International Criminal Tribunals for the Former Yugoslavia and for Rwanda

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I. The Former Yugoslavia

A. Status of Proceedings

By the end of 1999, the International Criminal Tribunal for the Former Yugoslavia (ICTY) had publicly indicted ninety-three individuals (undisclosed indictments may also exist). Seven accused have died, two while in the Detention Unit, and charges have been dropped against eighteen others. Proceedings against three accused have been completed. Thirty-six accused are currently in proceedings before the Tribunal: thirty-five are detained at the Detention Unit, and one has been released pending appeal. Of these thirty-six proceedings, thirteen are on appeal, one is awaiting judgment or sentencing by the Trial

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3. Completed proceedings are: Erdemovic (guilty plea to one count of violations of the laws or customs of war on March 5, 1998, serving five years in Norway); Papic (acquitted on one count of a crime against humanity and released on January 14, 2000); and Tadic (guilty of 20 counts of violations of the laws or customs of war, crimes against humanity, and grave breaches of the Geneva Conventions, ultimately sentenced to 20 years imprisonment on January 26, 2000). See id.

4. Delalic, found not guilty on 11 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war in 1998, was released. The prosecutor has appealed. See id.

5. Trials have been completed and appeals are pending for: Delalic (acquitted), Delic (guilty on 13 counts of grave breaches of the Geneva Conventions and violations of the law or customs of war, sentenced to 20 years imprisonment), Landzo (guilty of 17 counts of grave breaches and violations of the laws or customs of war, sentenced to 15 years), and Mucic (guilty of 11 counts of grave breaches and violations of the law or customs of war, sentenced to seven years) (the Celebici defendants); Furundzija (guilty of two counts of violations of the law or customs of war, sentenced to 10 years); Aleksovski (guilty of one count of a violation of
Chamber, six are in ongoing trials, and twenty are in the pre-trial stage. One is awaiting transfer to a U.N. member state to serve his sentence. Thirty of the publicly indicted accused remain at large.

On November 16, 1999, Judge Claude Jorda (France) was chosen as president and Judge Florence Mumba (Zambia) was chosen as vice president of the ICTY. Both were elected to two-year terms. A new chief prosecutor, Carla Del Ponte (Switzerland), took over for the outgoing Louise Arbor in September. The ICTY continues its focus on the investigation and prosecution of those higher up in the chain of command.

The ICTY continues to struggle with Balkan republics over the transfer of indicted individuals and evidence to the Tribunal and the right of Tribunal personnel to investigate within former Yugoslav territories. The U.N. mandate for the ICTY obliges member states to cooperate with its requests for information and arrest warrants. Thus far, former Yugoslav entities Republika Srpska (Bosnian Serb entity), the Federal Republic of Yugoslavia (FRY), Croatia, and Bosnia-Herzegovina have refused to arrest or transfer accused in their territory to the ICTY. The outgoing president of the ICTY, Gabrielle Kirk McDonald, the laws or customs of war, sentenced to two years, six months imprisonment, and released for time served; Jelše (acquitted on one count of genocide, pled guilty to other charges, below, and sentenced to 40 years); and Z. Kupreskić (guilty of one count of a crime against humanity, sentenced to 10 years), M. Kupreskić (guilty of one count of a crime against humanity, sentenced to eight years), V. Kupreskić (guilty of one count of a crime against humanity, sentenced to six years), Jostojović (guilty of three counts of crimes against humanity, sentenced to 15 years), Santić (guilty of three counts of crimes against humanity, sentenced to 25 years), and Papić (acquitted of one count of a crime against humanity) (the Kupreskić and others case). All but Delalić and Papić are in the Detention Unit pending appeal. See id. The Appeals Chamber in Aleksovski has dismissed Aleksovski's appeals, but a written judgment on the prosecutor's appeals is pending. See id.

6. Blaskić's trial was completed in July 1999. See id.


8. See ICTY Fact Sheet, supra note 2.

9. Tadić awaits transfer to a member state to serve the remainder of his sentence. See id.

10. See id.


12. See ICTY Fact Sheet, supra note 2.


15. Belgrade refuses to recognize ICTY jurisdiction and has ignored requests to transfer Karadzic and Mladic, the most wanted accused from Bosnia's 1992 to 1995 war, to the ICTY for prosecution. Croatia has yet to recognize ICTY jurisdiction over "Operation Storm" and "Operation Flash," Croatian army offensives that retook possession of Serbian secessionist territory, claiming these are an internal police matter. See ICTY President Implores UN to Act Against "Non-Compliant" States, Agence France Presse, Nov. 3, 1999, available in LEXIS, News Library, Curnws File.
in November 1999, repeated her earlier requests to the U.N. Security Council to take measures to force these states to cooperate with the ICTY.\textsuperscript{16}

**B. MAJOR LEGAL DEVELOPMENTS**

1. **Protected Persons under the Geneva Conventions—The Tadic Appeal**

   In *Prosecutor v. Tadic*, the Trial Chamber found that Tadic's victims were not protected persons under the Geneva Conventions because they were not victims of offenses committed by a foreign power. The Appeals Chamber reversed, finding that nationality of victims is not always determinative of protected status under the Geneva Conventions. The Appeals Chamber held that the overriding concern in determining who was a “protected person” was whether nationals enjoyed the normal “diplomatic protection” of their state, and when nationals lose this protection, they become “protected persons” under the Geneva Conventions:\textsuperscript{18}

   \[\text{In modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. ... Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts ... allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.}\textsuperscript{19}\]

   Under this test, the Appeals Chamber held that Tadic's victims were protected persons and found Tadic guilty of an additional six counts of grave breaches of the Geneva Conventions.\textsuperscript{20}

2. **Crimes Against Humanity—The Tadic Appeal**

   a. “Purely Personal Reasons”

   The Appeals Chamber in *Tadic* also reversed the Trial Chamber's finding that an act carried out for purely personal reasons cannot constitute a crime against humanity. The Appeals Chamber held that a conviction for crimes against humanity must be based on a showing that the crimes were “related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.”\textsuperscript{21} However, further inquiry into the accused's *mens rea* is unnecessary. To hold otherwise would permit “any accused that played a role in mass murder purely out of self-interest [to] be acquitted.

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\textsuperscript{18} *Id.* ¶ 165.

\textsuperscript{19} *Id.* ¶ 166.

\textsuperscript{20} In total, the Appeals Chamber found Tadic guilty on an additional nine counts: six because the victims were protected by the Geneva Conventions and three because the elements were satisfied beyond a reasonable doubt. Tadic was sentenced to nine separate additional sentences, to be served concurrently with the original 20 year sentence. Both the prosecution and the defense appealed. See International Criminal Tribunal for the Former Yugoslavia: Tadic Case: The Judgment of the Appeals Chamber, Press Release (July 15, 1999) (visited Dec. 20, 1999) <http://www.un.org/icty/pressreal/p419-e.htm>.

\textsuperscript{21} *Tadic*, ¶ 271.
This shows the meaninglessness of any analysis requiring proof of ‘nonpersonal’ motives . . . .”\(^\text{22}\) Thus, the Appeals Chamber held that, as motive is generally irrelevant in criminal law, a conviction for crimes against humanity requires showing of motive other than a showing of knowledge of widespread or systematic criminal acts of which the accused’s act is a part.\(^\text{23}\)

b. Discriminatory Intent

The Appeals Chamber in \textit{Tadic} also found that the Trial Chamber erred in finding that discriminatory intent is required for all crimes against humanity. The Appeals Chamber held that the ordinary meaning of article 5 of the ICTY statute does not require discriminatory intent for all crimes against humanity, but only for that subcategory of crimes against humanity relating to persecution (article 5(h)).\(^\text{24}\) This conclusion is supported by customary international law, under which one class of crimes against humanity (murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population) have no discriminatory intent requirement, while another class of offenses (persecutions on political, racial, or religious grounds) do have such a requirement.\(^\text{25}\)

3. Genocide—The Jelisic Case

The ICTY has not yet convicted any individual on charges of genocide.\(^\text{26}\) Jelisic, the self-styled “Serb Adolf” and the only accused to be tried for genocide thus far, was acquitted of genocide, the only count to which he pled not guilty.\(^\text{27}\) The Trial Chamber in \textit{Prosecutor v. Jelisic}\(^\text{28}\) ruled that the material element of genocide, the murder of members of a given group, had been established, but that the mental element of “intent to ‘destroy, in whole or in part, a national, ethnical, racial or religious group’” had not.\(^\text{29}\) The Trial Chamber found that Jelisic’s behavior, “in addition to being clearly odious and discriminatory, was opportunistic and inconsistent” but was “not the expression of a person with the conscious

\(^{22}\) Id. ¶ 269.
\(^{23}\) See id. ¶ 268.
\(^{24}\) See id. ¶ 282.
\(^{25}\) See id. & 289.
\(^{26}\) There have recently been claims that examinations of “mass-burial” sites in the former Yugoslavia found far fewer bodies than anticipated, though only one-third of the claimed sites have been examined. Thus, charges of genocide may be more difficult to sustain than expected by the ICTY, especially when viewed in comparison to Nazi concentration camps and the situations in Rwanda and Cambodia, where evidence of mass killings was “everywhere, often not even in mass graves.” James P. Lucier & Kelly Patricia O’Meara, \textit{Tribunal Can’t Substitute Kosovo Genocide Charges}, \textit{Wash. Times}, Dec. 6, 1999, \textit{available} in 1999 WL 3100414.
\(^{27}\) See \textit{International Criminal Tribunal for the Former Yugoslavia: Goran Jelisic Sentenced to 40 Years Imprisonment for Crimes Against Humanity and War Crimes}, Press Release (Dec. 14, 1999) (visited Dec. 20, 1999) <http://www.un.org/icty/pressreal/p454-e.htm>. Jelisic pled guilty to 15 counts of crimes against humanity and 16 counts of violations of the laws and customs of war. He received 40 years imprisonment, the harshest sentence handed down so far by a Trial Chamber. The Trial Chamber found that “the circumstances under which the acts ascribed to the accused were committed make the crimes appear especially abject and revolting.” \textit{See also} Michael Conrath, \textit{Bosnian Serb “Adolf” gets 40 years, Longest Warcrimes Sentence Yet}, \textit{Agence France Presses}, Dec. 14, 1999, \textit{available} in LEXIS, News Library, Curnws File.
intention to *destroy* a group as such.” The prosecutor has appealed the genocide ruling and other aspects of the decision.

4. **Head of State**

On May 27, 1999, the ICTY announced indictments against President Milosevic and other senior government officials of the FRY and Serbia. This indictment breaks new legal ground, as it is the first to charge a sitting head of state during an ongoing armed conflict with the commission of serious violations of international humanitarian law. The indictment charges that in 1999, forces under the control of the indictees persecuted the Kosovo Albanian civilian population on political, racial, or religious grounds. Each is charged with three counts of crimes against humanity and one count of violations of the laws or customs of war for systematic and widespread offenses against Albanian towns and villages in Kosovo; the murder of over 340 persons; and the forced removal of hundreds of thousands of Kosovo Albanian citizens. All are charged with individual criminal responsibility, and four, including Milosevic, are charged with superior criminal responsibility based on their legal and de facto relationship with the military and police forces in Kosovo.

II. **Rwanda**

The International Criminal Tribunal for Rwanda (ICTR) achieved mixed results in 1999. The ICTR continued to make slow but steady progress in bringing to justice those responsible for the 1994 genocide in Rwanda. Among other things, the ICTR secured several convictions, adopted new procedures to expedite trials, substantially lowered the high vacancy rate for jobs at the ICTR, and established a new panel of trial judges. The ICTR’s progress was largely overshadowed, however, by the dismissal of the charges against Jean-Bosco Barayagwiza on grounds of pre-indictment delay, resulting in serious friction with the government of Rwanda. In 2000, the ICTR will face a number of serious challenges, including rebuilding its relationship with the Rwandan government, prosecuting those in custody in a timely manner, and resolving the difficult issue of whether to prosecute Tutsis responsible for atrocities during their efforts to overthrow the former Hutu government and stop the 1994 genocide.

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30. *Id.*


32. The indictment is also against Milutinovic, president of Serbia; Sainovic, deputy prime minister of the FRY; Ojdanic, chief of staff of the Yugoslav Army; and Stojiljkovic, minister of internal affairs of Serbia. See *President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo*, Press Release (May 27, 1999) (visited Dec. 20, 1999) <http://www.un.org/icty/pressreal/p403-e.htm>.

33. The ICTY has also been served with complaints against NATO for events surrounding its 1999 military attacks over Kosovo. Listed in the complaints are bombarding a Belgrade television center, killing refugees, and an air strike against a railway bridge when a passenger train was passing. The complaints ask that NATO politicians bear the same responsibility as Milosevic. See *Czech President Charged With War Crimes Over NATO’s Kosovo Campaign*, *British Broadcasting Corp.*, Jan. 6, 2000, available in LEXIS, News Library, Curnws File.

34. See *id.; see also War Crimes Prosecutor Vows to Put Milosevic on Trial*, *Agence France Presse*, Dec. 23, 1999, available in LEXIS, News Library, Curnws File.


SUMMER 2000
A. STATUS OF PROCEEDINGS

By the end of 1999, the ICTR had indicted forty-five individuals, of whom thirty-nine were in the ICTR's custody in Arusha, Tanzania.36 The ICTR continued to receive international cooperation in apprehending suspects—including Cameroon,37 Tanzania,38 and France39—so that at the end of the year over one-half of the Rwandan cabinet in power at the time of the genocide was in international custody.40

Two trials were completed in 1999—Alfred Musema, a former factory boss, and Georges Rutaganda, a businessman and high-ranking member of the paramilitary group Interahamwe—resulting in convictions for genocide and crimes against humanity and sentences of life imprisonment.41 In February 1999, Omar Serushago was sentenced to fifteen years imprisonment after pleading guilty to crimes against humanity.42 In May 1999, Clement Kayishema and Obed Ruzindana, whose trials were completed in November 1998, were sentenced to life imprisonment and twenty-five years, respectively, for their roles in the genocide in Kibuye prefecture.43

B. LEGAL DEVELOPMENTS

The most significant legal development at the ICTR in 1999 was the Appeals Chamber's dismissal of the charges against Jean-Bosco Barayagwiza,44 a former government official who had been a founder of both an extremist Hutu political party and a Rwandan radio station that incited violence against Tutsis.45 Barayagwiza was detained in Cameroon

37. See Ex-Ministers Arrested for Rwanda Genocide, GUARDIAN, Apr. 8, 1999, at 16. Three former ministers of the Rwandan government were arrested in Cameroon and transferred to the ICTR headquarters in Arusha, Tanzania, where they have been charged, along with a fourth former minister already in custody, with genocide, conspiracy to commit genocide, and crimes against humanity. See Three Rwandan Ex-Ministers Transferred to ICTR Detention Facility, Press Release (Aug. 2, 1999) (visited Jan. 9, 2000) <http://www.ictr.org/english/pressrel/195.htm>.
39. See Around the World, DALLAS MORNING NEWS, Dec. 2, 1999, at 26A. Jean de Dieu Kamahanda, former Minister of Education, Research, and Culture, was arrested in France in December 1999 and was expected to be turned over to the ICTR to face charges for his role in the genocide.
40. See Human Rights Watch, supra note 35.
in April 1996 but was not ordered to be transferred to the ICTR’s detention unit in Arusha until March 1997. Barayagwiza was not actually transferred to Arusha until November 1997 and did not make his initial appearance before the ICTR until February 1998. In November 1998, the Trial Chamber dismissed Barayagwiza’s motion to review or nullify his arrest. The Appeals Chamber reversed, however, and ruled that Barayagwiza’s rights had been violated by his lengthy detention without indictment, dismissed the charges against him, and ordered that he be released and returned to Cameroon.

The Appeals Chamber sharply criticized the prosecution, stating that “in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor’s failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious . . . .” The Appeals Chamber emphasized that it did not reach such a decision lightly and that the crimes with which Barayagwiza had been charged were “very serious,” but stated:

[to allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

ICTR prosecutors have requested review of this decision based on “new and additional facts,” and the Appeals Chamber has stayed its decision to consider this request.

In reaction to the Barayagwiza ruling, the Rwandan government, already frustrated by the slow pace at which cases had been brought to trial, temporarily suspended its cooperation with the ICTR and refused to grant an entry visa to Chief Prosecutor Carla Del Ponte. Such noncooperation could seriously complicate the ICTR’s work because virtually all witnesses appearing before the ICTR must travel to Arusha from Rwanda. Moreover, the Appeals Chamber’s ruling raised the possibility that other defendants could have the charges against them dismissed on the same ground. By late December 1999, four defendants—including Theoneste Bagosora, widely regarded as the military organizer of the Rwandan genocide—had either filed for release or indicated that they intended to do so.

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46. See Barayagwiza ¶ 7.
47. See id. ¶ 3.
48. Id. ¶ 10.
49. Id. ¶¶ 67, 106-08.
50. Id. ¶¶ 106-08.
51. Id. ¶ 112.
56. See Fisher, supra note 54.
As a result of these events, Navanethem Pillay, the ICTR's chief judge, in December 1999 described the ICTR as being "in a crisis."

Another difficult issue facing the ICTR is whether to prosecute Tutsis. To date, the ICTR has prosecuted only officials and supporters of the Hutu-dominated government in power at the time of the genocide for their roles in atrocities directed at Tutsis and moderate Hutus. However, Human Rights Watch has estimated that at least 25,000 Hutus were killed as a result of massacres by the Tutsis, and the Tribunal's former chief prosecutor, Louise Arbor, has publicly stated that the Tribunal should investigate atrocities committed by "both sides" of the conflict. Because a major role of the ICTR (like the ICTY) is to discourage future atrocities by dispensing even-handed justice, it would seem wise for the ICTR to follow the suggestion of Ms. Arbor.

57. Id.
58. See id.
59. Id.