

International Criminal Tribunals for the Former Yugoslavia and Rwanda

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I. International Criminal Tribunal for the Former Yugoslavia

In late 1996 and throughout 1997, the International Criminal Tribunal for the Former Yugoslavia (ICTY) continued to expand its work, proceeded with various prosecutions (including three trials), and confronted several difficult legal issues. General background information on the ICTY, which was established in 1993, is available from a variety of sources.¹

A. STATUS OF PROCEEDINGS

As of August 1997, the ICTY had issued nineteen indictments involving seventy-seven defendants.² The tribunal had custody of twenty of these defendants as of October 1997,³ and the significant early difficulty that the ICTY experienced in obtaining custody of defendants appears to be abating. In October 1996, Richard Goldstone, the former chief prosecutor of the ICTY, noted that all but seven defendants were “walking around as [f]ree men in various parts of the former Yugoslavia,” and “criticized in strong terms the failure by IFOR (the Implementation Force in Bosnia) to have been given a robust policy with regard to the arrest of indicted war criminals.”⁴ However, in July 1997, IFOR troops arrested one Bosnian Serb war-crimes suspect, Milan Kovacevic, and killed another during an attempted arrest in surprise raids in the Bosnian town of Prijedor.⁵ In October 1997, ten indicted Bosnian Croats turned

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1. See, e.g., VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995); Douglas Stringer, *International Criminal Tribunal for the Former Yugoslavia*, 31 INT'L LAW. 611 (1997); ICTY Home Page <<http://www.un.org/icty/index.html>>.

2. International Criminal Tribunal for the former Yugoslavia, Latest List of Indictments and Indictees (Aug. 5, 1997), (visited Dec. 3, 1997) <<http://www.un.org/icty/list2.htm>>.

3. International Criminal Tribunal for the former Yugoslavia, Latest List of Detainees (Oct. 7, 1997), (visited Dec. 3, 1997) <<http://www.un.org/icty/list3.htm>>.

4. Richard Goldstone, *Assessing the Work of the United Nations War Crimes Tribunals*, 33 STAN. J. INT'L L. 1, 6, 7-8 (1997) (address to Stanford Law School).

5. Chris Hedges, *NATO Troops Kill a Serbian Suspect in War Atrocities*, N.Y. TIMES, July 11, 1997, at A1.

themselves in to the ICTY.⁶ Moreover, reportedly, "NATO commanders are considering a plan to arrest the two top Bosnian Serb suspects—Radovan Karadzic . . . and Gen. Ratko Mladic."⁷

The past year also saw major progress in individual proceedings before the ICTY. The tribunal's first full-scale trial, of Bosnian Serb Dusko Tadic, lasted from May to November 1996. On May 7, 1997, the ICTY convicted Tadic on eleven counts involving persecution and beatings (the ICTY dismissed eleven counts for reasons described in section II. A. below and acquitted Tadic on nine murder counts).⁸ On July 14, 1997, Tadic was sentenced to twenty years imprisonment.⁹ Appeals by Tadic and by the ICTY prosecutor are now pending.

Two other trials are ongoing—one known as the "Celebici Case" involving four defendants (Zejnil Delalic, Hazim Delic, Esad Landzo, and Zdravko Mucic) and one involving defendant Tihomir Blaskic.¹⁰ In another case, defendant Drazen Erdemovic pled guilty in May 1996 and was sentenced to ten years imprisonment in November 1996.¹¹ However, after an appeal by Erdemovic, the Appeal Chamber of the ICTY ruled that "the guilty plea of the Appellant was not informed and accordingly [the Appeals Chamber] remits the case to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead."¹²

The composition of the ICTY changed significantly in November 1997 when five of the eleven judges were replaced by judges newly elected in May 1997 (a sixth judge newly elected in May 1997 joined the ICTY in June 1997 when a sitting judge resigned for health reasons).¹³ In November 1997, Judge Gabrielle Kirk MacDonald of the United States replaced Judge Antonio Cassese of Italy as president of the ICTY as well.¹⁴

B. MAJOR LEGAL DEVELOPMENTS

There have been several major legal developments at the ICTY during the past year. Summarized below are important decisions in the *Tadic*, *Blaskic*, and *Erdemovic* cases.

1. *Tadic*—Applicability of Geneva Conventions

The indictment in the *Tadic* case charged eleven counts of violations of the Geneva Conventions of 1949. In considering these counts, the *Tadic* Trial Chamber noted that Article 4 of the Geneva Convention IV¹⁵ provides: "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."¹⁶

6. Chris Hedges, *Bosnian Croats Surrender to War Crimes Tribunal*, N.Y. TIMES, Oct. 7, 1997, at A3.

7. *Id.*

8. See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, (May 7, 1997) [hereinafter *Tadic Judgment*].

9. See Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgment, (July 14, 1997).

10. See International Criminal Tribunal for the former Yugoslavia, Fact Sheet (Oct. 7, 1997), (visited Dec. 3, 1997) <<http://www.un.org/icty/facts2.htm>>.

11. *Id.*

12. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment, at ¶ 20 (Oct. 7, 1997).

13. See International Criminal Tribunal for the former Yugoslavia, *Five New Judges Take Oath on Monday 17 November 1997* (Nov. 12, 1997) (press release), (visited Dec. 3, 1997) <<http://www.un.org/icty/p261-e.html>>.

14. See International Criminal Tribunal for the former Yugoslavia, *President MacDonald Composes the Chambers* (Nov. 19, 1997) (U.N. press release), (visited Dec. 3, 1997) <<http://www.un.org/icty/p265-e.html>>.

15. *Id.*

16. *Tadic Judgment*, *supra* note 8, at ¶ 578 (quoting Geneva Convention IV) [emphasis added].

The Trial Chamber (with the strong dissent of Judge MacDonald) decided that under this provision, the Geneva Conventions are not applicable on the territory of Bosnia and Herzegovina after May 19, 1992 (the date on which the armed forces of the Federal Republic of Yugoslavia withdrew and the local army of the *Republika Srpska* assumed authority for the conflict in Bosnia and Herzegovina), on the grounds that the alleged victims were after that date not "in the hands of a party to the conflict of which they were not nationals."¹⁷ The majority of the Trial Chamber believed that the acts of the Bosnian Serbs could not be considered as acts of the Federal Republic of Yugoslavia because the prosecution had not proved that Serbia had exercised effective control over the Bosnian Serb forces after May 19, 1992. Accordingly, the Trial Chamber dismissed eleven counts of the *Tadic* indictment alleging grave breaches of the Geneva Conventions.¹⁸

This decision, which is currently being reviewed by the Appeals Chamber, is highly controversial and seriously limits the authority of the ICTY to prosecute individuals for conduct occurring under the Geneva Conventions after May 19, 1992. Nevertheless, as occurred in the *Tadic* case, the same conduct can generally be alleged: (1) to violate the laws of customs of war; or, (2) to constitute crimes against humanity.¹⁹ Thus, nine additional counts against *Tadic* charged violations of the laws of war and eleven counts charged crimes against humanity. He was convicted on five counts of violation of the laws of war and six counts of crimes against humanity.

2. *Blaskic—Orders to Governments to Produce Documents*

In January 1997, Judge MacDonald issued subpoenae duces tecum to the governments of Croatia, Bosnia and Herzegovina, as well as certain high officials of those governments in the *Blaskic* case. After the government of Croatia contended that the ICTY did not have authority to issue such subpoenae, the *Blaskic* Trial Chamber confirmed its subpoena power in a July 1997 decision. The Trial Chamber concluded:

[A] Judge or Trial Chamber of the International Tribunal has the authority and power to issue orders to States and individuals, including high government officials, for the production of documents required for the preparation or conduct of a trial. . . . Any objection to an order for the production of documents, including a claim that a State's national security interests could be threatened by disclosure, does not automatically excuse the State or individual from compliance. Rather, such claims must first be assessed by the relevant Trial Chamber.²⁰

The Appeals Chamber agreed that the ICTY could issue binding orders and requests to States that are obliged to comply with them pursuant to article 29 of the Court's Statute (although such an order may not be issued as a "subpoena" carrying a threat of penalty against a state). That is, only the Security Council, upon a finding by the ICTY of noncompliance with an order to a state, may enforce the order. Furthermore, the Appeals Chamber held that the ICTY may not address binding orders to state officials acting in their official capacity, but

17. *Id.* at ¶¶ 607-08. In reaching this decision, the Trial Chamber relied on the legal standard articulated by the International Court of Justice in the *Nicaragua* case. *Id.*

18. *Id.* at § VIII (Judgment).

19. For additional commentary on the *Tadic* case, see Michael P. Scharf, *Prosecutor v. Tadic*, 91 AM. J. INT'L L. 718 (1997) and Marjise Simons, *Civil, It Wasn't: Defining a War to Determine the Crime*, N.Y. TIMES, May 18, 1997, at D4.

20. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, at ¶ 150 (July 18, 1997).

may address binding orders to state officials acting in their private capacity. Finally, the Appeals Chamber agreed with the Trial Chamber that states are not allowed, on the claim of national security interests, to withhold documents and other evidentiary material requested by the Tribunal.²¹ Accordingly, the Appeals Chamber decided to quash the subpoena duces tecum issued by the Trial Chamber that was addressed to both Croatia and the Croatian Defense Minister, on the understanding that the prosecutor would be at liberty to seek issuance of a binding order addressed to Croatia alone.²²

The interaction and relative powers of international bodies and sovereign states is a difficult and important issue under international law. In the *Blaskic* case, the decision that the ICTY has authority over sovereign states was necessary to ensure the ability of the ICTY to carry out its tasks. It will be of great interest to see whether this approach becomes more widely accepted under international law, particularly in the drafting of the convention for an international criminal court, which will be considered next year at a diplomatic conference in Italy.²³

3. *Erdemovic—Duress as a Defense*

As described in section A. above, the defendant in the *Erdemovic* case appealed the imposition of a sentence of ten years imprisonment by the ICTY after a guilty plea. The Appeals Chamber remanded the case to a Trial Chamber on the grounds that Erdemovic was not adequately informed of the difference between a war crime and a crime against humanity, and that his guilty plea to a crime against humanity (the more serious of the two offenses) was therefore invalid.²⁴

However, the more important issue before the Appeals Chamber was whether the Trial Chamber erred in rejecting Erdemovic's asserted defense of duress. The majority of the Appeals Chamber upheld the Trial Chamber decision, concluding that "duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives," and further, that duress is relevant only in mitigation of punishment.²⁵ Judges Cassese and Stephen dissented from this opinion on the ground that duress is recognized as a complete defense under nearly all common law and civil law systems, with the sole exception that duress is not a defense to murder under the common law.²⁶

II. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has also expanded its work over the past year. The ICTR shares its prosecutor's office and Appeals Chamber with the ICTY, but six judges assigned exclusively to the ICTR compose its two Trial Chambers. Additional

21. See Prosecutor v. Blaskic, Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at ¶¶ 25-60 (Oct. 29, 1997).

22. *Id.* at § III (Disposition).

23. Similarly, in confronting the European Union challenge in the World Trade Organization (WTO) to the U.S. Helms-Burton legislation, the United States has claimed that national security provides an absolute defense to the authority of the WTO to review the legislation. This U.S. position is effectively contrary to the decision of the Tribunal in the *Blaskic* case.

24. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge MacDonald and Judge Vohrah, at ¶¶ 19-27 (Oct. 7, 1997).

25. *Id.* at ¶¶ 88-90.

26. See Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese; *id.*, Separate and Dissenting Opinion of Judge Stephen.

background information on the ICTR, which was established in late 1994, was provided in this space last year.²⁷

As of late 1997, the ICTR had indicted twenty-one persons, thirteen of whom were in custody.²⁸ The ICTR, as of July 1997, also had several unindicted persons in custody,²⁹ some of whom recently made initial appearances before the tribunal.³⁰ Although similar numbers of persons are in custody at the ICTY and ICTR, the ICTR has been the more successful of the two tribunals in obtaining the custody of prominent indictees, including the former Prime Minister, Jean Kambanda, and Minister of Defense, Théoneste Bagosora of the Hutu-led government that reportedly directed the initial genocidal massacres in Rwanda.³¹

The ICTR, however, has been less successful at proceeding with adjudication of the cases before it. A major setback for the tribunal was a February 1997 UN report identifying major financial abuses and mismanagement at the tribunal.³² This report led to the dismissal of the ICTR's registrar and chief administrator, Andronico Adede of Kenya, and its deputy prosecutor, Honoré Rakotomanana of Madagascar.³³ They were replaced by Agwu Ukiwe Okali of Nigeria and Bernard A. Muna of Cameroon, respectively.³⁴ Another distraction has been the parallel war crimes trials that are proceeding in the Rwandan courts. These trials have been criticized by international organizations as procedurally unfair.³⁵

Nevertheless, the ICTR is beginning to make progress.³⁶ Three trials have begun since the beginning of 1997, involving four defendants: Jean-Paul Akayesu, Clément Kayishema, Obed Ruzindana, and Vincent Rutaganira.³⁷ Although all three trials have been suspended, they are scheduled to recommence in early 1998.³⁸ Three additional trials were scheduled to begin in the months of February through April 1998.³⁹

27. Stringer, *supra* note 1, at 621; see also Intermedia, *Coverage and Written Record of the International Criminal Tribunal for Rwanda* (visited Dec. 16, 1997) <<http://persoweb.francenet.fr/intermed/index.html>>.

28. See War Criminal Watch, *Rwanda Suspects* (visited Dec. 16, 1997) <<http://www.wcw.org/ictcr/suspects.html>>.

29. See Steven Lee Myers, *In East Africa, Panel Tackles War Crimes, and Its Own Misdeemeanors*, N.Y. TIMES, Sept. 14, 1997, at A6 ("the tribunal now has 21 suspects in custody, including seven arrested in Kenya in July").

30. See, e.g., *En bref*, 29 UBUTABERA (on-line journal of ICTR) (Dec. 9, 1997) <<http://persoweb.francenet.fr/intermed/french/lettre29.htm>> (initial appearance of Samuel Imanishimwe); *En bref*, 28 UBUTABERA (Nov. 24, 1997) <<http://persoweb.francenet.fr/intermed/french/lettre28.htm>> (initial appearance of Hassan Ngeze); see also *En bref*, 27 UBUTABERA (Nov. 17, 1997) <<http://persoweb.francenet.fr/intermed/french/lettre27.htm>> (Gratien Kabiligi, Jean Kambanda, and Samuel Imanishimwe await initial appearances).

31. See Myers, *supra* note 29.

32. See Paul Lewis, *U.N. Report Comes Down Hard on Rwandan Genocide Tribunal*, N.Y. TIMES, Feb. 13, 1997, at A13.

33. See *2 Dismissed From Tribunal on Rwanda*, N.Y. TIMES, Feb. 27, 1997, at A6.

34. See Myers, *supra* note 29.

35. See James C. McKinley, Jr., *Massacre Trials in Rwanda Have Courts on Overload*, N.Y. TIMES, Nov. 2, 1997, at A3; Amnesty International, *Rwanda—Unfair Trials: Justice Denied* (visited Dec. 15, 1997) <<http://www.oil.ca/amnesty/aipub/1997/AFR/14700897.htm>>.

36. See Myers, *supra* note 29 ("the tribunal has started to show signs of progress, if not yet success").

37. See Intermedia, *The Tribunal and the Accused* (visited Dec. 16, 1997) <<http://persoweb.francenet.fr/intermed/uk/tribu.htm>>.

38. See *En bref*, 29 UBUTABERA (Dec. 9, 1997) <<http://persoweb.francenet.fr/intermed/french/lettre29.htm>>.

39. See *id.*

