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Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg*, 60 ALB. L. REV. 861 (1997).

#### ALWD 7th ed.

Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg*, 60 Alb. L. Rev. 861 (1997).

#### APA 7th ed.

Scharf, M. P. (1997). *The prosecutor v. dusko tadic: an appraisal of the first international war crimes trial since nuremberg*. *Albany Law Review*, 60(3), 861-882.

#### Chicago 17th ed.

Michael P. Scharf, "The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg," *Albany Law Review* 60, no. 3 (1997): 861-882

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#### AGLC 4th ed.

Michael P. Scharf, 'The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg' (1997) 60(3) *Albany Law Review* 861

#### MLA 9th ed.

Scharf, Michael P. "The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg." *Albany Law Review*, vol. 60, no. 3, 1997, pp. 861-882. HeinOnline.

#### OSCOLA 4th ed.

Michael P. Scharf, 'The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg' (1997) 60 Alb L Rev 861  
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# **THE PROSECUTOR v. DUSKO TADIC: AN APPRAISAL OF THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG**

*Michael P. Scharf\**

## **I. INTRODUCTION**

During the twentieth century, four times as many civilians have been victims of war crimes and crimes against humanity than were soldiers killed in all the international wars combined.<sup>1</sup> After the Nazis exterminated 6 million Jews during the Holocaust, the world community proclaimed "never again." The victorious Allied powers set up an international tribunal at Nuremberg to prosecute the Nazi leaders for their monstrous deeds. There was hope that the legacy of Nuremberg would lead to the institutionalization of a judicial response to atrocities wherever and by whomever committed across the globe.

Yet, the pledge of "never again" quickly became the reality of "again and again" as the world community failed to take action to bring those responsible to justice when 4 million people were murdered during Stalin's purges (1937-1953), 5 million were annihilated during China's Cultural Revolution (1966-1976), 2 million were butchered in Cambodia's killing fields (1975-1979), 30,000 disappeared during Argentina's Dirty War (1976-1983), 200,000 were massacred in East Timor (1975-1985), 750,000 were exterminated in Uganda (1971-1987), 100,000 Kurds were gassed in Iraq (1987-1988), and 75,000 peasants were slaughtered by death

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<sup>1</sup> Professor Rudi Rummel documents that as many as 170 million persons have been murdered by their own governments. See RUDOLPH J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994).

squads in El Salvador (1980-1992).<sup>2</sup> The United Nations (U.N.) High Commissioner for Human Rights summed up this state of affairs when he recently observed that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000."<sup>3</sup>

In the summer of 1992, the world learned of the existence of Serb-run concentration camps in Bosnia-Herzegovina, where conditions were reminiscent of the Nazi-run camps of World War II.<sup>4</sup> Soon, daily reports of acts of unspeakable barbarity committed in the Balkans began to fill the pages of our newspapers.<sup>5</sup> The city of Sarajevo, which had recently impressed the world as host of the 1984 Winter Olympics, was transformed from a symbol of ethnic harmony into a bloody killing ground. For the first time since World War II, genocide had returned to Europe. The international outcry was deafening.

Against great odds, the Yugoslavia War Crimes Tribunal was established on May 25, 1993.<sup>6</sup> Within a year and a half, the judges had been elected, a prosecutor and his staff appointed, a courtroom and detention center erected, rules of procedure promulgated, and the first indictments issued.<sup>7</sup> Among the first to be charged by the

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<sup>2</sup> See Arlene Levinson, *World Wipes Bloody Hands as Century Nears End; Advance of Civilization Has Brought with it Decline in the Value of Sanctity of Life*, PEORIA J. STAR, Sept. 17, 1995, at A1.

<sup>3</sup> *Quote of the Month*, 8 BULLETIN OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1 (May 14, 1996) (quoting Jose Anala Lassa).

<sup>4</sup> See, e.g., John F. Burns, *Horrors in Bosnia Recall Nazi Atrocities; Killings, Rapes, Abuse Prompt Comparisons*, ORANGE COUNTY REG. (Cal.), June 21, 1992, at A1 (reporting on the horrific conditions of the concentration camps in Bosnia); Roy Gutman, *Prisoners of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia*, NEWSDAY (N.Y.), July 19, 1992, at 7 (same); Dave Todd, *Serbian Concentration Camps Reported in Bosnia: Muslims, Croats Face Expulsion at Gunpoint*, VANCOUVER SUN (Can.), July 31, 1992, at A8 (same).

<sup>5</sup> See, e.g., Louise Branson, *Yugoslav Atrocities Take on Sinister Name*, S.F. EXAMINER, July 30, 1992, at A1 (describing the realities of the term "ethnic cleansing"); Roy Gutman, *Eyewitness: Tales of Torture in Serb "Concentration Camps," The Serbs Call Them Prisoners of War But Inmates Tell of Routine Torture in the Army's "Concentration Camps,"* GUARDIAN (London), July 20, 1992, at 1 (reporting on conditions at a Manjaca "prisoner of war" camp); Dave Todd, *The Human Toll of Bosnia's War Refugees, Orphans and Now Reports of Concentration Camps*, MONTREAL GAZETTE, July 31, 1992, at A1 (reporting on Serbian "ethnic cleansing" actions); *Hundreds Reported Killed in Two Serbian Camps*, SEATTLE TIMES, Aug. 2, 1992, at A11 (reporting on the conditions at concentration camps in Bosnia).

<sup>6</sup> See *United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) [hereinafter S.C. Res. 827].

<sup>7</sup> See generally 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995) (discussing the

Tribunal was Dusko Tadic, a Bosnian Serb pub owner, karate instructor, and part-time traffic cop.<sup>8</sup> Tadic had recently moved to Germany, where he was taken into custody after being identified as the "Butcher of Omarska" by Bosnian refugees who had been interned in the infamous Serb-run Omarska concentration camp.<sup>9</sup> Tadic was charged with thirty-four counts of crimes against humanity and grave breaches of the Geneva Conventions, including the murder, rape and torture of Muslim men and women within and outside the Omarska camp.<sup>10</sup> Tadic's trial, the first before the new international war crimes tribunal, began on May 7, 1996.<sup>11</sup> Over 120 witnesses testified during the seven-month trial, which ended with closing arguments beginning on November 25.<sup>12</sup> As of the time of this writing, the Tribunal had not yet rendered a judgment in the case.

## II. *An Assessment of the Tadic Trial*

Whether Tadic is acquitted, convicted, or, as is more likely to be the case, found guilty of only some charges, historians are apt to rank his trial among the most important of the century.<sup>13</sup> Unlike other renowned trials, such as the treason trials of Ethel and Julius Rosenberg, the Chicago Seven trial, the Watergate trials, the Rodney King case, and the O.J. Simpson trial, the importance of the Tadic case lies not in the status of the defendant nor the nature of his alleged crimes, but in the fact that the proceedings constituted an

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establishment of the Tribunal, the selection of its judges and prosecutor, and the interpretation of its statute and rules of procedure and evidence).

<sup>8</sup> See Jenifer Chao, *Eyewitness Claims Serb Defendant Slit Muslim Cops' Throats*, ASSOCIATED PRESS, June 14, 1996, available in 1996 WL 4427694; Kit R. Roane, *Family Says Hague War Crimes Tribunal Has the Wrong Person*, PITTSBURGH POST-GAZETTE, May 12, 1996, at A4.

<sup>9</sup> See *Germany Arrests Bosnian Serb for Alleged War Atrocities*, BOSTON GLOBE, Feb. 15, 1994, at 7; UNITED PRESS INT'L, Feb. 14, 1994, at 1, available in LEXIS, News Library, Arenws File.

<sup>10</sup> See Indictment, Prosecutor v. Dusan Tadic a/k/a "Dule," Case No. IT-94-1-T (Int'l Crim. Tribunal Feb. 13, 1995) (visited Jan. 19, 1997) <<http://www.court tv.com/casefiles/warcrimes/documents/borov.html>>.

<sup>11</sup> See Nicolas Miletitch, *First War Crimes Trial Opens in The Hague*, AGENCE FRANCE-PRESSE, May 7, 1996, available in Lexis, News Library, Curnws File; Marlise Simons, *Far From Former Yugoslavia, First War Crimes Trial Opens*, N.Y. TIMES, May 8, 1996, at A1.

<sup>12</sup> See *Bosnian Mediator Unhurt After Women Mob Car in Sarajevo*, BOSTON GLOBE, Nov. 27, 1996, at A12 (discussing the conclusion of the Tadic trial).

<sup>13</sup> See William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept. 1995, at 5-6 (discussing the impact the Tadic trial may have within the international arena).

historic turning point for the world community.<sup>14</sup> Just as the Nuremberg trials launched the era of promulgation of international human rights standards fifty years ago, the *Tadic* trial has inaugurated a new age of human rights enforcement. As the Yugoslav Tribunal itself reflected in its first annual report:

The United Nations, which over the years has accumulated an impressive corpus of international standards enjoining States and individuals to conduct themselves humanely, has now set up an institution to put those standards to the test, to transform them into living reality. A whole body of lofty, if remote, United Nations ideals will be brought to bear upon human beings . . . . Through the Tribunal, those imperatives will be turned from abstract tenets into inescapable commands.<sup>15</sup>

At the opening session of the Yugoslav Tribunal in November 1993, U.N. Under-Secretary for Legal Affairs Carl-August Fleischhauer said that in establishing the Tribunal, the Security Council had exhibited a determination to achieve three goals: "First, to put an end to the crimes being committed in . . . the former Yugoslavia; second, to take effective measures to bring to justice the persons who are responsible for those crimes; and, third, to break the seemingly endless cycle of ethnic violence and retribution."<sup>16</sup> It is no overstatement to suggest that the success or failure of the Yugoslav Tribunal in meeting these goals of deterrence, justice and peace will decide the direction of human rights enforcement in the next century.

#### A. *The Deterrent Value of the Trial*

The trial of Dusko Tadic should be seen as an effort, not merely to bring an individual to justice but to understand the most barbarous butchery to blight Europe in fifty years. One of the tribunal's goals was to prevent a repetition of recent history. The record of the *Tadic* trial provides the authoritative and impartial account to which future historians may turn for truth, and future politicians for warning. While there are various means to achieve an historic

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<sup>14</sup> See *id.*

<sup>15</sup> 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, 49th Sess., Agenda Item 152, at 49, U.N. Doc. A/49/342 (1994).

<sup>16</sup> Guido de Bruin, *Yugoslavia: War Crimes Tribunal Inaugurated in The Hague*, INTER PRESS SERVICE, Nov. 17, 1993, available in 1993 WL 2532943.

record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process.<sup>17</sup>

If, to paraphrase George Santayana, we are condemned to repeat our mistakes unless we learn the lessons of the past, then we must establish a reliable record of those mistakes.<sup>18</sup> The Chief Prosecutor at Nuremberg, Supreme Court Justice Robert Jackson, underscored the logic of this proposition when he reported to President Truman that one of the most important legacies of the Nuremberg trials following World War II was that they documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."<sup>19</sup> Similarly, the *Tadic* trial has generated a comprehensive record of the nature and extent of violations in the Balkans, the method by which they were planned and executed, the fate of individual victims, the individuals who gave the orders and those who carried them out. By carefully proving these facts one witness at a time in the face of vigilant cross-examination by distinguished defense counsel, the *Tadic* trial produced a definitive account that can endure the test of time and resist the forces of revisionism.

The story that emerged from the *Tadic* trial was of a country whose people got swept up in the hurricane of ethnic nationalism. Witness after witness testified that there had been general ethnic harmony and a high rate of interfaith marriage in Bosnia before 1992.<sup>20</sup> The trial proved that the hatred that emerged in 1992 had

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<sup>17</sup> One means of establishing an historic record of atrocities which is in vogue these days is through the creation of a "Truth Commission." See generally Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS Q. 597 (1994) (engaging in a comprehensive survey of truth commissions in fifteen countries). Yet, Truth Commissions are a poor substitute for prosecutions. They do not have prosecutorial powers such as the power to subpoena witnesses or punish perjury, and they are viewed as one-sided since they do not provide those accused of abuses with the panoply of rights available to a criminal defendant.

<sup>18</sup> See GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 396 (1953) (concluding that "there can be no serious history until there are archives and preserved records").

<sup>19</sup> Justice Robert H. Jackson, Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals (June 7, 1945), reprinted in 39 AM. J. INT'L L. 178, 184 (Supp. 1945).

<sup>20</sup> See Michael P. Scharf, *Luring Out Humanity's Dark Side: U.N. War Crimes Trial of Bosnian Serb Suggests that Manipulation, Not History, Can Turn Ordinary People into 'Willing Executioners'*, BOSTON GLOBE, Dec. 1, 1996, at D2.

been engineered, not innate. Serb-controlled television and radio spread ethnic hatred like an epidemic.<sup>21</sup> By way of comparison, one of the witnesses asked the judges to imagine what would happen if former Klu Klux Klan leader David Duke seized control of all the television and radio stations in America.<sup>22</sup>

A half century after Nuremberg, historians like Daniel Jonah Goldhagen continue to address the question of how so many ordinary people could be so readily enlisted to participate in atrocities. Goldhagen's recent work, *Hitler's Willing Executioners*, hypothesizes that the Holocaust was a product of the German people's unique cultural predisposition toward "eliminationist antisemitism."<sup>23</sup> But the *Tadic* case suggests a different answer. Lead prosecutor Grant Niemann believes the trial proves that "human beings are universally capable of doing the things Tadic has done."<sup>24</sup> The most extraordinary hallmark of the Yugoslav carnage was its intimacy. Torturers knew their victims and had often grown up alongside them as neighbors and friends. Perhaps the real lesson of the *Tadic* trial is that given the right set of circumstances, many of us can become willing executioners. It is what the American historian Hannah Arendt, in her classic account of the Eichmann trial, referred to as the "banality of evil."<sup>25</sup> Three centuries earlier, the philosopher

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<sup>21</sup> See *id.* at D2. See also, e.g., Michael Dobbs, *Yugoslavia Maps a Road to Ruin; Economic Collapse, Nationalist Conflict*, WASH. POST, Sept. 5, 1993, at A1 (discussing the artificial creation of hatred through television); Richard C. Dujardin, *How the Media Perpetuates Stereotypes*, PROVIDENCE J.-BULL., Apr. 27, 1996, at C7 (discussing the power of the media to create hatred and antagonism); George Rodrigue, *Bridges Burned: Bosnian Capital's Ethnic Groups Resigned to Life in Divided City*, DALLAS MORNING NEWS, Aug. 29, 1993, at A1 (reporting on the results of television and radio propaganda); *Serbs Flee Muslim-Led Government*, SALT LAKE TRIB., Feb. 29, 1996, at A7 (noting the use of hate-filled media broadcasts as a method of war).

<sup>22</sup> See Scharf, *supra* note 20, at D2.

<sup>23</sup> DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 375-454* (1996) (focusing on whether German citizens voluntarily participated in actions against Jews).

<sup>24</sup> Interview with Grant Niemann, Prosecutor, International War Crimes Tribunal for the Former Yugoslavia, in The Hague, Netherlands (July 25, 1996) (notes of interview on file with author).

<sup>25</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963). Arendt concluded that Adolf Eichmann, who stood trial in Jerusalem in the summer of 1962 as "the engineer of Hitler's Final Solution," was neither a monster nor a "perverted sadist" as the prosecution had described him. *Id.* at 276. Rather, Arendt believed that "the trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal." *Id.*

Thomas Hobbes hypothesized that there exists a thin line between civilization and barbarism.<sup>26</sup>

What are the circumstances that can lure out this dark side of human nature and push us across that thin line? "That is one of the mysteries of the Yugoslav conflict," says Deputy Prosecutor Graham Blewitt.<sup>27</sup> "What transforms ordinary people into savages? The *Tadic* case gave us a glimpse of how provocation, incitement, and propaganda can raise hatred and fear to such an extent that ordinary people turn on their neighbors in a bloodthirsty way," Blewitt added.<sup>28</sup> Throw in an official sanction, a bit of coercion by persons in authority, pressure from assenting comrades, opportunities for personal gain, and a long history of ethnic tension, and you have the active ingredients of ethnic cleansing—Bosnian style.

What is most shocking about the Balkan conflict is not that atrocities were committed, but that the rest of the world once again did so little to prevent them or bring them to an end. As Court TV anchor Terry Moran observed during the trial,

[t]he Tadic trial proved how very difficult it is for people to care about evil in countries and places that are far from their personal experiences. Whether we are humankind in fact as well as in name is an open question in light of what happened in Bosnia and the international community's continuing inadequate response.<sup>29</sup>

Unfortunately, world-wide ethnic nationalism likely has not reached its final zenith with events in the former Yugoslavia. As Senator Daniel Patrick Moynihan recently wrote, "Of the next fifty states which will come into being in the next fifty years, ethnic conflict will be almost [always] the defining characteristic by which that process will take place."<sup>30</sup> Consequently, the questions raised by the

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<sup>26</sup> See THOMAS HOBBS, *LEVIATHAN* 94-98 (Everyman ed., Oxford Univ. Press 1929) (1651) (discussing the natural inclination of even the civilized toward violence).

<sup>27</sup> Interview with Graham Blewitt, Deputy Prosecutor in the *Tadic* Trial, in The Hague, Netherlands (July 26, 1996) (notes of interview on file with author).

<sup>28</sup> *Id.*

<sup>29</sup> *War Crimes on Trial* (Court TV television broadcast, Sept. 17, 1996). For a discussion "about the work of the International War Crimes Tribunal for the former Yugoslavia, the . . . trial [of Bosnian Serb Dusko Tadic] and the prospects for a permanent international criminal court," see Terry Moran (Court TV Broadcast of the *Tadic* Trial, Sept. 17, 1996)(visited Jan. 31, 1997) <<http://www.courtstv.com/casefiles/warcrimes/reports/interview.html>>.

<sup>30</sup> Aleksa Djilas, *A Paper House: The Ending of Yugoslavia*, NEW REPUBLIC, Jan. 25, 1993, at 38, 42 (book review of DANIEL PATRICK MOYNIHAN, *PANDEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* (1993)).



savagery in the Balkans—how to preserve minority rights, when to recognize claims to self-determination, how to apply preventive strategies, and when and how to use force—are likely to confront us again and again in the coming years.<sup>31</sup> More than anything else, the record of the hostilities in the Balkans generated by the *Tadic* trial should stand as a reminder to the international community of the perils of unchecked ethnic conflict.

If the fate of the victims of Bosnia stands as a lesson to the international community, the image of Dusko Tadic in the dock, transmitted throughout the world by satellite, sends a message to would-be war criminals and human rights abusers around the globe that in the future those who commit such acts may be held accountable for their actions. As Judge McDonald, who presided over the *Tadic* trial, succinctly put it: "We are here to tell people that the rule of law has to be respected."<sup>32</sup>

The vehicle of a televised trial is an especially potent one for attaining respect for the rule of law and deterring future violations. Throughout the summer of 1996, live television coverage of the *Tadic* trial was carried throughout Bosnia, "while private cable TV transmission in Belgrade . . . made the trial accessible to at least a limited Serbian audience."<sup>33</sup> As Chief Prosecutor Richard Goldstone stated in an interview, "People don't relate to statistics, to generalizations. People can only relate and feel when they hear somebody that they can identify with telling what happened to them."<sup>34</sup> That's why the public broadcasts of the *Tadic* case can have a strong deterrent effect.

"While Nuremberg came too late to help the Nazis' victims, the *Tadic* trial and [the subsequent trials before the Yugoslav Tribunal] at least have a chance of deterring Serbs and others from continuing to commit war crimes."<sup>35</sup> There is a particular benefit in laying bare to the unscathed Serbs in Belgrade the ghastly consequences of blood-curdling nationalistic rhetoric. Even for those who support

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<sup>31</sup> See WARREN ZIMMERMAN, ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA'S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY at xii (1996).

<sup>32</sup> Horne, *supra* note 13, at 65.

<sup>33</sup> Tyler Marshall, *U.N. Tribunal's Power on Trial; Balkans: First War Crimes Suspects Face Judgment. But Many See Fate of Rebel Serb Leaders as Real Test of Court's Effectiveness*, L.A. TIMES, June 24, 1996, at A6.

<sup>34</sup> Interview by Terry Moran with Justice Richard Goldstone, former prosecutor in the *Tadic* Trial (Court TV Broadcast of the *Tadic* Trial, Sept. 17, 1996) (visited Jan. 19, 1997) <<http://www.courtvtv.com/casefiles/warcrimes/reports/interview.html>>.

<sup>35</sup> Horne, *supra* note 13, at 6.

Karadzic and Milosevic, "it will be much more difficult to dismiss live testimony given under oath than simple newspaper reports," Deputy Prosecutor Graham Blewitt points out.<sup>36</sup> "The testimony will send a reminder in a very dramatic way that these crimes were horrendous."<sup>37</sup>

While there is ongoing debate about the general deterrent value of criminal punishment,<sup>38</sup> prosecutor Grant Niemann believes "deterrence has a better chance of working with these kinds of crimes than it does with ordinary domestic crimes because the people who commit these acts are not hardened criminals; they're politicians or leaders of the community that have up until now been law-abiding people."<sup>39</sup> Richard Goldstone adds:

If people in leadership positions know there's an international court out there, that there's an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren't going to think twice as to the consequences. Until now, they haven't had to. There's been no enforcement mechanism at all.<sup>40</sup>

Indeed, Richard Goldstone believes that the existence of the Tribunal may have already deterred human rights violations in the former Yugoslavia during the Croatian army offensive against Serb rebels in August 1995.<sup>41</sup> "[F]ear of prosecution in The Hague," Goldstone commented, prompted "Croat authorities to issue orders to their soldiers to protect Serb civilian rights when Croatia took control of the Krajina and Western Slavonia regions of the country."<sup>42</sup> Unfortunately, the existence of the Tribunal did not have a similar deterrent effect when Serbs massacred over 10,000 civilians in the "safe area" of Srebrenica the previous month.<sup>43</sup>

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<sup>36</sup> Interview with Graham Blewitt, *supra* note 27.

<sup>37</sup> *Id.*

<sup>38</sup> See JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE 45-48 (1974) (contending that those who commit crimes under emotional stress (such as murder in the heat of passion) or who have become expert criminals (such as professional safecrackers and pickpockets) are less likely than others to be deterred by the threat of criminal punishment).

<sup>39</sup> Interview with Grant Niemann, *supra* note 24.

<sup>40</sup> Interview by Terry Moran with Justice Richard Goldstone, *supra* note 34.

<sup>41</sup> See *War Crimes Prosecutor Says Tribunal May Have Deterred Violations*, DEUTSCHE PRESSE-AGENTUR, Jan. 26, 1996, available in LEXIS, News Library, Curnws File.

<sup>42</sup> *Id.*

<sup>43</sup> See *Answering For War Crimes; Lessons From the Balkans*, FOREIGN AFF., Jan.-Feb. 1997, at 2, available in LEXIS, News Library, Curnws File; *Conflict in the Balkans: In Bosnia; Serbs Continuing To Shell 3 "Safe Areas,"* N.Y. TIMES, July 22, 1995, at A5.

Perhaps this was because, at the time, the Bosnian-Serb leaders who were responsible for the Srebrenica atrocities (Radovan Karadzic and General Ratko Mladic) had no reason to believe that there was a real possibility that they would be brought to trial before the Tribunal.

The Tribunal's deterrent value may ultimately be linked to the eventual fate of Karadzic and Mladic. "The international community, acting through the Security Council, has raised [the victims'] expectations that war criminals would be brought to account for the terrible atrocities which they have suffered," Goldstone has said.<sup>44</sup> "If the accused are left free to continue to flout international agreements and international law, is there really less likelihood of further violence in the former Yugoslavia . . . ?"<sup>45</sup> Goldstone adds, "[t]he failure to make arrests also risks destroying the broader deterrent value of the tribunal. Future tyrants will be given notice that they also have nothing to fear from international justice for as long as they are surrounded by armed guards."<sup>46</sup>

### B. *The Fairness of the Proceedings*

In a sense, four trials were simultaneously held in that compact, high-tech courtroom at The Hague from May to November 1996. First, and most obviously, there was the trial of Dusko Tadic, whose fate was in the hands of the Tribunal. Second, there was the trial of the Bosnian Serb leadership and the authorities in Belgrade, who were implicitly in the dock with Tadic. In fact, during the first two months of the trial, there was nearly as much evidence introduced into the record about Slobodan Milosevic's responsibility for ethnic cleansing as there was about the particular crimes Tadic had committed.<sup>47</sup> Third, the international community was on trial for failing to prevent or halt the bloodshed in the former Yugoslavia. The trial made clear that the fate of Bosnia could have been avoided, if only the major powers had possessed the political will and judgment to take vigorous actions when the time was right. Fourth, and perhaps most importantly, the Tribunal itself was on trial. In assessing the *Tadic* trial, one must ask whether the Tribunal discharged its duty in a way that creates confidence and faith that

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<sup>44</sup> Richard Goldstone, *Bosnia-Herzegovina: The Responsibility to Act*, INTER PRESS SERVICE, June 27, 1996, available in LEXIS, News Library, Curnws File.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Nicolas Miletitch, "Witness Q" Takes the Stand Against Tadic in Warcrimes Trial, AGENCE FRANCE PRESSE, June 11, 1996, available in LEXIS, News Library, Curnws File.

guilt and innocence can be fairly adjudicated by an international war crimes tribunal.

"Whatever amounts from this Tribunal," Deputy Prosecutor Graham Blewitt told the author,

there will always be debates about whether it has been successful or not. It's difficult to quantify success. It's not just a matter of looking at the number of indictments, the number of persons tried, and the number of convictions. To me, the best measure of success is if [the Tribunal] can achieve the prosecution of individuals fairly, regardless of whether they are convicted or acquitted.<sup>48</sup>

The International Tribunal, with its detailed rules of procedure, represents an advance on its Nuremberg predecessor, notably by foreswearing trials *in absentia*,<sup>49</sup> by making better provisions for the defense, and by providing a right of appeal.<sup>50</sup> Still, at times, the Tribunal tread dangerously close to denying Tadic a fair trial, most conspicuously by its decision to allow certain prosecution witnesses to testify anonymously<sup>51</sup> and to permit the prosecution to base so much of its case on hearsay. "For those who would respond to criticisms of the Tribunal by saying you have to start somewhere," Tadic's lawyer Michail Wladimiroff told the author in an interview at The Hague, "I say that's not good enough when you're dealing with a person whose life and liberty are at stake."<sup>52</sup> Even the Tribunal's Deputy Prosecutor, Graham Blewitt, confided that he is "personally very uncomfortable with the notion of going forward with witnesses whose identities are not disclosed to the accused."<sup>53</sup>

In contrast to most televised trials, the *Tadic* proceedings were marked by a great deal of substance and very little sensationalism. The rhetoric was restrained, objections were few, and the cross-examination was forceful but seldom insulting. Perhaps this is one of the inherent benefits of a non-jury trial. Then again, the effort to ensure an absolutely fair trial may have cut against the goal of

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<sup>48</sup> Interview with Graham Blewitt, *supra* note 27.

<sup>49</sup> See RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL, arts. 20-21, reprinted in 2 MORRIS & SCHARF, *supra* note 7, at 35-36.

<sup>50</sup> See *id.* at arts. 25-26, at 36.

<sup>51</sup> See Monroe Leigh, *Yugoslavia Tribunal: Use of Unnamed Witnesses Against Accused*, 40 AM. J. INT'L L. 235 (1996); *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, IT-94-I-T, Aug. 10, 1995, at 15.

<sup>52</sup> Interview with Michail Wladimiroff, part-time Professor of Economic Criminal Law at the University of Utrecht and senior partner in Wladimiroff & Spong, in The Hague, Netherlands (July 26, 1996) (notes of interview on file with author).

<sup>53</sup> Interview with Graham Blewitt, *supra* note 27.

deterrence. The world media (and viewers) soon lost interest in the orderly, yet unenthralling, proceedings. Reflecting this development, over the course of the trial, Court TV coverage waned from six hours of daily gavel-to-gavel coverage during the first days of the proceedings to brief nightly highlights after the first month. During this period, the number of print journalists covering the trial dwindled from over a hundred to less than a handful.

While Prosecutor Goldstone repeatedly extolled the educational benefits of the world-wide coverage of the trial and its potential deterrent value, Grant Niemann told the author that "the popular appeal and educational aspect of the trial was not part of our consideration at all. Our prosecution strategy, including the order of our witnesses, was designed to secure a conviction, not boost the ratings of Court TV."<sup>54</sup> But, as Fred Graham, the Chief Anchor and Managing Editor of Court TV, pointed out, "the prosecutors should have realized that if they presented an airtight case at the cost of boring the world into tuning them out, they had failed to accomplish an important part of their mission."<sup>55</sup>

Yet, the prosecution had no real choice since the *Tadic* case presented such an extraordinary conflict in testimony, and the prosecution had so little documentary evidence. Like many cases, this one would come down to the question of credibility: Who would the judges believe? What makes this case so unique, however, is that most of the testimony on both sides was inherently biased. The prosecution eyewitnesses were Muslims, who were victims of abuse at the hands of Serbs during an armed conflict; the defense witnesses were all Serbs, many of whom might well be guilty of their own war crimes.

At Nuremberg, Prosecutor Robert Jackson told the judges, "We will not ask you to convict these men on the testimony of their foes. There is no count in the Indictment that cannot be proved by books and records."<sup>56</sup> In the *Tadic* trial, however, that is exactly what the prosecution asked the judges to do. The prosecution's task became all the more difficult when its most important witness—witness "L"—later admitted that he had falsely testified about Tadic's

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<sup>54</sup> Interview with Grant Niemann, *supra* note 24.

<sup>55</sup> Interview with Fred Graham, Chief Anchor and Managing Editor of Court TV, in New York, N.Y. (Aug. 20, 1996) (notes of interview on file with author).

<sup>56</sup> Opening Statement of Robert Jackson at Nuremberg (1945) (visited Mar. 3, 1997) <<http://www.courtstv.com:80/casefiles/nuremberg/jackson.html>>.

involvement in crimes at a Serb-run concentration camp.<sup>57</sup> The prosecution tried to overcome the credibility problem through sheer numbers: over forty prosecution witnesses testified that they saw Dusko Tadic commit war crimes or placed him in locations where war crimes were committed.<sup>58</sup> The prosecution strategy was to make the judges ask themselves: How could so many people be so wrong about Tadic's participation?

### C. *The Role of the Trial in the Peace Process*

In addition to deterrence and justice, there is the issue of peace and reconciliation. The Yugoslav Tribunal was created, in the words of Security Council Resolution 827, to "contribute to the restoration and maintenance of peace."<sup>59</sup> As with Nuremberg, the sight of leading war crimes suspects—from all sides of the ethnic divide—standing trial and receiving sentences is supposed to enable the population scarred by the war to apportion blame on individuals and not on the collective. "Avoiding collective guilt will greatly strengthen the peace process in Bosnia," says the Tribunal's press spokesman, Christian Chartier.<sup>60</sup> "We have an obligation to carry forward the lessons of Nuremberg," President Clinton declared last fall. "Those accused of war crimes, crimes against humanity and genocide must be brought to justice. There must be peace for justice to prevail, but there must be justice when peace prevails."<sup>61</sup> In a similar vein, on the day the Dayton Peace Agreement was signed, the President of the Tribunal, Judge Antonio Cassese, along with Chief Prosecutor Richard Goldstone said:

Justice is an indispensable ingredient of the process of national reconciliation. . . . It is essential to the restoration

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<sup>57</sup> See *Witness Says Bosnia Forced Him to Lie*, N.Y. TIMES, Oct. 26, 1996, at 7 (reporting that prosecutors withdrew testimony of Dragan Opacic (witness "L") because he had been ordered by the Bosnian Government to lie to the Tribunal); *War Crimes Tribunal Struggles on Amid Perjury Row*, ANP ENGLISH NEWS BULL., Oct. 29, 1996, available in LEXIS, News Library, Curnws File (noting that the witness "L" incident "highlights the problems of witness reliability raised . . . throughout Tadic's trial").

<sup>58</sup> See Gillian Sharpe, *Prosecution Over In War Crimes Trial*, UNITED PRESS INT'L, Aug. 15, 1996, available in LEXIS, News Library, Curnws File; *Lawyer Wants Some Charges Dropped Against Serb*, ANP ENGLISH NEWS BULL., Aug. 8, 1996, available in LEXIS, News Library, Curnws File.

<sup>59</sup> S.C. Res. 827, *supra* note 6, at 1.

<sup>60</sup> Mark Rice-Oxley, *Tribunal Depends on the Kindness of Foes*, NAT'L L.J., June 3, 1996, at A10.

<sup>61</sup> Philip Shenon, *G.I.'s in Bosnia Shun Hunt for War-Crime Suspects*, N.Y. TIMES, Mar. 2, 1996, at 3.

of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. [Thus p]eace and justice go hand-in-hand.<sup>62</sup>

If it achieves its aims, the Tribunal will do far more to secure lasting peace in Bosnia than the 60,000 NATO troops stationed there as part of the Dayton Accords. "If the trials fail, Justice Goldstone says, so will any attempt at peace."<sup>63</sup> Goldstone adds:

It is nonsensical to expect that hundreds of thousands of victims could forgive or forget. And if there is a peace treaty in former Yugoslavia or anywhere else in which the architects of atrocities are left unpunished in leading positions, then all it will be is an interval between cycles of violence.<sup>64</sup>

For this reason, Goldstone insists, "the arrest of Radovan Karadzic, the indicted Bosnian Serb leader, . . . [is] 'not only in the interests of justice but in the interests of peace.'"<sup>65</sup>

To some extent, the Dayton Accords transformed the role of the Tribunal. After Dayton, its function was not just to punish the guilty but, through the issuance of indictments, to identify persons who, under the Agreement, were prohibited from being elected or appointed members of government in Bosnia.<sup>66</sup> In this way, official accusation became a means of removing from the political scene men like Karadzic, who was viewed as the greatest impediment to peace. During the *Tadic* trial, Bosnia conducted its first post-war elections on September 17, 1996.<sup>67</sup> Incredibly, the election took place with no bloodshed and little fraud, and the results provided a glimmer of hope that Bosnia would survive as a unified nation.<sup>68</sup> "Bosnian President Alija Izetbegovic won the most votes for the three-person presidency" and thus the right to serve as chairman and head of

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<sup>62</sup> Wilbur G. Landrey, *Don't Forget War Crimes, Prosecutors Remind Us*, ST. PETERSBURG TIMES (Fla.), Nov. 26, 1995, at 2A.

<sup>63</sup> Ed Vulliamy, *In Times of Trial*, GUARDIAN (London), Oct. 31, 1995, at T6.

<sup>64</sup> *Id.*

<sup>65</sup> Jane Perlez, *War Crimes Prosecutor Vents Frustrations*, N.Y. TIMES, May 22, 1996, at A8.

<sup>66</sup> *See Warrants Issued for Karadzic, Mladic; Other Developments*, FACTS ON FILE WORLD NEWS DIG., July 11, 1996, at 474, C3.

<sup>67</sup> *See Bosnia on the Road Back to Nationhood, The New Institutions Can Be Made to Work, With Outside Help*, PORTLAND PRESS HERALD (Or.), Sept. 17, 1996, at 6A.

<sup>68</sup> *See European Organization Certifies Bosnian Elections, The Validation Confirms that the Presidency Will Be Led By a Muslim*, FT. WORTH STAR-TELEGRAM, Sept. 30, 1996, at 3 (explaining that while the elections were not up to the standards of western democracies, they were adequate considering the recent war).

state pursuant to the Dayton Accord.<sup>69</sup> A week later, in his address before the United Nations General Assembly, Izetbegovic underscored the continuing importance of the work of the War Crimes Tribunal to the peace process, stating, "[f]or the road to reconciliation to be opened, the criminals must be punished."<sup>70</sup> The next day, the Security Council voted to lift the economic sanctions it had imposed on Serbia in accordance with the Dayton Accord.<sup>71</sup> A day later, Izetbegovic and Serbian President Slobadan Milosevic met in Paris and agreed to establish full diplomatic relations and to work toward restoring trade and economic ties between Bosnia and Serbia.<sup>72</sup>

### III. THE CHOICE TO BEGIN WITH TADIC

Dusko Tadic stood trial for the murder of thirteen people and the torture of at least eighteen others.<sup>73</sup> In the United States, he would have been considered among the nation's worst mass murderers, rivaling the likes of Charles Manson, Albert DeSalvo ("the Boston Strangler"), Kenneth Bianchi ("the Hillside Strangler"), David Berkowitz ("Son of Sam"), Ted Bundy, and Jeffrey Dahmer.<sup>74</sup> Yet, in the context of the former Yugoslavia, he is persistently referred to as a "small fry."<sup>75</sup>

A number of critics have even questioned whether the Tribunal was correct to concentrate on such a "minor sadist" for its first case, "whereas Nuremberg put on trial the key Nazi leaders themselves."<sup>76</sup> If, as one newspaper put it, "Mr. Tadic was no more than a monstrous tadpole in a pool of sharks,"<sup>77</sup> why should he have been

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<sup>69</sup> Judith Ingram, *Muslim Izetbegovic, Declared Winner in Bosnia, Brings New Hope for Unity*, BOSTON GLOBE, Sept. 19, 1996, at A2.

<sup>70</sup> *Failure to Implement Dayton Could Bring More Conflict*, AGENCE FRANCE-PRESSE, Sept. 25, 1996, available in LEXIS, News Library, Curnws File.

<sup>71</sup> See S.C. Res. 1074, U.N. SCOR, 3700th mtg. at 9, U.N. Doc. S/RES/1074 (1996).

<sup>72</sup> See Lynne Terry, *Bosnia, Serbia Sign Diplomatic Pact*, BOSTON GLOBE, Oct. 4, 1996, at A2; *Yugoslavia, Bosnia Sign Pact on Bilateral Ties; Sarajevo is Assured the Serbs Won't Secede*, BALTIMORE SUN, Oct. 4, 1996, at 15A.

<sup>73</sup> See Alex Ross, *Television View: Watching for a Judgment of Real Evil*, N.Y. TIMES, Nov. 12, 1995, at 37.

<sup>74</sup> See generally DONALD J. SEARS, *TO KILL AGAIN: THE MOTIVATION AND DEVELOPMENT OF SERIAL MURDER* (1991) (discussing the phenomenon of the serial killers in America, their behavioral profiles and their methods).

<sup>75</sup> Robert Block, *First, Catch You a War Criminal*, INDEP. (London), Apr. 30, 1995, at 4.

<sup>76</sup> Jon Swain, *Serb War Criminals Flaunt Their Freedom*, SUN. TIMES (London), June 23, 1996, at 1.

<sup>77</sup> John Lichfield, *Sharks Escape as The Hague Tries a Minnow*, INDEP. (London), May 12, 1996, at 14.



the subject of the Tribunal's first prosecution? Hanne Sophie Greve, the Norwegian judge who served on the U.N.'s investigative commission for the former Yugoslavia, remarked that "[h]e is not the level of person I would like to see at the Hague. I think they should have aimed higher up."<sup>78</sup>

Yet, there are several reasons why Dusko Tadic turned out to be an ideal subject for the first trial. First, "Tadic fell into the hands of the international community when he was arrested in Germany in 1994."<sup>79</sup> Given the nature of his alleged offenses and the massive body of evidence pointing to his guilt, the Tribunal could not just "turn a blind eye to the allegations."<sup>80</sup> Second, through the *Tadic* case, the Tribunal has begun to construct a "pyramid of evidence" leading to the principals ultimately responsible for the horror in Bosnia.<sup>81</sup> Third, to the victims of Dusko Tadic and his colleagues, as well as to those who suffered as a result of the actions of ordinary prison guards and police officials, it is very important that some of their torturers be brought to justice.<sup>82</sup> Only by prosecuting individuals at all levels of responsibility can the victims see that justice has been done. Finally, the *Tadic* case has provided an opportunity for the Tribunal to refine its procedure and the international legal rules before turning to the bigger fish and more difficult cases.<sup>83</sup>

When asked whether the *Tadic* case was a good one to begin with, Richard Goldstone replied:

If one had a choice, clearly not. Instead, one would have wanted to start with a higher profile defendant. It is highly unsatisfactory that someone at the level of Dusko Tadic should face trial and that those who incited and facilitated his conduct should escape justice and remain unaccountable. But it's really an academic question because we had no choice; Tadic was the only accused available to bring before the Tribunal at a time when the judges, the media, and the international community were clamoring for us to begin prosecutions.<sup>84</sup>

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<sup>78</sup> Block, *supra* note 75, at 4.

<sup>79</sup> Lichfield, *supra* note 77, at 14.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Block, *supra* note 75, at 14.

<sup>83</sup> See Lichfield, *supra* note 77, at 14.

<sup>84</sup> Interview with Justice Richard Goldstone, former prosecutor of the *Tadic* trial, in Brussels, Belgium (July 20, 1996) (notes of interview on file with author).

At the time of the *Tadic* trial, there were just six other indicted Yugoslav war criminals in custody at The Hague: Croatian General Tihomir Blaskic, Bosnian Croat Zdravko Mucic, Serbian Army member Drazen Erdemovic, and Bosnian Muslims Zejnir Delalic, Hazim Delic, and Esad Landzo.<sup>85</sup> According to Goldstone:

If we don't get more arrests for the Tribunal in the fairly near future, then I think people with justification will be able to conclude that we've been effectively prevented from doing the work that we've been set up to do. What worries me about the failure to effect arrests, is that the public perception of the success of the Tribunal is inextricably linked to the resources we are given. The politicians won't want to spend scarce dollars on what the public regards as a failure. Ultimately, credibility is going to depend on whether we are able to put on trial in the Hague the major people who have been indicted.<sup>86</sup>

The challenge for the Tribunal is to work backwards from the likes of Tadic to those who fanned the flames of hatred. Goldstone did not hesitate to indict Karadzic and Mladic, despite criticism at the time that such indictments would derail the peace process.<sup>87</sup> But will the prosecutor have the fortitude to indict Slobodan Milosevic if the mounting evidence establishes his culpability? From a political point of view, such action in the near future would seem to be folly. But from the point of view of justice, it might be indispensable. Despite Goldstone's insistence that the indictment process is immune from politics, there is reason to believe that global diplomacy, for better or for worse, affects the Tribunal's policies.<sup>88</sup>

Even bringing Karadzic and Mladic to justice has turned into an uphill battle for the Tribunal.<sup>89</sup> In its resolution conditionally lifting the trade sanctions on Serbia and Republika Srpska, the Security Council reiterated that compliance with the orders of the Tribunal was integral to the obligations of Serbia and Republika

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<sup>85</sup> See *UN Tribunal Sets January Date for War Crimes Trial*, REUTERS N. AM. WIRE, Dec. 18, 1996, available in LEXIS, News Library. The number in custody was at one time eight, but Bosnian Serb general Djordje Djukic had been released for medical reasons prior to his death and Bosnian Serb Goran Lajic was released when it was determined by the Prosecution that he was the wrong Goran Lajic. See Susanne Fowler, *Tribunal Releases Suspect: Wrong Man*, CHI. TRIB., June 18, 1996, at 10.

<sup>86</sup> Interview by Terry Moran with Justice Richard Goldstone, *supra* note 34.

<sup>87</sup> See Lichfield, *supra* note 77, at 14.

<sup>88</sup> See Colin Soloway & Stephen J. Hedges, *How Not to Catch a War Criminal*, U.S. NEWS & WORLD REP., Dec. 9, 1996, at 63.

<sup>89</sup> See *id.* (discussing NATO policies toward the apprehension of Karadzic and Mladic).

Srpska under the Dayton agreement.<sup>90</sup> According to the resolution, if either the Commander of the Implementation Force (IFOR), Admiral Leighton Smith of the United States, or United Nations High Representative Carl Bildt of Sweden, reported that those governments significantly failed to carry out their obligations, then the sanctions were to be automatically reimposed within five days.<sup>91</sup> Yet, as another indication of the relationship between international politics and the functioning of the Tribunal, no action was taken when General Ratko Mladic flaunted his freedom in the presence of television cameras on a ski slope and then appeared in public in Belgrade at the funeral of indicted war criminal, Djordje Djukic.<sup>92</sup> In May, Tribunal President Antonio Cassese called for the reimposition of sanctions against Serbia for failing to execute arrest warrants.<sup>93</sup> That request was elevated to a demand in June following the Rule 61 Hearing on Karadzic and Mladic.<sup>94</sup> The Security Council responded with a statement that it "deplores the failure to date of the Federal Republic of Yugoslavia [Serbia and Montenegro] to execute the arrest warrants," but it neither threatened nor took any further action.<sup>95</sup>

Goldstone places much of the blame on the NATO-led IFOR for Karadzic and Mladic's evasion of justice:<sup>96</sup> "There is no moral, legal or political justification for a military authority to grant effective immunity to persons whom the prosecutor, on behalf of the Security Council, has determined should be brought to trial[.]" he says.<sup>97</sup> Goldstone continued:

That IFOR, with its force of 60,000 troops, its sophisticated weaponry and intelligence capability, is able to effect such arrests must be beyond question. From a political point of

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<sup>90</sup> See S.C. Res. 1022, U.N. SCOR, 3595th mtg. at 1, U.N. Doc. S/RES/1022 (1995).

<sup>91</sup> See *id.* at 2.

<sup>92</sup> See Richard Goldstone, *Bosnia-Herzegovina: The Responsibility to Act*, INTER PRESS SERVICE, June 27, 1996, available in 1996 WL 10767855.

<sup>93</sup> See *Security Council Expresses Profound Concern at Failure of Federal Republic of Yugoslavia to Cooperate with Tribunal for Former Yugoslavia*, U.N. SCOR, 3663d mtg. at 1, U.N. Doc. Press Release SC/6219 (1996) (appending letter from Antonio Cassese to the President of the Security Council dated April 24, 1996).

<sup>94</sup> See *War Crimes Tribunal Presses for Arrest of Top Bosnian Serbs; Head Judge Urges Capture as Message to All Dictators*, BALT. SUN, July 13, 1996, at A7.

<sup>95</sup> *Statement by the President of the Security Council*, U.N. SCOR, at 1, U.N. Doc. S/PRST/1996/23 (1996).

<sup>96</sup> See Goldstone, *supra* note 92; see also Robert Fisk, *Bosnia Judge Condemns West*, INDEP. (London), Sept. 17, 1996, at T1 (discussing Goldstone's disgust over the failure to prosecute the war criminals).

<sup>97</sup> Goldstone, *supra* note 92.

view, can IFOR's men in uniform legitimately argue that they can avoid certain duties because they are potentially dangerous? On a national level, policemen are not infrequently obliged to arrest people who are armed and dangerous. Yet it is inconceivable that an attorney general would call off the arrests because of the risks to the lives of the arresting officers.<sup>98</sup>

Others felt that dispatching NATO troops to hunt down Serbs would be a tragic mistake.<sup>99</sup> They feared it would fuel the conflict by handing the two sides more scores to settle when NATO was scheduled to depart at the end of the year.<sup>100</sup> General Mladic, himself, told an interviewer that "NATO-led military forces would pay heavily if they tried to arrest him. 'They have to understand one thing, that I am very expensive and that my people support me.'"<sup>101</sup> Serbian President Slobodan Milosevic has similarly warned that Bosnia "could blow up" if top Bosnian Serb indicted war criminals were arrested.<sup>102</sup>

According to Richard Goldstone, the trials before the Tribunal are likely to continue for at least the next three to four years.<sup>103</sup> Whether the likes of Karadzic and Mladic will ever face justice before the Tribunal remains to be seen. Even if they do, however, Goldstone will not have the satisfaction of overseeing their prosecution. At the end of the *Tadic* trial, the Tribunal's venerated prosecutor resigned from his post to resume his position on South Africa's Constitutional Court.<sup>104</sup> He was succeeded by Justice Louise Arbour, a rising star in the Canadian court system who has presided over some of her country's most politically charged civil rights and war crimes cases.<sup>105</sup> Like Goldstone, Arbour has had no

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<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., William Drozdiak, *U.S. Urges Formation of Special Police Unit for War Crime Duty; Allies Cool to Auxiliary Force for Bosnia*, WASH. POST, Dec. 18, 1996, at A25 (explaining the U.S. position on the formation of a specially trained police force for the task of apprehending war criminals).

<sup>100</sup> See *id.* See also generally Jon Swain, *Mladic at Bay as Bosnian Serb Leaders Court World Approval*, SUN. TIMES (London), Nov. 17, 1996 (discussing the attempt by civilian leaders to overthrow Mladic).

<sup>101</sup> *Shrugging Off Indictment, Bosnian Serb General Skis*, N.Y. TIMES, Mar. 11, 1996 (Late ed.), at A3.

<sup>102</sup> Jane Perlez, *Failure to Arrest Bosnian Serbs Threatens Peace, UN Prosecutor Says*, OTTAWA CITIZEN, May 22, 1996, at A13.

<sup>103</sup> Interview with Justice Richard Goldstone, *supra* note 84.

<sup>104</sup> See *id.*

<sup>105</sup> See Barbara Crossette, *2 Tribunals on Atrocities Will Be Led by Canadian*, N.Y. TIMES, Feb. 23, 1996 (Late ed.), at A7.

previous prosecutorial experience.<sup>106</sup> However, Goldstone's strengths were his vision and his diplomatic acumen, rather than his administrative or trial skills.<sup>107</sup> Only time will tell whether Justice Louise Arbour will be able to ensure that the Tribunal maintains momentum at a critical period in its history.

#### IV. CONCLUSION AND PRELUDE TO THE FUTURE

The Yugoslavia Tribunal was meant as a one-time-only *ad hoc* institution. But soon after the Tribunal had been established, the Security Council found itself faced with an even greater genocide, when over half a million Tutsis were massacred by the Hutus in Rwanda during a one hundred day period in the spring of 1994.<sup>108</sup> Comparing the scale of the crimes committed in Rwanda to Nazi Germany and Bosnia, Rwanda's Prime Minister-designate asked the United Nations Security Council, "Is it because we're Africans that a [similar] court has not been set up?"<sup>109</sup> With the justifiable charge of Eurocentrism ringing through the United Nations, the Security Council was compelled to establish a Rwanda Tribunal, which has its own Trial Chambers but shares the Appeals Chamber and the Office of the Prosecutor of the Yugoslavia Tribunal.<sup>110</sup>

The creation of the Rwanda Tribunal showed that the machinery designed for the Yugoslavia Tribunal could be employed for other specific circumstances and offenses, thereby avoiding the need to reinvent the wheel in response to each global humanitarian crisis. Yet, the Security Council shows no signs of setting up a tribunal for the crimes committed by Iraq against the Kuwaitis during the Gulf War, the genocide in Cambodia, the terrorism committed by Libya, or the crimes against humanity recently committed in El Salvador, Haiti, and East Timor. There are several reasons why the Security Council has proven unwilling or unable to continue with the *ad hoc*

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<sup>106</sup> See Frank Wright, *Troubled Path to Peace—Mass Graves Hold the Clues, Forensics Expert Says—Former Medical Examiner is Preparing to Return to the Former Yugoslavia this Spring to Try to Make Sure that International Inquiries into Mass Murders There Are Successful*, STAR-TRIBUNE (Minneapolis-St. Paul), Mar. 19, 1996, at A6; *Arresting War Criminals Not NATO's Job, Judge Says*, PATRIOT LEDGER (Quincy, Mass.), Mar. 5, 1996, at 4.

<sup>107</sup> See Clare Dyer, *Judge of Our Inactions*, GUARDIAN (London), Oct. 1, 1994, at 29 (discussing Judge Goldstone's life experiences and how they have shaped his judicial decisions).

<sup>108</sup> See Stephen Buckley, *Tribal Labels Mask African Power Struggle; In Rwanda and Burundi, Ethnic Politics Is Letting More Blood*, WASH. POST, Jan. 27, 1996, at A1.

<sup>109</sup> Nelson Graves, *Premier-Designate Compares Rwanda to Nazi Genocide*, REUTERS WORLD SERVICE, May 26, 1994.

<sup>110</sup> See S.C. Res. 955, U.N. SCOR, 3453d mtg. at 1-3, U.N. Doc. S/RES/955 (1994).

approach that was employed for Yugoslavia and Rwanda. The first reason is sometimes referred to as "tribunal fatigue" because the process of reaching a consensus on the Tribunal's statute, electing judges, selecting a prosecutor, and appropriating funds has turned out to be extremely time consuming and politically exhausting for the members of the Security Council.<sup>111</sup> Second, at least one permanent member of the Security Council, China, has openly expressed concern about using the Yugoslavia Tribunal as precedent for the creation of other *ad hoc* criminal tribunals<sup>112</sup>—perhaps out of fear that its own human rights record might subject it to the proposed jurisdiction of such future international criminal courts. Third, the creation of *ad hoc* tribunals by the Council is viewed as inherently unfair by the vast majority of countries that do not possess permanent membership or veto power on the Council, because the permanent members are able to shield themselves and their allies from the jurisdiction of such Tribunals, notwithstanding atrocities that may be committed within their borders.<sup>113</sup> The final reason for hesitation in creating additional *ad hoc* tribunals is purely economic; that is, the expense of establishing Tribunals is simply seen as too much for an organization whose budget is already stretched extremely thin.<sup>114</sup>

A permanent international criminal court established by treaty is hailed by the majority of countries in the United Nations as the solution to the problems that afflict the *ad hoc* approach. The U.N. General Assembly has set up a preparatory conference to hammer out a statute for a permanent international criminal court based on the draft completed in 1994 by the International Law Commission.<sup>115</sup> This time, even the United States is giving its support to

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<sup>111</sup> See David J. Scheffer, *International Judicial Intervention*, CARNEGIE ENDOWMENT FOR INT'L PEACE, Mar. 22, 1996, at 34.

<sup>112</sup> See *Provisional Verbatim Record of the Three Thousand, Two Hundred and Seventeenth Meeting*, U.N. SCOR, 3217th mtg. at 33-34, U.N. Doc. S/PV.3217 (prov. ed. 1993) (containing the statement of Mr. Li Zhaoxing of China at the time of voting on Security Council Resolution 827, which established the Yugoslavia Tribunal). China later abstained on Security Council Resolution 955, which established the Rwanda Tribunal. See S.C. Res. 955, U.N. SCOR, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994).

<sup>113</sup> See Francisco Villagran De Leon, Editorial, *Stop Abuses of U.N. Security Council Veto Power*, N.Y. TIMES, Jan. 18, 1997 (Late ed.), at 22 (noting the advantage that permanent members have over other countries); *Malaysia Calls for UN Security Council Veto Power Review*, AGENCE FRANCE PRESSE, Feb. 18, 1997, available in Lexis, News Library, Curnws File (illustrating examples of veto power abuses by permanent members).

<sup>114</sup> See Scheffer, *supra* note 111, at 34.

<sup>115</sup> See *Report of the International Law Commission on the Work of Its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 258-84, U.N. Doc. A/48/10 (1993); see also James

the endeavor.<sup>116</sup> "Perhaps the real yardstick for assessing the success of the Yugoslavia Tribunal," says Prosecutor Goldstone, "is whether it leads to the establishment of a permanent international criminal court."<sup>117</sup> There could be no greater contribution to a truly new world order than to provide the necessary legal machinery to deter and, if necessary, to respond to the most serious violations of international law wherever they occur. Conscious of the risk of failure, Goldstone asks "What are the alternatives?" Without international enforcement, there might as well not be international criminal law.<sup>118</sup>

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Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140, 140-41 (1994) (discussing the draft statute); Virginia Morris and M. Christian Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AM. J. INT'L L. 491, 496-97 (1996) (noting the lack of interest from representative countries).

<sup>116</sup> See generally *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of An International Criminal Court*, U.N. GAOR, at 7-29, U.N. Doc. A/AC.244/1/Add.2 (1995) (containing comments from the United States government on draft articles for a statute of an international criminal court); John F. Harris, *Clinton Pushes for U.N. War Crimes Tribunal*, WASH. POST, Oct. 16, 1995, at A4 (commenting on President Bill Clinton's support for a permanent international criminal tribunal).

<sup>117</sup> Interview with Justice Richard Goldstone, *supra* note 84.

<sup>118</sup> *Id.*