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The Right to a Fair Mistrial: A Criticism of the Procedures at the International Criminal Tribunal for the Former Yugoslavia

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I. Introduction

In 1993, the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (the “Tribunal”).¹ The United Nations erected the Tribunal in an effort to eradicate the myriad human rights violations that were characterizing the region.² However, almost fifteen years after the Tribunal’s establishment, these instances of genocide still persist.³

The procedural inefficiency that plagues the Tribunal continually stagnates the goal of bringing justice and peace to


² See id. (expressing grave alarm at the continuing reports of “widespread and flagrant” violations of international humanitarian law occurring within the borders of the Former Yugoslavia).

the region.\textsuperscript{4} The Tribunal detains defendants for years and those that do receive a trial are subject to prejudicial procedures.\textsuperscript{5} This comment attempts to dispel the notion that these criminal procedures are a model system of justice. The Tribunal is rife with inefficiency and excessive prosecutorial discretion that more developed nations would not tolerate. Further, the Tribunal stagnates the process of peacemaking through selective indictments.

Part II discusses the creation of the Tribunal and contrasts its procedures with the Nuremberg Tribunal, which was its model. Part III analyzes the consequences of these


\textsuperscript{5} See Indictment of Ljube Boskoski and Johan Tarculovski, The International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/indictment/english/bos-ii050309e.htm (last visited Nov. 15, 2007) (charging two defendants with substantially varying levels of culpability in the same indictment).
procedural flaws, both for the defendants, and for the entire Balkan region. Finally, Part IV recommends methods by which the tribunal can correct these flaws, including invoking more of the procedural rules employed in the Nuremberg trials and mandating a closure date for the tribunal.

II. Background

Since its prompt closing in 1946, the Nuremberg Tribunal ("Nuremberg") has been a model for other ad hoc criminal tribunals. Nuremberg connotes notions of efficiency and justice that other tribunals strive to achieve. While many of the


7 This comment makes the assumption that the procedures conducted at Nuremberg are generally regarded as a success and makes its comparisons to the current tribunals only against this largely held belief. It does not delve into the possibility that Nuremberg may have experienced its own little known procedural flaws. See John Q. Barrett, Doing TV Justice to Nuremberg?, FindLaw.com,

http://writ.news.findlaw.com/commentary/20000714_barrett.html
statutory articles creating procedures for the Tribunal appear reminiscent of Nuremberg’s procedures, the reality is that they are excessively vague and many times contradictory.\textsuperscript{8} Rather, the Tribunal has yet to employ procedures that efficiently forward its purpose, to bring justice to the Balkan region.\textsuperscript{9}

\begin{quote}
(last visited Nov. 14, 2007) (confirming that Nuremberg established the model for prosecuting war crimes). The Tribunals for the Former Yugoslavia and Rwanda operate under this model. \textit{Id.} It is also the model for the permanent International Criminal Court. \textit{Id.}
\end{quote}


\textsuperscript{9} See \textit{id.} at 649 (purporting that the Tribunal’s creation of a public record of the alleged crimes ensures that the accused will become “an international pariah” before the commencement of his/her trial).
A. Nuremberg: A Model Tribunal

The Nuremberg Trials refer to those trials, which began in October, 1945, of both the military and political leaders of Nazi Germany before the International Military Tribunal sitting at Nuremberg, Germany.10 The United States, the Soviet Union, and the United Kingdom created the tribunal to punish war crimes violators during the Nazi occupation.11 On August 8, 1945, the London Charter legalized the tribunal and laid out the

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11 See The Nuremberg Courtroom, United States Holocaust Memorial Museum, http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007089 (last visited Nov. 13, 2007)(pointing out that France was also allowed to sit on the adjudicating panel). The Nuremberg Courtroom, where the judges sat, was the only undamaged facility large enough to accommodate the trials. Id. The “courtroom” and venue for the defendants’ ultimate convictions was formerly the site of many Nazi rallies and conventions. Id.
procedural rules for the trials.12 “The Moscow Declaration: Statement on Atrocities” authorized the Charter’s development and the European Advisory Committee issued the final draft.13 The London Charter outlined in detail an adjudication system closely resembling most civil trials.14 However, the criminal procedures required hearings before a panel of judges that

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13 See Joint Four-Nation Declaration, Moscow Conference October 1943, http://www.ibiblio.org/pha/policy/1943/431000a.html (last visited Aug. 8, 2007) (uniting the State Parties in this declaration to continue hostilities against the axis powers until the axis powers laid down their arms in unconditional surrender).

14 See id. (outlining the rights available to the parties including a right to counsel).
typically allowed hearsay evidence.\textsuperscript{15} The victorious allied parties composed the members of the court.\textsuperscript{16}

Further, the London Charter delineated three types of crimes: war crimes, crimes against peace, and crimes against humanity.\textsuperscript{17} It also limited the trials to violations during

\textsuperscript{15} See, Nuremberg Trial Proceedings, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (allowing hearsay evidence is one of the substantive flaws of the Nuremberg tribunal as compared to the International Criminal Tribunal for the Former Yugoslavia).

\textsuperscript{16} See International Military Tribunal at Nuremberg, United States Holocaust Memorial Museum, http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007069 (last visited Aug. 22, 2007) (implicating the criticism that these tribunals only dole out victor’s justice). The current tribunal has never indicted any of the NATO countries for the bombings in Kosovo, which suggests that the indictments are handed out selectively. Id.

\textsuperscript{17} See Nuremberg Trial Proceedings, supra 12 (specifying the levels of crimes and what qualifies under each category). It distinguishes crimes against peace as planning and preparation for aggression from war crimes that violate the law or customs
wartime, precluding jurisdiction for any crimes committed prior to September 1, 1939.\textsuperscript{18} Holding an official position, where the job description required the commission of a war crime, was not a defense, but could be a mitigating factor during sentencing.\textsuperscript{19}

The first session in 1945 indicted twenty-two alleged war criminals and six organizations, including the Gestapo.\textsuperscript{20} These trials were all completed within one year between October 1945

\textsuperscript{18} See id. (specifying that Article 1 was enacted to apply to major war criminals acting as Axis powers, which effectively prevented the charge of any crimes before September 1, 1939).
\textsuperscript{19} See id. (writing in Article 7 that the official position of defendants, whether as Heads of State or responsible officials in Government Departments, is not a sufficient defense to free them from responsibility or mitigate punishment).
\textsuperscript{20} See id. (indicting the defendants for: participation in a common plan or conspiracy for the accomplishment of a crime against peace, planning initiating and waging wars of aggression and other crimes against peace, war crimes, and crimes against humanity).
and October 1946. Each defendant was entitled to an attorney of his or her choice. Chief American Prosecutor, Robert Jackson, primarily based his claims on information gleaned from primary sources authored by the defendants themselves. This quelled concern that the biased testimony of the Nazi victims would taint the trial. The system required a guilty verdict

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21 Compare War Crimes Trials, United States Holocaust Memorial Museum, http://www.ushmm.org/outreach/wcrime.htm (last visited Nov. 15, 2007) (discussing that at Nuremberg, all twenty-two major trials, twelve of which were capital offenses, were completed within one year. with ICTY Cases and Judgments, United Nations http://www.un.org/icty/cases-e/index-e.htm (last visited Nov. 15, 2007) (showing indictments for cases that have not been tried by the International Criminal Tribunal for the Former Yugoslavia dating back to 1995).

22 See War Crimes Trial, supra note 21 (recalling that the courts were also open to the public and sat about 400 visitor a day).

23 See id. (noting that President Truman appointed a new Chief prosecutor for the Subsequent Nuremberg Proceedings in the United States, perhaps suggesting he was not satisfied with the outcome of the trials).

24 See International Military Tribunal, United States Holocaust Memorial Museum,
from three of the four sitting judges in order to have a conviction.\(^\text{25}\)

Shortly after the Nuremberg Trials, the United Nations produced the Nuremberg Principles.\(^\text{26}\) The Nuremberg Principles


(last visited Aug. 30, 2007) (discussing how most of the defendants were low-level pawns; particularly camp guards, police officers, and doctors that participated in medical experiments). The prosecutor feared that they would be unfairly prejudiced by the bias of any witness that would appear. \(\text{Id.}\)

See The Doctors’ Trials, United States Holocaust Memorial Museum, http://www.ushmm.org/research/doctors/

(last visited Aug. 8, 2007) (recalling how many German physicians systematically enacted the euthanasia program of Nazi Germany, killing those they deemed “unworthy of life”).

\(^\text{25}\) See War Crimes Trial, supra note 21 (highlighting that although the rule required three out of four judges to find culpability in order to render a guilty verdict, generally, most guilty verdicts were unanimous).

extended the three categories of crimes punishable under international law from the London Charter to the new resolution. The “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,” the proper name for the resolution, asserts that the trials were revolutionary and set the standard for future tribunals. The equivocal judgments of Nuremberg are meant to inspire current ad hoc tribunals, even if they have not always been successful.

B. Establishing the International Criminal Tribunal for the Former Yugoslavia

The Security Council established the Tribunal with the passage of Resolution 827. The “Statute of the International Tribunal…” created the Tribunal’s jurisdiction as well as

27 See id. (retaining the same categories of crimes against humanity, war crimes and crimes against peace, but expanding the definition from the one delineated in the London Charter).

28 See id. (laying out the principles for any person who commits a crime under international law and their liability under the Nuremberg Principles).

delineated the powers of the Office of the Prosecutor and the different Trial Chambers. The following discusses the provisions of the most controversial statutory articles. Generally the controversy arises out of an article’s inconsistency with the rest of the statute or the Security Council’s failure to enforce it properly.

1. Basis for Jurisdiction

United Nations Security Council Resolution 827 (the “Resolution”) established the Tribunal in a purported effort to correct flagrant violations of international humanitarian law. The Resolution dictated that the Tribunal would function according to the provisions of “The Statute of the International Tribunal for the Prosecution of Persons...Committing ...Violations...in the Former Yugoslavia (the “Statute”).”


31 See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former
Articles 2 through 5 give the Tribunal subject-matter jurisdiction over breaches of the Geneva Convention, violations of the law or customs of war, genocide, and crimes against humanity. Articles 6, 8, and 9 provide the different bases for jurisdiction.\textsuperscript{32} Article Six authorizes personal jurisdiction over natural persons.\textsuperscript{33} Article 8 creates territorial jurisdiction over the air, land, and space within the boundaries of the Former Yugoslavia.\textsuperscript{34} Article 9 creates concurrent jurisdiction with the national courts.\textsuperscript{35} Further, the Statute specifies that the Tribunal has the power to ask the national

\begin{footnotesize}

\textsuperscript{32} Id. at arts. 6, 8-9.

\textsuperscript{33} See id. at art. 6 (authorizing personal jurisdiction over natural persons provided that it is consistent with the other articles pursuant to this Statute).

\textsuperscript{34} See id. at art. 8 (extending the temporal jurisdiction of the Tribunal to a period beginning retroactively on Jan. 1. 1991).

\textsuperscript{35} See id. at art. 9 (requiring the deference from the national courts to the Tribunal to comport with the present Statute and the Rules of Procedure and Evidence of the Tribunal).

\end{footnotesize}
courts to defer jurisdiction to the Tribunal. The legality of the Tribunal’s jurisdiction is the most controversial issue surrounding the Tribunal. Even the International Court of Justice (“ICJ”) has recognized that the Security Council’s authority to delegate jurisdiction is untenable. However, The Namibia Advisory Opinion and The Expenses Advisory Opinion agree that the ICJ has no authority to limit the tribunal’s judicial power.

36 Id.


2. Procedural Rules

The Statute provides for two trial chambers and one appeals chamber. The Chambers consist of eleven permanent judges, none of whom may be from the same state as the other. The

40 See Rachel Taylor, Tribunal Law Made Simple, Global Policy Forum, available at http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/ictyintro.htm (last visited Nov. 14, 2007)(underscoring that the decision of the appeals chamber is final unless a fact that could not have been reasonably known at the time of the trial arises, then either the defense or the prosecution can ask the Chambers to review the judgment).


42 Compare id. (requiring that the Chambers be composed of eleven judges; three in each of the trial chambers, and five in the Appeals Chamber), with Scott Grosscup, The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor’s Justice, 32 Denv. J. Int’l L. & Pol’y 355, 361 (claiming that the Tribunal is composed of sixteen permanent judges; seven of whom sit on the appeals chamber, five of whom sit on any individual appeal).
Statute requires that the jurists be of “high moral character, impartiality, and integrity.”\(^{43}\) The General Assembly fills the posts by conducting an election amongst a list of nominees submitted by the Security Council.\(^{44}\)

Articles 15 and 16 delineate the powers of the judges and the prosecutor.\(^{45}\) Particularly, Article 15 grants the power to create procedural and evidentiary rules to the judges.\(^{46}\) The Statute urges the judges to make rules that are in the best interest of the victims as well as the witnesses.\(^{47}\) The Article


\(^{44}\) [See id.](#) (disclaiming that if two or more candidates of the same nationality obtain the required number of majority votes, the one who received the higher number of votes shall retain the post). Within the Tribunal, the judges elect a president from a member of the appeals chamber. [Id.](#) The president then assigns the remaining judges to the appeals or trial chamber. [Id.](#)

\(^{45}\) [Id.](#) at arts. 15-16.

\(^{46}\) [See id.](#) at art. 15 (allowing the judges to create procedural rules for the pre-trial phase of the proceedings, trials and appeals, and the admission of evidence).

\(^{47}\) [See Howard S. Levie, The Statute of the International Tribunal for the Former Yugoslavia, 21 Syracuse J. Int'l. L. & Com. 1, 16 (1995)](#) (refuting the common criticism that Article Fifteen is too
Article Sixteen grants the Security Council the power to appoint the prosecutor.\textsuperscript{48} The prosecutor, as an official, retains an exceptional amount of power.\textsuperscript{49} For example, Rule 50 of the Tribunal’s “Rules of Procedures and Evidence,” allows the prosecutor to continually amend the indictment of an accused up until the trial date.\textsuperscript{50} Further, the Court tends to defer to prosecutorial motions. For example, in the Dordevic Case, the vague because the Statute permits the Chamber to adopt a rule that is in direct conflict with its basic constitutive document).

\textsuperscript{48} See id. at 19 (praising the Tribunal for developing a method of appointing the prosecutor that does not implicate notion of state equality).

\textsuperscript{49} See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 18, para. 1-2 (granting the Prosecutor the power to initiate investigations, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations).

Tribunal tried six men of varying levels of culpability together at the request of the prosecutor in an effort to promote efficiency.\(^5^1\)

Under the statute, the prosecutor serves four-year terms, but may be eligible for reappointment.\(^5^2\) His duties include the investigation and prosecution of persons responsible for the violations of international law.\(^5^3\) According to the Statute, the Office of the Prosecutor may employ other qualified staff as needed.\(^5^4\)

Article 15’s delegation of authority to the judges to create procedural rules conflicts with Articles 18 through 21, which


\(^5^2\) See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 16, para. 4 (assigning the terms and conditions of service of the prosecutor as those an Under-Secretary-General of the United Nations).

\(^5^3\) See id. (instructing the prosecutor to act independently and as a separate organ of the Tribunal). The Statute disallows the prosecutor from seeking or receiving instructions from any Government or other source. Id.

\(^5^4\) Id.
outline preparation of indictments, trials proceedings, and rights of the accused.\textsuperscript{55} Under these articles, the Prosecutor has the power to question witnesses, suspects, and victims, as well as conduct on-site investigations as necessary in order to collect evidence.\textsuperscript{56} The judge of the trial chamber must review

\textsuperscript{55} Compare Statute, \textit{S.C. Res. 827 U.N. Doc.S/25704 at art. 15} (instructing the judges to create the procedural rules for the pre-trial, trial and appellate proceedings in Article Fifteen), with \textit{id.} at arts. 18-21 (providing rules for the indictment, conduct of trial proceedings, and rights of the accused), and \textcite{Levie, supra} note 47 (highlighting that the national courts’ rules of evidence are not binding on the Tribunal). Rule 89 of the Chamber’s Rules of Procedure and Evidence provides that the Tribunal apply those rules of evidence which will best yield a fair determination on the matter. \textit{Id.} Accordingly, the Tribunal may admit and exclude evidence depending on the panel’s determination of its probative value. \textit{Id.}

\textsuperscript{56} Compare Statute, \textit{S.C. Res. 827 U.N. Doc.S/25704 at art. 18} (granting power to the Prosecutor to seek the assistance of state authorities in conducting investigations and collecting evidence) with \textit{id.} at art. 16 (disallowing the prosecutor from seeking any instructions from a government source to avoid excessive intermingling).
and confirm any indictments submitted by the prosecutor.⁵⁷ At
the request of the prosecutor, the judge may issue further
orders for the arrest and detention of persons as the prosecutor
deems necessary in order to conduct the trial.⁵⁸

Article 20 requires that a trial is impartial and
“expeditious.”⁵⁹ These proceedings must be conducted in
“accordance with the Rules of Procedure and Evidence,”⁶⁰ however, the Statute also emphasizes that the trial proceedings must be

(requiring the prosecutor to establish a prima facie case before the judge can confirm the indictment).

⁵⁸ Id.

(ordering the trial chamber to conduct trial proceedings efficiently, offering no statute of limitations or specific timetables for bringing or concluding an action), with
Limitation Act, 1980, c.58 (Eng.) (providing specific timescales for which actions may be taken for breaches of British law).

⁶⁰ Compare Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (providing 125 distinct procedural rules for the Tribunal), with
Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 15 (allowing the judges to create their own procedural rules for the different phases of the trial proceedings).
conducted with regard for the victims and witnesses. These hearings shall be public unless the Trial Chamber closes them in accordance with the rules of procedure and evidence. Regardless, the judges and the prosecutor enjoy the privileges and immunities, and exemptions and facilities accorded to diplomatic envoys in accordance with international law.

Article 21, “The Rights of the Accused,” requires that the defendant is deemed innocent until proven guilty. A majority

62 Id. at art. 20.
64 See Levi, supra note 47 (arguing that although Article 21 appears to provide a comprehensive list of protections for the accused, it would have been better for the Tribunal to borrow the “Fundamental Guarantees” of Article 75 of the Additional
of the panel must render a guilty verdict in order to sentence
the accused.\footnote{Compare Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 24 (requiring the Trial Chamber to deliver all judgments in public under Article Twenty-Four), with id. at art. 21 (allowing the Trial Chamber to close all trial proceedings to the public at the panel’s discretion).} Sentences are limited to imprisonment only and
are given at the discretion of the panel based on the gravity of
the offense.\footnote{See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 24 (determining that penalties awarded to an accused may include the an order to return any property or proceeds collected during the commission of the crime, including those items collected by means of duress).}

Finally, the budget of the United Nations includes the
total expenses of the Tribunal in accordance with Article 17 of the
Protocol I in 1977). The Statute required the later inclusion
of additional protections in the Rules of Evidence and Procedure
including: Rule 42 (Rights of Suspects During Investigation),
Rule 45 (Assignment of Counsel), and Rule 67 (Reciprocal
Disclosure). \textit{Id.} at 28 n.89.
Charter of the United Nations.\textsuperscript{67} In exchange for the funding, the President of the Tribunal must submit an annual report of the International Tribunal to both the Security Council and the General Assembly.\textsuperscript{68}

III. Analysis

Given the history of atrocities that has occurred in the Former Yugoslavia, that an organ of the United Nations attempted to create a remedy is not surprising.\textsuperscript{69} However, this section


\textsuperscript{68} See \textit{Statute}, \textit{S.C. Res.} 827 \textit{U.N. Doc.S/25704} at art. 33 (submitting the working languages for the President’s annual report, English and French). However, the Statute requires that indictments must be presented to the accused in their native language. \textit{Id.} at art. 21.

\textsuperscript{69} See Most Rev. Dr. Robert M. Bowman, Liet. Col., USAF, Chronology of the Conflict in Kosovo, \url{http://www.rmbowman.com/isss/kosovo.htm} (last visited Nov. 15, 2007) (detailing the history of Kosovo beginning when Byzantine
analyzes the illegalities and procedural flaws that have resulted from the Security Council’s attempt at recourse through the Tribunal. While some of these deficiencies have resulted from the vague and improper procedures delineated in the Statute, many of the Tribunal’s improprieties have resulted from the Tribunal’s failure to strictly adhere to the Statute’s rules.

A. The International Criminal Tribunal for the Former Yugoslavia Does Not Have Jurisdiction to Adjudicate the Conflict in the Balkan Region.

Since the inception of the Tribunal, defendants have attacked the Tribunal for exercising illegal jurisdiction.70 Dusko Tadic, rule was overthrown in 1172 through the revocation of Kosovo’s autonomy in 1989 and the conflict that ensued); see also Serbia to Return Bodies of 84 Ethnic Albanians to Kosovo, KosovaReport, (Aug. 5, 2005) (reporting the return of eighty-four dead ethnic Albanians who were tortured and killed in the 1998-1999 Kosovo war). This was the largest single dead return in the region’s history. Id.

the Tribunal’s first defendant, was also the first to register these arguments before the Tribunal, but certainly not the last.\textsuperscript{71} Further international law scholars attack the grant of primacy to the International Tribunal, as well as challenge its extensive subject-matter jurisdiction.\textsuperscript{72} Both historical precedent and international law suggest that the United Nations Security Council did not have the authority to create the Tribunal and authorize its jurisdiction.\textsuperscript{73}

does not have the authority to set up an independent, ad hoc criminal tribunal). However, Tadic’s primary defense was that he had an alibi. Greenwood, supra note 29.


\textsuperscript{72} See Id. (challenging the subject-matter jurisdiction based on the illegality of the Tribunal’s establishment, in other words, that the Tribunal did not possess any jurisdiction over this alleged crime or any).

\textsuperscript{73} See Hans Koechler, supra note 37 (criticizing the United Nations and the Tribunal for its improper establishment and overreaching jurisdiction). Koechler calls the Tribunal’s procedures a “futile exercise that attempts to masquerade politics with legitimate judicial proceedings.” Id. But see generally George Aldrich, Editorial: Amicus Curiae Brief
A treaty demonstrates an affirmative and consensual act of multiple nations. Resolution 827 only reflects the aims of the members of the Security Council as opposed to a treaty that demonstrates an affirmative and consensual act of multiple nations. Prior to the creation of the Tribunal, no auxiliary organ of the United Nations had ever created an independent

presented by the Government of the United States of America, 90 Am. J. Int’l L. 64 (1996) (arguing that the prosecutor and the United States, which submitted an amicus brief, were correct to give great weight to the views of the United Nations Security Council). The 1992 Bosnian conflict involved the Federal Yugoslav Army, this involvement was sufficient to qualify as an international armed conflict and thus legalized Tribunal intervention. Id.

74 See Koechler, supra note 37 (dispelling the belief that the Tribunal was created through a treaty that requires the agreement of multiple nations). Rather, the Tribunal was created within the very narrow scope of the United Nations Security Council. Id.

75 See id. (claiming that Chapter VII of the United Nations Charter determines the competence of the Security Council in matters of international security, but not in matters of criminal justice or other judicial matters).
tribunal.\textsuperscript{76} Not only did the Security Council break precedent in the creation of the Tribunal, the Security Council granted this Tribunal exceptionally expansive jurisdiction as seen in Article 6, 8, and 9.\textsuperscript{77}

Article 9 of the Statute grants the Tribunal, at the very least, concurrent jurisdiction with the national courts and at most, primacy over the national courts.\textsuperscript{78} As many of the crimes

\textsuperscript{76} See \textit{S.C. Res.} 955 \textit{U.N.} Doc. S/RES/955 (Nov. 8 1994) (establishing the International Criminal Tribunal for Rwanda for the persecution of persons responsible for the genocide and other violations of international humanitarian law occurring in the region). Unlike the Tribunal, which sits in The Hague, the Rwandan Tribunal sits in Arusha, United Republic of Tanzania.

\textsuperscript{77} See \textit{Levie, supra} note 47 (demonstrating the Tribunal’s expansive jurisdiction through a discussion of its concurrent jurisdiction with the national courts and its power to request that the national court defer their jurisdiction to the Tribunal).

\textsuperscript{78} See \textit{Statute, S.C. Res.} 827 \textit{U.N.} Doc.S/25704 at arts. 6, 9. (providing concurrent jurisdiction and primacy over the national courts in certain situations provided that the deference is
that the Tribunal adjudicates occurred while the Former Yugoslavia remained one nation, the Tribunal has inserted itself into an intra-national conflict.\textsuperscript{79} Intervention by the Security Council had always previously required an international armed conflict, defined as “a threat to two or more sovereign nations.”\textsuperscript{80} As all violent instances occurred within the borders of Yugoslavia, there was no international emergency that warranted the intervention of the Security Council.\textsuperscript{81}

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conducted in accordance with the Tribunal’s Rules of Procedure and Evidence).
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\textsuperscript{79} See Decision on the Defense Motion on Jurisdiction supra note 37 (explaining that the alleged crimes for which the Tribunal indicted Tadic all occurred within the boundaries of the former Yugoslavia).
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\textsuperscript{80} See id. (citing the Geneva convention’s definition of an international emergency).
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\textsuperscript{81} See Second Amended Indictment of Dusan Tadic, International Criminal Tribunal for the Former Yugoslavia, (Dec. 1995) available at http://www.un.org/icty/indictment/englisg/tad-2ai951214e.htm (listing the charge and breaking down the alleged crimes by the supposed occurrences at each concentration camp, all contained within the boundaries of the Former Yugoslavia);
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The Security Council claims it felt that the region presented an international threat.\textsuperscript{82} Clearly, their solution was to sit a deferential judicial panel on trials with a powerful Office of the Prosecutor.\textsuperscript{83} While Articles 14, 15, and 16 appear facially neutral, when viewed in the context of a Trial, the power of the prosecutor is extremely prejudicial to the defendants.\textsuperscript{84} Further, Article 15 specifically allows the judges to create

\textbf{see also} Sells, supra note 3 (describing the instances of genocide occurring within the Bosnian boundaries).

\textsuperscript{82} S.A. Res. 827, \textit{U.N. Doc A/res/827} (determining the need for an end to the threat to international peace and security, the Security Council established the Tribunal to put an end to such crimes that were repeatedly occurring in the region).

\textsuperscript{83} \textbf{See} Statute, \textit{S.C. Res. 827 U.N. Doc.S/25704 at arts. 15, 18} (creating the judges’ ability to adopt procedural rules for each individual trial and the prosecutor’s ability to conduct extensive investigations).

\textsuperscript{84} \textbf{See} Indictments and Proceedings at the ICTY, United Nations, \texttt{http://www.un.org/icty/cases-e/index-e.htm} (last visited Nov. 15, 2007)(listing all those indicted to date and charging them with violations of Articles 3, 5, and 7 of the Statute of the Tribunal). Most of the accused have had their indictment amended at least once. \textit{Id.}
rules on a case-by-case basis.\textsuperscript{85} There is no procedure to determine primacy between conflicting rules.\textsuperscript{86}

Rather, the Security Council’s intervention represents an attempt to impose a western justice system on a volatile eastern European nation.\textsuperscript{87} Displacing the jurisdiction of the national courts is inconsistent with the Tribunal’s purported aim of bringing peace and stability to a volatile region.\textsuperscript{88} Countries with veto power on the Security Council are permitted to wage

\textsuperscript{85} See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 15. (instructing the judges to create the procedural rules for the different phases of the trial proceedings).


\textsuperscript{87} See Koechler, supra note 37 (lambasting the Security Council and the Tribunal for behaving as a “surrogate for judicial authority” when proper jurisdiction belongs to the national courts).

\textsuperscript{88} S.A. Res. 827, U.N. Doc A/res/827 (claiming the Tribunal’s establishment is an attempt to bring peace to a volatile region and eradicate the threat to international peace and security).
war on a region in distress without fear of persecution. Instead, the Tribunal focuses its indictments on legitimate heads of state and officials from the Former Yugoslavia.

Advisory opinions that the International Court of Justice (“ICJ”) previously issued further undermine the legality of the Tribunal’s jurisdiction. The Expenses Advisory Opinion highlights that there is no procedure for determining the legality of acts performed by auxiliary organs of the United Nations. Prior actions by the Security Council are the guiding

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89 See Koechler, supra note 37 (regretting that because that Tribunal does not have the power to stop the international law violation being conducted by NATO nations, the Tribunal focuses on legitimate heads of state regardless of its lack of legal jurisdiction).

90 See id.

91 See “Namibia Advisory Opinion, 1971 I.C.J. at 45 (1970) (asserting that the power to adjudicate the armed conflict should remain with South West Africa and not with auxiliary organs of the United Nations or another sovereign nation); see also The Expenses Advisory Opinion, 1962 I.C.J. at 151.

92 See The Expenses Advisory Opinion, 1962 I.C.J. at 168 (citing Article 17(2) of the Charter of the United Nations, which states
instruments for the United Nations organ.\textsuperscript{93} Therefore, in creating the Tribunal, the Security Council expanded its own authority with the knowledge that there was no possibility of repercussions.\textsuperscript{94} Unfortunately, the ICJ opinions make it very difficult to reverse the authority of the Tribunal because the ICJ could not have the power of judicial review over a claim of illegal jurisdiction, as there is no procedure to determine the initial illegality of the Security Council’s actions.\textsuperscript{95}

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that all expenses shall be apportioned by the United Nations General Assembly).
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\textsuperscript{93} See \textit{S.C. Res. 955 U.N.} Doc. S/RES/955 (creating the International Criminal Tribunal for Rwanda almost one and a half years at the creation of the Yugoslavian tribunal).

\textsuperscript{94} See \textit{Namibia Advisory Opinion}, 1971 \textit{I.C.J.} at 51 (confirming that to date, no procedure exists for determining the legality of acts committed by auxiliary United Nations Organs such as the Security Council).

\textsuperscript{95} See \textit{Decision on the Defense Motion on Jurisdiction, supra}, note 37 (relying incorrectly on the ICJ advisory opinion and therefore implicating a deficiency in the appeals process, that is, there is no power of judicial review or ability to petition for a writ of habeus corpus).
The Security Council justifies its actions as necessary to remedy “Grave Breaches of the Geneva Convention” that persisted, and continue to persist, in the region.\textsuperscript{96} Even if one dismisses the claims of illegal jurisdiction, establishing the Tribunal was still a makeshift resolution to a grave problem. Not coincidentally, the Security Council’s “solution” largely forwarded western ends.\textsuperscript{97} The Tribunal creates thousands of jobs beginning at the administrative level and continuing up the ranks through the Appeals Chamber.\textsuperscript{98} The Tribunal’s inefficiency


\textsuperscript{97} See Koechler, \textit{supra} note 37 (characterizing the establishment of the tribunal as merely an attempt to influence political events in favor of NATO countries).

\textsuperscript{98} See The Importance of City Marketing, \textit{Nieuw beeldmerk Stad Den Haag} (2005) \url{http://www.1november.nl/en-5.htm} (follow “english” hyperlink) (citing a 2005 survey which found that International Organization create more then 24,000 jobs in The Hague). 12,500
suggests that those who occupy these positions would like to perpetuate their positions at the expense of expediency. 99

The Security Council further defends its actions by claiming that it is inherent in the treaty of the United Nations that this organ could not act arbitrarily or for ulterior purposes. 100 Undoubtedly, the United Nations places

of these jobs were formed as a result of international organizations coming to the region. Id.


100 See generally Anne-Sophie Massa, NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion, 24 Berkeley J. Int’l L. 610 (2006) (discussing how the Tribunal consistently
great faith in the Security Council’s authoritative figures, as punitive measures that guard against arbitrary acts do not exist.\textsuperscript{101} The Security Council describes the decision to establish the Tribunal as a “protracted four-step process involving: condemnation publication, investigation, and punishment.”\textsuperscript{102} Notably, the Security Council justifies the establishment of the Tribunal by the ends it seeks to meet rather than the means or legality with which the UN Security Council established it.\textsuperscript{103}

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\textsuperscript{101} See id. (pointing out that Dusko Tadic’s attempts at extending the Capacity of the Tribunal to in turn review the legality of the acts of the Security Council was fruitless).
\textsuperscript{102} See id.
\textsuperscript{103} See Jeffrey Davis, Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally – But It was the Right Thing to Do . . . So Who Cares?, 28 \textit{N.C. J. Int’l L. & Com. Reg.} 395 (2002)(highlighting that if Tadic’s objection to jurisdiction had been sustained, not only would he have been acquitted but “the notion of the Tribunal would have been shattered”).
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B. Conducting Joint Trials For Defendants Of Varying Levels Of Culpability Prejudices The Parties Because It Requires Them To Defend Against The Prosecution As Well As Their Co-defendants.

As the Tribunal comes under mounting pressure to promote efficiency, joinder has become an increasingly common practice.\textsuperscript{104} World pressures to close the Tribunal continually battle the notion that the Tribunal should effectively try all the alleged human rights violators.\textsuperscript{105} In order to reconcile the two concerns, the Tribunal has increasingly joined defendants that may have remote contact with the nexus of any one crime.\textsuperscript{106}


\textsuperscript{106}Compare Gottlieb, supra note 104 (asserting that a trial of nineteen defendants would at least lead to greater coherence in the treatment of the various charges brought against the
Many Courts prefer joinder because it promotes judicial economy.\textsuperscript{107} However, there is always the fear that when too many defendants are joined, a defendant’s trial may result in “prosecution” from the government as well as from his or her co-defendants.\textsuperscript{108} Trying defendants with greatly varying degrees of accused), with Indictment of Ljube Boskovski and Johan Tarculovski, The International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/indictment/english/bos-ii050309e.htm (last visited Nov. 15, 2007) (indicting two defendants for crimes with varying levels of culpability).

\textsuperscript{107} See United States v. Zafiro, 506 U.S. 534, 568 (1993) (announcing a preference for joint trials in order to promote judicial economy). O’Connor’s opinion is considered the most seminal writing on the issue of severance. Scott Boalik, Joinder and Severance, 8 Geo. L. J. 1427 (1998). The article discusses how certain instances of prejudice can fail the “Zafiro Test” in light of limiting instructions. \textit{Id.}

\textsuperscript{108} See United States v. Dentico, No. 05-607, 2006 WL 757217 (D.N.J. Mar. 20, 2006) (severing two of the defendants from a joint trial because they would have been substantially harmed by association with the other more culpable defendants). Joinder cannot stand if there is evidence that the jury will not be able
culpability heightens the risk of prejudice.\textsuperscript{109} Subjecting the defendants to this risk is inconsistent with the protections of Article Twenty-One, “Rights of the Accused.”\textsuperscript{110}

Additionally, a legitimate fear that joinder lowers the necessary burden of proof exists.\textsuperscript{111} Many legal scholars raise concerns that joinder of defendants implores the panel to determine who of the defendants is the most or least guilty, as to compartmentalize evidence presented against particular defendants. \textit{Id.}

\textsuperscript{109} \textit{Zafiro}, 506 U.S. at 568 (warning that joinder is similar to introducing a second prosecutor because it “[turns] each co-defendant into the other’s most forceful adversary”). Secondly, Justice Stevens raised the concern that when a jury is faced with two defendants, a jury will convict the one who appears guiltier regardless of the proof the prosecutor has presented. \textit{Id.}

\textsuperscript{111} See \textit{Statute, S.C. Res. 827 U.N. Doc.S/25704} at art. 21 (guaranteeing a presumption of innocence and a fair trial, \textit{inter alia}, to the accused).

\textsuperscript{111} See \textit{Zafiro}, 506 U.S. at 568 (raising the fear that jurors will establish relative levels of guilt rather than evaluating each defendant individually against the evidence that the government has presented).
opposed to determining whether the government has met its burden of proof.\textsuperscript{112} The Dordevic case implicates this concern.

In that case, six men were indicted for violating crimes against humanity due to the posts they held in the Serbian government.\textsuperscript{113} If one holds a leadership position within the organization deemed responsible for the crime, the defendant is de facto responsible as a result of his or her leadership post.\textsuperscript{114} However, Dordevic served as an assistant of the MUP, while his co-defendant, Milan Milutonovíc, served as President

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\textsuperscript{112} \textit{Id.}
\textsuperscript{113} See ICTY at a Glance, United Nations, \texttt{http://www.un.org/icty/glance-e/index.htm} (last visited Nov.15, 2007) (displaying the charges of Dordevic based on his post as compared to the charges of his co-defendants all of whom had more powerful positions in the defendant’s army).
\textsuperscript{114} See G.A. Res. 177/2(a), U.N. Doc A/res/177/2, \textit{International Humanitarian Law – Treaties and Documents} (Nov. 21, 1947) available at \texttt{http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument} (precluding defendants from using certain defenses including but not limited to carrying out an order or holding an authoritative position). This practice was taken from the Nuremberg Trials and applied in the Nuremberg Principles). \textit{Id.}
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of Serbia for almost four years.\textsuperscript{115} If the courts assign culpability based on their posts, it is fair to say that these men have exceptionally differing levels of culpability and their trials should have been severed.\textsuperscript{116}

Currently, the Tribunal is debating whether to proceed with the joint trial of nineteen defendants.\textsuperscript{117} This would be the largest trial ever conducted before the Tribunal.\textsuperscript{118} While joint trials promote the benefit of consistency, such a large trial not only threatens traditional notions of due process and a fair trial as required by the Statute in Articles 21, but could also become an “organizational nightmare.”\textsuperscript{119} Given repeated allegations of prejudice and excessive prosecutorial discretion,

\textsuperscript{115}See ICTY at a Glance, \textit{supra} note 113.

\textsuperscript{116}See \textit{United States v. Dentico}, No. 05-607, 2006 WL 757217 (D.N.J. Mar. 20, 2006) (ruling that the two appellants should be severed because they were only charged with engaging in an illegal numbers operation and were therefore substantially less culpable than the other charged defendants, who were all charged with multiple RICO violations, gambling, extortion, and collection of unlawful debts).

\textsuperscript{117}See Gottlieb, \textit{supra}, note 104.

\textsuperscript{118}Id.

\textsuperscript{119}Id.
it would be dangerous to allow a small handful of prosecutors to try so many defendants at once; particularly when the Tribunal has historically deferred to the prosecutor’s preferences.  

The only viable counterargument is that even in a joint trial, each defendant remains entitled to his or her own independent counsel. The theory is that the prosecution must defeat the defenses of multiple legal teams, rather than one,


and this will favor the defendants.\textsuperscript{122} However, this argument ignores both the prejudicial problems with joinder cited above, as well as the Tribunal’s historical deference to the prosecution.\textsuperscript{123} Rather, it is much more likely that, as the trial progresses, the defenses of each individual defendant will

\textsuperscript{122} See Gottlieb, supra note 104 (questioning whether trying so many defendants at once will benefit defendants rather than the prosecution). The author writes that although such a large trial could benefit the prosecution, with regard to the Srebrenica indictees, the legal proceedings “[could] not be completed until Mladic and Karadzic are also sat in the dock at the Yugoslavia tribunal.” Id.

\textsuperscript{123} See Indictment of Ljube Boskoski and Johan Tarculovski, The International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/indictment/english/bos-ii050309e.htm (last visited Nov. 15, 2007) (joining the two defendants in an indictment charging them with violations of the customs of war despite their very different rankings within the criminal conspiracy). Boskovski was a Minister of the Interior, while Tarculovski provided security to the president. Id. The defendants’ joinder exemplifies the Tribunal’s historical deference to the prosecution. Id.
increasingly merge with one another.\textsuperscript{124} Therefore, the prosecution will only need to overcome one defense to implore the panel to render a guilty verdict.\textsuperscript{125} The likelihood that this will be a rather lengthy trial further increases the possibility of merging defenses.\textsuperscript{126}

C. The Prosecutor’s Ability to Amend the Indictment of a particular defendant up until the trial date denies the defendant ample time and information to prepare a good defense.

Rule 50 of the Rules of Evidence states that a prosecutor may amend an indictment after the assignment of a case to a trial chamber up until the trial date and independently of any factors relevant to the exercise of

\textsuperscript{124} See United States v. Zafiro, 506 U.S. 534, 568 (1993) (requiring severance in cases where it is clear that the jury will not be able to compartmentalize the evidence presented against each particular defendant).

\textsuperscript{125} See Gottlieb, supra note 104 (arguing that a large joint trial would save considerable time because “many points would only need to be made once).

\textsuperscript{126} See United States v. Dentico, No. 05-607, 2006 WL 757217 (D.N.J. Mar. 20, 2006) (recognizing that the standard permits joinder when an alleged criminal nexus exists between the co-defendants because of the overlap in factual and legal issues).
Almost always, the Trial Chamber will grant the prosecutor’s motion to amend an indictment based on very limited evidence because the judges assume that the prosecutor will present more substantial evidence at trial. The existence of this Rule is one example of the Tribunal’s deference to the

\[127\] See Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (detailing the prosecutor’s power to amend the indictment at any time without leave before its confirmation). The accused then has a sixty-day period to file any motions in respect of the new charges. Id.

\[128\] See Decision on Prosecution Motion For Leave to Amend the Original Indictment and Defense Motions Challenging the Form of the Proposed Amended Indictment, International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/boskoski/trialc/decision-e/051101.pdf (last visited Nov. 15, 2007) (granting the prosecution’s motion to extend the period of armed conflict to September 2001 because the court did not find that it would pose an undue burden to the defense). However, the court also required the prosecution to translate all submitted materials into the language of the accused. Id.
prosecutor that may yield harmful prejudice for the defendant.\textsuperscript{129} Not only is this inconsistent with the defendant’s right to a fair trial as required by the Statute, but the lack of procedural limitations on the scope of a search and the preparation of an indictment further compound this deficiency.\textsuperscript{130}

The more times the prosecutor amends an indictment, the more difficult it is for the accused to prepare a valid and

\textsuperscript{129} See Prosecutor v. Mile Mrksic: Decision on Form of the Indictment, United Nations, Jun. 19, 2003, available at http://www.un.org/icty/mrksic/trialc/decision-e/030619.htm (submitting the unfairness to the defendant that ensues with the introduction of new counts into the Second Amended Indictment prior to the introduction of corroborating evidence because a defendant must change his or her strategy before evaluating the supposedly inculpatory evidence). This rule also runs contrary to Rule 67 of the Rules of Evidence, “Reciprocal Disclosure.”

Levie, supra note 47.

\textsuperscript{130} See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 18 (allowing the Office of the Prosecutor to question suspects, victims, and witnesses, collect evidence and conduct on-site investigations with no procedural search limitations).
informed defense against the charges.\textsuperscript{131} Although the Statute requires a presumption of innocence, such blatant favoritism produces outcomes akin to those of courts that maintain presumptions of guilt or distribute selective indictments.\textsuperscript{132} Despite multiple challenges to Rule 50, the Tribunal has repeatedly held that a defendant does not suffer any adverse impact from needing to change strategy.\textsuperscript{133} On the contrary, one

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\item \textsuperscript{131} See Alexander Greenawalt, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, 39 \textit{NYU J. Int’l L. & Pol.} 583, 614-626 (2007) (citing problems with amnesty, positive law, multilateral prosecution, and disproportionate criminal charges as creating some of the many impartiality problems also associated with excessive prosecutorial discretion at the International Criminal Court).
\item \textsuperscript{132} See Statute, S.C. Res. 827 U.N. Doc.S/25704 at art. 21 (requiring that the accused be presumed innocent until proven guilty according to the provisions of the Statute).
\item \textsuperscript{133} See Greenawalt, supra note 131 (acknowledging that in transitional situations, one of the greatest decisions is not whether to prosecute, but whom to prosecute and how broadly). The author points out that Articles 146 and 147 of the “Geneva Convention Relative to the Prosecution of Civilian Persons” require prosecution of those who have committed Grave Breaches
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of the most determinative decisions an ad hoc court can make is how broadly to prosecute a defendant. A repeated criticism of national courts that are overburdened with human rights violations is that they choose to selectively prosecute certain crimes. This phenomenon is constantly occurring at the Tribunal, a judicial entity that displaces the national courts in a purported effort to ensure justice.

Despite NATO’s use of cluster bombs in the late 1990s in the Kosovo, which was a glaring violation of international law, the Prosecutor has never moved to indict any of these member of the Convention. However, Greenawalt asserts that the kind of political transition that the Court is trying to achieve through prosecution in an ad hoc court may not be possible without an amnesty deal that precludes prosecution.

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134 Id.

135 See id. (highlighting that many times when countries with outrageous human rights atrocities are left to adjudicate the crimes these countries either “ignore past crimes or [employ] alternate mechanisms” to expose and acknowledge those crimes without subjecting individuals to prosecution).

136 See Koechler, supra, note 37 (rejecting the claim that a group of NATO nationals are acting in the interest of peace by placing a group of a member country’s leaders under attack).
nations. These types of international armed conflicts are purportedly the reason that the Security Council established the Tribunal. However, the distribution of selective indictments further confirms the suspicion that the Tribunal continues to exist as long as it promotes western goals. Therefore, the

137 See Marjorie Cohn, No Victor’s Justice in Yugoslavia: NATO Must be Tried for their War Crimes, Jurist, Mar. 27, 2000, http://jurist.law.pitt.edu/forum/forumnew4.HTM, (calling on the International Criminal Tribunal for the Former Yugoslavia to indict NATO countries for an “open violation” of the U.N. Charter, NATO’s own treaty, the Geneva Conventions and the principles of international law recognized by the Nuremberg Tribunal). The article points to the bombing of civilian targets and alleges that NATO leaders “have admitted publicly to having agreed upon and ordered these actions, being fully aware of their nature and effects.” Id.

138 See Ellis, supra note 121 (arguing that even if the court expedites its convictions, the court’s efficiency, or lack thereof, will never be an indicator of justice).

139 See Cohn, supra note 137 (suggesting that the United States sought to ensure its status as a global superpower when structuring the ICC to insulate itself from prosecution for war crimes).
outcomes of the cases only represent victor’s justice for the purpose of appearances.\(^{140}\) The fact that the Tribunal’s procedural flaws continue in disrepair while under the control of the largest and most powerful nations in the world strongly suggests that these nations derive a benefit from the continued existence of the Tribunal.\(^{141}\)

\(^{140}\) See Taylor, supra note 40 (describing sentencing procedures that instruct the panel to consider aggravating or mitigating factors). Currently, convicted defendants serve sentences in states that have signed agreements on the enforcement of sentences with the International Criminal Tribunal for the Former Yugoslavia. \textit{Id.} These countries currently include: Austria, Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden, and the United Kingdom. \textit{Id.}

\(^{141}\) See Practical Information, supra note 99 (citing the thousands of jobs that are created by the continuance of the International Criminal Tribunal for the Former Yugoslavia in The Hague).
IV. Recommendations

It is clear that the International Criminal Tribunal for the Former Yugoslavia is rife with inefficiency. The inconsistency between the Articles and the practical realities of the Tribunal, gives an insight into the procedural deficiencies this Court continues to face even after so many years. The following section suggests several ways to remedy the Tribunal’s procedural flaws.

A. The International Criminal Tribunal for the Former Yugoslavia Should Strongly Adhere to the Nuremberg Model in order to promote efficiency.

The International Criminal Tribunal for the Former Yugoslavia was created in the image and likeness of the Nuremberg Model. Even today, Nuremberg still represents the modern paradigm for ad hoc tribunals attempting to correct atrocious human rights violations through justice, even in the

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142 See Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Appeals Chamber (Nov. 2, 1999) (describing how the appellant has been held in provisional detention for over three years).

143 See generally Statute, S.C. Res. 827 U.N. Doc.S/25704 (announcing the provisions of the International Criminal Tribunal for the Former Yugoslavia, many of which are similar if not the same as many of the articles in the London Charter).
face of scrutiny and inescapable prejudice. 144 After almost fifteen years, Yugoslavia’s tribunal has yet to master the procedural nuances involved in trying these cases. 145 The United Nations should formulate a focus group to study the procedures employed at Nuremberg and then develop stricter procedural rules for the Tribunal. However, adherence to these rules will depend on whether the Tribunal has any motivation to employ them.


Many of the procedural problems that persist in the Tribunal stem from the organ that created it. The Tribunal’s charter gives the United Nations Security Council the authority to take action to restore international peace and security. 146 Such a narrow base of supervision within the United Nations has

144 See Taylor, supra note 40 (noting how the Tribunal’s Rules of Procedure have been amended more than thirty times in a continued effort to refine their adjudication methods); see also ICTY Cases and Judgments, supra note 113 (listing the indictments for the currently pending cases, many of which allege crimes that occurred in the 1990s).

145 See id.

garnered extensive criticism.\textsuperscript{147} International law scholars and defendants alike argue that the Security Council does not have proper jurisdiction.\textsuperscript{148} Broadening the supervisory entities, perhaps to include the United Nations General Assembly, heightens the Tribunal’s accountability. Further it puts the Tribunal in the international spotlight, which would highlight its procedural flaws in order to pressure the Tribunal to make necessary changes. For example, many do not know the lengthy detentions that some of the defendants face while waiting to go before the Tribunal.\textsuperscript{149} If the General Assembly supervised the Tribunal, expediency would be a matter of greater international concern.

\textsuperscript{147} See Koechler, supra note 37; Ellis, supra note 121; Gottlieb, supra, note 104.

\textsuperscript{148} See Koechler, supra note 37 (summarizing the foremost arguments against the Tribunal’s subject-matter jurisdiction); see also Defense Motion on Jurisdiction, supra note 37 (alleging that the Tribunal did not have the jurisdiction to try Tadic for his crimes).

\textsuperscript{149} See Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Appeals Chamber (Nov. 2, 1999) (describing how the appellant has been held in provisional detention for over three years).
C. The International Criminal Tribunal for the Former Yugoslavia Should Be Removed from The Hague and replaced in the Balkan Region.

Moving the Tribunal from The Hague to the alleged site of the crimes could substantially mitigate prejudice in the Tribunal. Allowing the Tribunal to remain in The Hague results in many issues. First, it allows a volatile region to continually rely on outside support. Likewise, the Tribunal relieves that pressure and need for the local government to stabilize. Second, the relief that the Tribunal offers local authority is compounded by the collusion between the national courts and the Tribunal.

According to the Tribunal’s own policies, its self-determined jurisdiction is intertwined between the Tribunal and the national court.¹⁵⁰ Rather than have this international tribunal remain as it is structured currently, the United Nations should work to phase out the Tribunal’s existence and shift the responsibility to the local government. It should first implement this recommendation by removing the Tribunal from The Hague to the Balkan Region. This would also resolve many of the evidentiary issues that arise from having the

Tribunal situated so far away from the site where the alleged crimes occurred.

Further, the United Nations should slowly replace its jurisdiction with that of the national courts while retaining supervision. This gives the nation greater judicial autonomy and encourages prompter stabilization of government as it will want to bring these defendants to justice. Again, the international supervision should be given to the United Nations General Assembly rather than the Security Council to dispel any notions of impropriety.

D. The United Nations Should Mandate an end date by which the International Criminal Tribunal for the Former Yugoslavia should complete all the trials.

The United Nations recently faced outside pressured to close any new trials by 2008 and conclude all appeals by 2010.\textsuperscript{151} Setting end dates is crucial to improving expediency in the Tribunal. More importantly, the Tribunal should establish a more specific time line with dates marking the different steps involved in phasing out these ad hoc courts.

In many ways the sooner the Tribunal closes the better. The whispers of ulterior motives by the UN Security Council and

\textsuperscript{151} See Gottlieb, supra note 104 (citing outside pressures to close the Tribunal as the reason that the Tribunal is considering trying nineteen defendants all at once).
illegal jurisdiction, coupled with the reality of excessive 
prosecutorial discretion, and lengthy and inefficient procedures 
have no doubt diminished the legitimacy of the Tribunal.¹⁵²
Hopefully, the United Nations will be able to transplant a more 
efficient court back to the Balkan region where a national 
tribunal, under international supervision, can try the alleged 
criminal. If this fails, the United Nations General Assembly 
can always retract the national judicial autonomy and restart 
the Tribunal and still eradicate many of its existing flaws. The 
aforementioned recommendations attempt to suggest steps that can 
be taken to correct the deficiencies of the Tribunal and 
eventually altogether eliminate the court without feeling as 
though justice has not been served. Regardless, it is clear that 
the status quo is unacceptable.

¹⁵² See War Crimes Tribunal’s Workload Exceeds Capacity, United 
Tribunal lacks sufficient judges, investigators, and information 
processors to function efficiently). The report points out that 
a failure to bring an accused to trial within two years 
undermines the efficiency and legitimacy of the tribunal. Id.
V. Conclusion

Examples and comparisons of the procedural flaws of the Criminal Tribunal for the Former Yugoslavia demonstrate the downfalls that this ad hoc criminal court has experienced since its inception. It has become increasingly difficult to recognize its admirable goals when the Tribunal is overrun with inefficiencies and practices that more developed nations would not tolerate. One thing is clear, the Tribunal cannot continue as it functions and while purporting that it serves justice. It is procedurally defunct and not representative of a fair justice system. It has been fifteen years, and it is high time that justice for both the victims, and the accused, is served.