. 474, 475-76 & n. 8 (1986); *accord* YARNOLD, *supra* note 85, at 36-46 (analyzing reasons for successes).

89. Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, U.S.-U.K., *reprinted in* 24 I.L.M. 1104 (1985). *See Smyth II*, 61 F.3d at 714 (reasons for eliminating political offense exception); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 79 AM. J. INT'L L. 1045-47 (1985) (same). The United States attempted to negotiate similar abolitions with a few other countries, with mixed results. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1476 n.196 (1988) (citing Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986)).

> if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.[90]

In words that echo a U.S. civil rights or asylum statute,[91] this unique provision thus instructs courts not to extradite on a showing that for an impermissibly discriminatory reason the requesting country either: (1) " 'trumped up' charges against the fugitive," or (2) would cause the fugitive prejudice at trial or in punishment, detention, or other restrictions on personal liberty.[92]

Smyth based his challenge to extradition on the second clause. In a five-week hearing before the U.S. District Court in San Francisco, he called twenty-two witnesses and presented exhibits: the history and status of the conflict in Northern Ireland; British efforts to suppress violence through suspension of civil rights and other emergency measures; allegations that British security forces were involved in killings of Irish republicans; abuse of Maze escapees who had been recaptured; and mistreatment of Smyth himself, before and after his 1978 conviction.[93] Noting that Article 3(a) required it to "make a prediction as to what will happen in the future," the District Court concluded that Smyth was likely to suffer physical assault and other abuse, perhaps even "retaliatory killing," in prison, and "[a]rrests, detentions and interrogations" on release.[94] These extralegal restrictions would result not because of Smyth's offense, the court ruled, but because of his Catholic-religious heritage, his Irish nationality, and his political status as a republican and member of Sinn Fein.[95] It thus denied extradition.[96]

A panel of the U.S. Court of Appeals for the Ninth Circuit reversed.[97] Rejecting the government's contrary argument, it held that the second clause of Article 3(a) extends to likely harm not only during incarceration, but also after release.[98] it recognized that Article 3(a) encroaches on

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90. Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of American and the Government of the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, U.S.-U.K., *as amended*, T.I.A.S. No. 12050, *entered into force* Dec. 23, 1986 (Supplementary Treaty). The Senate also deleted some crimes from the list of those to which the political offense exception does not apply, retaining violent offenses such as murder, kidnapping, and bombing. *See id.* art. 1. For a description of the Senate debate, see *Smyth II*, 61 F.3d at 714-16.

91. *Compare* Supplementary Treaty, art. 3(a) *with, e.g.*, 42 U.S.C.A. § 2000e-2(a) (1994) (making certain employment practices against an individual unlawful if done "because of such individual's race, color, religion, sex, or national origin"); 42 U.S.C.A. § 3604 (1994) (proscribing discrimination in housing "because of race, color, religion, sex, familial status, or national origin"); and 8 U.S.C.A. § 1253(h)(1) (Supp. 1996) ("The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."). The district court analogized Article 3(a) to the last statute, *Smyth I*, 863 F. Supp. at 1151, but the Ninth Circuit held this comparison inapposite, *Smyth II*, 61 F.3d at 719-20.

92. *Smyth I*, 863 F. Supp. at 1150.

93. *Smyth II*, 61 F.3d at 717-18; *see Smyth I*, 863 F. Supp. at 1139-48. The District Court defined "republicans" as those who support unification of Northern Ireland with the Republic of Ireland, and "who believe that the use of violence is a legitimate means of pursuing that goal." *Smyth I*, 863 F. Supp. at 1139. Not all republicans use violence, according to this definition. *Id.* at 1139.

94. *Smyth I*, 863 F. Supp. at 1151. As an independent ground for denial, the court ruled that the United Kingdom had failed to rebut presumptions imposed as sanctions for the United Kingdom's refusal to comply with a court order to produce for *in camera* review internal reports that Smyth had sought in discovery. *Id.* at 1151-52. The Ninth Circuit rejected this sanction. *Smyth II*, 61 F.3d at 720-21.

95. *Id.* at 1155. The court expressly declined to decide if Smyth belonged to the IRA. *Id.* at 1147. The Ninth Circuit first labeled Smyth an IRA member, but later amended its opinion to state that he is "reputedly . . . a member." Requested Extradition of Smyth, 73 F.3d 887 (9th Cir. 1995). *See also Smyth III*, 72 F.3d at 1435-36 (Noonan, J., dissenting from failure to take en banc).

96. *Smyth I*, 863 F. Supp. at 1155.

97. *Smyth II*, 61 F.3d at 722. The treaty's authorization of an appeal is another innovation. *See id.* at 713 (citing Supplementary Treaty, art. 3(b)).

98. *Smyth II*, 61 F.3d at 719.

the traditional rule of noninquiry,[99] yet construed the defense narrowly in order not to frustrate "the overall purpose of extradition treaties—to facilitate criminal prosecution and punishment."[100] Thus requiring an "individualized inquiry," it discounted conclusions the district court had drawn from general evidence of political violence and persecution in Northern Ireland.[101] It appeared to agree that Smyth was likely to face restrictions on his liberties, yet held that Smyth had failed to shoulder the "difficult burden" of showing that the restrictions would be motivated by his religious or political status, and not because of the nature of his convictions.[102]

Smyth's request for rehearing en banc was denied over searing dissents joined by three judges.[103] The U.S. Supreme Court denied Smyth's petition for certiorari and he was extradited.[104] In *Smyth* the Ninth Circuit properly recognized that Article 3(a) requires courts to inquire how security officials in Northern Ireland would treat a relator, not only during trial and punishment, but also after release. But it imposes on fugitives a nearly impossible burden, thus undermining the Senate's purpose in inserting Article 3(a).[105] The standard also counters settled doctrine in the similar contexts of U.S. civil rights and asylum law.[106] That law does not require proof that discrimination stems solely from an impermissible reason; rather, a claimant may prevail by showing that the impermissible reason was a motivating factor.[107] Furthermore, that law permits fact finders seeking to determine the existence of a forbidden motive to look not only at specific abuse suffered by the claimant, but also at general mistreatment.[108] Courts reviewing Article 3(a) in the future should apply these analogues and bar extradition upon a showing, based both on specific and general evidence, that extralegal punishment would derive in substantial part from an impermissibly discriminatory motive.[109]

99. *Id.* at 720; *see id.* at 715 n.3 (quoting Senate debate).

100. *Id.* at 720.

101. *Id.* at 719-20.

102. *Id.* at 720-22.

103. *Smyth III*, 72 F.3d at 1433 (dissenting opinions by Noonan and Reinhardt, JJ., joined by O'Scanniain, J.).

104. *Smyth IV*, 116 S. Ct. at 2558; *supra* note 81.

105. *See Smyth III*, 72 F.3d at 1441-43 (Reinhardt, J., dissenting from failure to take en banc). The Article 3(a)–based cases of three other Maze escapers were pending in U.S. District Court in San Francisco at the time of Smyth's extradition. See Owen Bowcott, *Battle Continues for Return of Ulster's Wanted Men*, THE GUARDIAN, Aug. 6, 1996, at 4, *available in* 1996 WL 4037724.

106. *See supra* note 91.

107. *See, e.g.*, Bristow v. Drake Street Inc., 41 F.3d 345 (7th Cir. 1994) (applying Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), holds that once plaintiff shows unlawful motive for employment decision, burden shifts to employer to show legitimate motive); Burris v. Wilkins, 544 F.2d 991 (5th Cir. 1977) (burden on plaintiff in Fair Housing Act case not to show that refusal to rent was "solely" because of race, but only that race was "significant factor"); Strauss v. Microsoft Corp., 814 F. Supp. 1186 (S.D.N.Y. 1993) (under mixed-motives method of proof, plaintiff can establish employment discrimination if she can demonstrate that illegitimate factor, such as gender, played motivating or substantial role in employment decision).

Had that standard been applied, Smyth well might have prevailed in the Court of Appeals as well as in the district court. *See Smyth III*, 72 F.3d at 1442-43 (Reinhardt, J., dissenting from failure to take en bane) (". . . Smyth submitted evidence . . . that *he* had been beaten and tortured *long before* he had ever been charged with a crime. Even the panel, presumably, would have to agree that this is strong evidence that a substantial part of the barbaric treatment to which he was subjected was not related to any crime whatsoever.") (emphases in original). *See also id.* at 1437 (Noonan, J., dissenting from failure to take en banc).

108. *See Smyth III*, 72 F.3d at 1440-42 (Reinhardt, J., dissenting from failure to take en banc) (citing Zavala-Bonilla v. I.N.S., 730 F.2d 562, 564 (9th Cir. 1984) (assessing general and specific evidence in asylum case)).

109. In the meantime, relators may seek additional relief under the first, and as yet uninterpreted, clause of Article 3(a). *See Escaper Fights UK Attempts to Return Him from U.S.*, IRISH TIMES, Nov. 7, 1996, at 5, *available in* 1996 WL 12409108 (in opening statement, attorney for Irish fugitive Kevin Artt alleges that charges were "trumped up").