Proof and Consequences: An Analysis of the Tadic & Akayesu Trials

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PROOF AND CONSEQUENCES: AN ANALYSIS OF THE TADIC & AKAYESU TRIALS

INTRODUCTION

"The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."¹ In 1945, Justice Robert Jackson used this poetic phrase in his opening statement at the Nuremberg Trials.² Unfortunately, it appears that the wrongs he spoke of have been repeated in the former Yugoslavia, Rwanda, Cambodia, and many other regions all over the world. Through the formation of ad hoc International Criminal Tribunals, the world has acted to condemn and punish those who have committed wrongs in the renewed hope that such wrongs will not continue to occur.

The International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis ("IMT") created by the Allies of World War II in Nuremberg, Germany³ stands as the only precedent involving the trial of international criminals by an internationally-created adjudicating body.⁴ The work of the Tribunal at Nuremberg contributed greatly to the development of international law. It promulgated the idea that "no one should be left totally abandoned to the vagaries of his or her government and that... the inter-

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². See id.
³. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The IMT Charter was annexed to this document.
⁴. The International Military Tribunal for the Far East ("IMTFE") was created a year after the one in Nuremberg, on January 19, 1946. See M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in 1 INTERNATIONAL CRIMINAL LAW 3, 6 n.12 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, Sources and Content]. It was modeled exclusively after the IMT at Nuremberg and the trials that took place under the IMTFE, known as the Tokyo trials. See id. The IMT and IMTFE are the only adjudicating bodies in history to have the ability to directly enforce their decisions. See id. at 14. In other words, because the Allies controlled both Germany and Japan entirely, the IMT did not need to rely on the cooperation of the offending countries' domestic laws to enforce its judgments. See id. at 6-7. This is much different from the to-be-discussed current international tribunals, that rely heavily on the cooperation of the former Yugoslavia and Rwanda at every step of adjudication—from the indictment stage to the sentencing stage. See id. at 14.
national community will not stand idly by . . .." Nuremberg also suggested that international criminal law and its norms will be enforced. For the first time, individual culpability for crimes against humanity became enforceable under international law. The tribunals developed recently have been shaped, to a large extent, after the Nuremberg model.

The present international criminal tribunals, while attempting to accomplish the valuable objectives set forth at Nuremberg, must steer clear of the shortcomings that plagued its operation. The trials conducted at Nuremberg have been criticized for a lack of "judicial impartiality," ex post facto application of "Allied-formulated laws," and adjudication by judges from only the victorious nations of World War II.

The currently functioning internationally-created tribunals have been established to prosecute war criminals. Though these tribunals were created to provide a forum for the prosecution of international criminals, they are, in many ways, similar to domestic courts. International trials, however, present unique evidentiary problems that, for the most part, do not arise in domestic prosecutions. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") were both modeled after Nuremberg and established for the prosecution of international criminals. The international criminal cases tried at each of these tribunals so far have presented unique evidentiary problems because of the massive character of the crimes committed and the unique history of each country. The admittance of anonymous testimony and hearsay evidence has also raised serious questions about whether a balance can be struck to simultaneously ensure that defend-

7. See id. at 384.
8. See infra Part I.B.
11. See infra Part I.B.
12. The current Tribunals' statutes and rules of evidence and procedure were developed based on the rules that govern domestic courts throughout the world. See infra Part I.B.
13. See infra Part II.
14. See infra Part I.A.
ants are receiving fair trials in such politically-charged prosecutions and that victims and witnesses are being adequately protected.\footnote{15}{See infra Part II.C-D.}

Part I first explains the historical background of the conflicts in the former Yugoslavia and Rwanda that led to the establishment of the respective Tribunals.\footnote{16}{See infra Part I.A.} Next, the historical underpinnings of the Tribunals themselves, including their establishment, jurisdictional authority, statutes, and rules of evidence and procedure, are discussed.\footnote{17}{See infra Part I.B.} Part II briefly discusses the roles Dusko Tadic, one defendant in the ICTY, and Jean-Paul Akayesu, a defendant in the ICTR, played in the respective conflicts.\footnote{18}{See infra Part II.A-B.} Several evidentiary rulings made in each trial, including the use of anonymous witnesses and the admission of hearsay evidence, are then closely examined.\footnote{19}{See infra Part II.C-D.} These evidentiary rulings are analyzed to determine whether they comport with international norms and more general concepts of justice. Where the rulings do not seem to comply with these norms, a preferable solution is presented. Finally, in Part III, consideration is given to the steps which ought to be taken in drafting the yet-to-be-fixed International Criminal Court ("ICC") rules of evidence.\footnote{20}{See infra Part III.} A determination is made as to how the rules and rulings of the ICTY and ICTR might affect future criminal cases brought before the ICC. Part IV concludes that the evidentiary problems previously encountered should be recognized and remedied.\footnote{21}{See infra Part IV.}

I. Historical Background

A brief examination of the histories of the sordid conflicts in the former Yugoslavia and Rwanda will help explain both the role of the individual defendants in the respective conflicts and the necessity for the Tribunals. Once that is concluded, an analysis of the creation and composition of the Tribunals will follow to illustrate how problems not often encountered in domestic trials are likely to arise in these forums.

A. Conflicts

The conflicts in the former Yugoslavia and Rwanda are similar in many ways. Both are based on political, cultural, and religious strug-
gles between groups of people with historically defined differences. While the conflict in the Balkans is primarily driven by ethnic and religious differences, the one in Rwanda is based on a type of racial differentiation. The crimes that occurred in both regions are similar in the way they were fostered by the use of massive propaganda.

1. The Balkan Conflict

"[A] war of intimate betrayals." The 600-year conflict in the former Yugoslavia has led to its characterization as a "boiling cauldron of ethnic tension." The ingredients in this "cauldron" are the four major ethnic groups in the region—Serbs, Muslims, Croats, and Slovenes. The genesis of the conflict between the present-day Bosnian Serbs and Bosnian Muslims is said to lie in the Ottoman Turk defeat of Serbian forces in the Battle of Kosovo on June 28, 1389. After this defeat, Bosnia and Serbia were absorbed into the Ottoman Empire, which thereafter conducted a process of "Islamization" of the local populations. Christians in the conquered territory became the target of religious oppression and subjugation. The Turks, who were Muslim, granted only second-class citizenship to the Christians, reducing them to "a society of peasants and small merchants." All non-Muslims were made to pay a poll tax and forced to perform free labor. While many Christians

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27. Though much of the Balkan conflict involves all of these ethnic groups, the main focus of this Comment is that between the Bosnian Serbs and Bosnian Muslims. It is also important to remember that a mix of these groups is found throughout the entire region.
29. See Dedijer & Bozic, supra note 28, at 141. Before the Turks' victory, most inhabitants were Christian—either Roman Catholic or Eastern Orthodox. See Anzulovic, supra note 28, at 17-31. While Bosnia and Herzegovina were controlled by the Ottoman Empire, Croatia and Slovenia were absorbed into the Hapsburg Empire, though in reality, they maintained their independence. See Dedijer & Bozic, supra at 147.
30. Though non-Muslims faced much discrimination from their Turkish rulers, the Serbian Orthodox Church maintained a privileged status among all other Christian denominations. See Anzulovic, supra note 28, at 42.
31. Id. at 33.
32. See id. at 34.
acquiesced to this status, others became Muslims to prevent their own oppression. The hatred many Bosnian Serbs currently hold toward Bosnian Muslims derives, at least partially, from what the Serbs (who remained Christian) felt to be a “betrayal of the true faith by their ancestors” who converted to Islam.

Centuries later, in 1908, the Hapsburg Empire annexed Bosnia-Herzegovina, which sparked Serb nationalism because the newly-implemented government was primarily occupied by Catholics. The surge in Serb nationalism led to Balkan wars in 1912 and 1913 and the eventual “liberation of the Balkan peninsula from Ottoman control.” Seeking to free the region from foreign domination altogether, Gavrilo Princip, a Serb nationalist, assassinated the heir to the Hapsburg Empire, Archduke Ferdinand of Austria, in Sarajevo on June 28, 1914, not coincidentally, the anniversary of the Battle of Kosovo. At the end of World War I, in 1918, the Serbian king announced the liberation of the peninsula pronouncing it the “Land of the South Slavs,” or Yugoslavia. The king was assassinated, though, in 1934 by Velicko Georgijev-Kerin. This murder led to the region’s

33. See SCHARF, supra note 24, at 22.
34. Id.
35. See DEDIJER & BOZIC, supra note 28, at 449.
36. See id. Even though there were twice as many Serbian Orthodox Christians in the territory, Catholics were given the majority position in the government assembly and a Muslim was appointed as its president. See id.
37. During the Balkan wars, “Serbian nationalists resorted to ethnic violence on a massive scale” in their attempt to expel the Turks. SCHARF, supra note 24, at 22. “Terror was the method [the Serbs] employed to rule over [their] subjects” after they liberated themselves from foreign control. ANZULOVIC, supra note 28, at 88.
38. SCHARF, supra note 24, at 22.
39. See DEDIJER & BOZIC, supra note 28, at 469. This assassination is said to have started World War I, though as Dedijer and Bozic suggest, it is unlikely that under “normal” circumstances such an event would have caused such “significant consequences.” Id.
40. See SCHARF, supra note 24, at 22.
41. See Elizabeth L. Pearl, Note, Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor’s Justice?, 30 AM. CRIM. L. REV. 1373, 1380 (1993). On January 6, 1929, King Alexander arranged a coup d’état with the intent and effect of instituting a totalitarian dictatorship to resolve the rampant ethnic tensions throughout Yugoslavia. See DEDIJER & BOZIC, supra note 28, at 540. He eventually reinstated democracy by way of a September 3, 1931 constitution because his regime “was in a crisis.” Id. at 542. However, he forced all potential candidates for government positions to take an oath that they would not be part of any “religious, ethnic, or regional political [parties].” Pearl, supra at 1380.
42. See SCHARF, supra note 24, at 22.
43. See DEDIJER & BOZIC, supra note 28, at 545. There are differing histories as to whom this assassin held his loyalty. One source suggests that he was part of a Croatian uprising. See SCHARF, supra note 24, at 23. This uprising was called the Ustasha, meaning uprising, and was formed “to implement a . . . brutal exclusivist ethnic program against the Serbs” with the intention of Croatian independence. NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF “ETHNIC CLEANSING” 19 (1995). Another source, however, indicates that there may have been
vulnerability to the Axis Powers' invasion on April 6, 1941.\textsuperscript{44} After invading Yugoslavia, the Axis Powers divided the region into many spheres of control—one German, one Italian, one Hungarian, and one Bulgarian.\textsuperscript{45}

It was not until after World War II that Yugoslavia again became, however nominally, a united nation.\textsuperscript{46} With the help of the Allied Powers, Josip Broz Tito,\textsuperscript{47} a Croat and partisan Communist leader with Serbian supporters, took control of Yugoslavia in 1946.\textsuperscript{48} Tito established a federal system comprising the republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro.\textsuperscript{49} As retribution against those Serbs who refused to support him in his takeover of the region, Tito ordered the “mass execution” of civilian refugees, Chetnik leaders,\textsuperscript{50} and Nazis.\textsuperscript{51} The remaining reticent Serbs were divided among the republics, with most being sent to Bosnia-Herzegovina.\textsuperscript{52} When Tito died in 1980, the “disintegration” of the region began.\textsuperscript{53} The impetus of this disintegration was the dissolution of the collective leadership system\textsuperscript{54} implemented after Tito’s death.\textsuperscript{55} Slovenia, Croatia, and Bosnia-Herzegovina wanted to eject the Com-

\begin{itemize}
\item a connection between the assassin and the Italian or Hungarian governments. See \textit{Dedijer \& Bozic, supra} at 545-46.
\item 44. See \textit{Dedijer \& Bozic, supra} note 28, at 566; \textit{Scharf, supra} note 24, at 23.
\item 45. See \textit{Dedijer \& Bozic, supra} note 28, at 571. Croatia was run as a puppet state, with the permission of Nazi Germany, by Ustasha leader, Ante Pavelic, who had been convicted and sentenced to death \textit{in absentia} for the assassination of King Alexander just seven years before. See \textit{id.} at 572-74. Pavelic helped the Nazis in their racist policy to eliminate the Serbs, killing between 200,000 and 500,000 of them during this period. See \textit{id.} at 577-82. This puppet state included Bosnia-Herzegovina, Croatia, Slavonia, Srem, and part of Dalmatia. See \textit{id.} at 572.
\item 46. See \textit{id.} at 698. On November 29, 1945, Yugoslavia was declared the Federal People’s Republic of Yugoslavia. See \textit{id.}
\item 47. Tito’s plan as leader was to unite Yugoslavia as a socialist country. See \textit{Pearl, supra} note 41, at 1380.
\item 48. When Tito’s partisan group took power, it killed over 100,000 Croatians as revenge for those Serbs killed during World War II. See \textit{Scharf, supra} note 24, at 24.
\item 49. See \textit{id.} Within the Serbian republic, Kosovo and Vojvodina existed as “autonomous provinces.” \textit{Id.} The system included a rotating presidency so that a leader from each republic would hold the presidency of Yugoslavia for a certain period of time until it was another republic’s turn. See \textit{id.} at 26.
\item 50. The Serbs, after World War II, separated into two opposing groups, the Chetniks, who favored a monarchy and a “Greater Serbia,” and the Communists, guided by Tito, who envisioned a “Socialist Yugoslavia.” \textit{Pearl, supra} note 41, at 1380.
\item 51. See \textit{id.} at 1381.
\item 52. See \textit{id.}
\item 53. See \textit{Scharf, supra} note 24, at 24.
\item 54. Under this system, the presidency of Yugoslavia was to be comprised of representatives from each republic working cooperatively. See \textit{Pearl, supra} note 41, at 1381.
\item 55. See \textit{id.}
\end{itemize}
munist regime, but Serbia wanted to preserve that government. This conflict gave rise to unrest and an almost immediate declaration of independence by Slovenia. Serbian nationalism was rekindled as the Serbs feared the total disintegration of Yugoslavia. Serb nationalism was sustained through the spreading of ethnic-based, government-sponsored propaganda against Muslims and Croats.

The balkanization of Yugoslavia came to a head in 1991 when the leader of the Serbian Communist Party, Slobodan Milosevic, effectively inhibited the Croatian leader, Stipe Mesic, from taking his turn as president of the rotating leadership in violation of the Yugoslav Constitution. This caused Croatia to declare its independence. Because of his supposed concern for the 500,000 Serbs living in the now-independent republics outside Serbia, Milosevic sent the “Serb-dominated Yugoslav National Army” (“JNA”) to invade both Slovenia and Croatia. During these invasions, the JNA began the “ethnic cleansing” of Croats, which spilled over to Muslims in Bosnia-Herzegovina.

In early 1992, the Bosnian Muslims and Croats declared the independence of Bosnia-Herzegovina causing the Serbs to attack both populations within Bosnia, based on an asserted need to protect the ethnic Serbs within the province. Information collected by the United Nations and human rights organizations suggested that Serbs, including Bosnian Serbs, were attempting to cleanse the region of Muslims and Croats. This ethnic cleansing was accomplished by “mass forced-population transfers of Muslims, organized massacres, the physical destruction of whole towns, the systematic and repeated rape of thousands of Muslim women and young girls, and the exist-

56. See id. Serbian morale to preserve the Communist government was boosted by Slobodan Milosevic, an important and menacing figure in later Serbian history. See id. at 1382.
57. See id.
58. See SCHARF, supra note 24, at 25.
59. See id.
60. See id. at 26.
61. See id.
62. See id.
63. Ethnic cleansing is defined as “the forcible expulsion of nondominant ethnic groups in a given canton.” BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 7 (rev. ed. 1994).
64. See Pearl, supra note 41, at 1382. For example, during its invasion of Croatia, the JNA massacred over 200 Croatian hospital patients and then discarded their bodies in a mass grave. See SCHARF, supra note 24, at 26.
65. See SCHARF, supra note 24, at 27-28. Bosnia-Herzegovina is made up of Slavic Muslims, Croats, and ethnic Serbs. See Pearl, supra note 41, at 1382.
66. See SCHARF, supra note 24, at 28-29.
ence of over four hundred Serb-run detention centers." At the end of 1994, "the Serbs had expelled, killed or imprisoned 90 percent of the 1.7 million non-Serbs who once lived in Serbian-held areas of Bosnia." It is this Serbian attack on Bosnian Muslims that is the subject of most of the cases being tried at the ICTY.

2. The Rwandan Conflict

"The last battle of the colonised against the coloniser will often be the fight of the colonised against each other." Unlike that in the former Yugoslavia, the conflict in Rwanda is not the "result of a deep-rooted and ancient hatred between two ethnic groups." Rather, it stems from the colonization of Rwanda by "racially-obessed nineteenth-century Europeans." At the 1885 Berlin Conference, it was decided that Rwanda would be the responsibility of Germany, which maintained control until after World War I. In 1924, the League of Nations mandated that Belgium take over the rule of Rwanda and Burundi, which it did until 1962. When Belgium began its administration, Rwanda was run by Mwami (or King) Yuhi V Musinga, the head of the Tutsi dynasty; however, in 1931, Musinga was deposed and exiled. Belgium then appointed a king who would

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67. Id. at 29. The detention camps include Omarska, Keraterm, and Trnopolje, which are the camps at which Dusko Tadic was alleged to have committed the atrocities of which he was convicted. Indictment, Prosecutor v. Tadic a/k/a "Dule" and Goran Borovnica, Feb. 13, 1995, at 12 <http://www.courttv.com/casefiles/warcrimes/documents/borov.html> [hereinafter Tadic Indictment].

68. SCHARF, supra note 24, at 29.

69. There are also Croats and Muslims who have been indicted for war crimes. See <http://www.un.org/icty/cases-te.htm>. Likewise, Slobodan Milosevic and others have been indicted for more recent crimes against the Kosovars. See <http://www.un.org/icty/indictment/inde.htm>.

70. PRUNIER, supra note 24, at xi (quoting FRANTZ FANON, THE WRETCHED OF THE EARTH (1986)).


72. PRUNIER, supra note 24, at 6. The Europeans who explored Rwanda and many uninformed people today have often referred to the different groups (Hutu, Tutsi, and Twa) as tribes. See id. at 5. This is a misnomer because the groups had none of the attributes of tribes; rather, all shared the same language (Bantu), lived side-by-side, and intermarried. See id.

73. See DESTEXHE, supra note 71, at 78. While the Germans occupied Rwanda until the end of World War I, their presence was insignificant. See PRUNIER, supra note 24, at 24-25. Their ignorance of the complex local politics in Rwanda led them unknowingly to bolster the hierarchical elite Tutsi. See id. at 25.

74. See DESTEXHE, supra note 71, at 78.

75. See id. The Belgians disliked Musinga because he supported the Germans in their fight against Belgian appropriation of the region. See PRUNIER, supra note 24, at 30. Likewise, "he was haughty and unruly, his mother was a pest, he was openly adulterous, bisexual and incestuous, he never converted to Christianity and he deviously tried to hijack the white man's civilising mission for his political benefit." Id.
be more favorable to the Belgium colonization of Rwanda. The Belgian colonizers stratified the three groups of Rwandans—Hutu, Tutsi, and Twa—based on perceived racial characteristics. Distinctions between groups were premised on who looked more “white”; therefore, the Tutsi, who made up about 15% of the population and have a lighter skin color, were considered to be the more intelligent and noble of the peoples. Similarly, the Hutu, who made up about 84% of the population and have darker skin, were considered less intelligent and noble because they were less white. The final group, the Twa, or pygmies, made up only 1% of the population and were considered to be “a caste of dwarfs” by the colonizers. This characterization of the different groups led to the indoctrination of the natives themselves. In other words, the natives were so completely submerged in “highly value-laden stereotypes” that the Tutsi developed a dropsical self-importance and the Hutu acquired an “inferiority complex” sparking racial enmity toward the Tutsi. To reinforce stratification, the colonizers made it mandatory that all persons carry an identity card stating their ethnicity.

Between the 1920s and 1940s, the Belgians supported the Tutsi monopoly of power. Eventually, however, the Tutsi began to recognize the benefits of racial equality with white colonizers and the possibility of self-government. These fueled a desire for independence.

76. See Prunier, supra note 24, at 30-31. The next king, Musinga’s son, Mutara, was called “‘King of the Whites,’” as he “dressed well in Western clothes . . . ., drove his own car, was monogamous and . . . converted to Christianity.” Id. at 31.


78. See Destexhe, supra note 71, at 38.

79. See id. at 37-39.

80. See Prunier, supra note 24, at 5.

81. See Destexhe, supra note 71, at 39.

82. See Prunier, supra note 24, at 9. Prunier’s argument is that through this indoctrination to racial stratification, both the Tutsi and Hutu began to believe the myth developed by their colonizers. See id. at 39. The colonizer’s myth had been “synthesized into a new reality.” Id.

83. See Destexhe, supra note 71, at 40. This card-carrying requirement was not abolished until after the atrocities in 1994. See Akayesu Judgement, supra note 77, at 21.

84. See Prunier, supra note 24, at 28. Belgian legislators, for example, helped the Tutsi modify land and contractual rights to favor them over the Hutu. See id. This often allowed Tutsi to gain control over Hutu landholdings. See id.

85. See id. at 43.

86. See id. In 1951, a noticeable shift emerged in Rwandan clergy because “control of the Rwandese church was slowly slipping from the hands of the whites.” Id. This shift was indicative, the Tutsi began to realize, of the possible power they could obtain at the conclusion of colonial rule. See id.
Belgians, afraid of a Tutsi-independence movement, began to shift their support to the Hutu by offering them more political and educational opportunities, which, in turn, angered the Tutsi. With Belgium’s fear-induced installation of universal voting rights, the Hutu began to realize their political strength. The Tutsi saw the granting of universal suffrage as a slight to their supremacy, making “confrontation with the Hutu ... inevitable.” Concurrent with Belgium’s grant of political power to the Hutu, Hutu intellectuals began to confront Tutsi domination in documents like the Bahutu Manifesto (“the Manifesto”). These intellectuals along with a number of revolutionaries believed the Hutu to be the natives of Rwanda and the Tutsi to be immigrants from Ethiopia who needed to be expelled to their own native land. With the publication of the Manifesto, Rwanda became a hotbed of “political rivalry” and unrest.

In 1959, a series of Hutu riots, triggered by propaganda that a Hutu activist had been killed, escalated into a revolution by the masses against the dominant Tutsi, resulting in the death of many Tutsi and the exile of many more. This revolution “represented a turning

87. See id. at 44. The Belgians realized that European control over the church was being challenged and that white power was likely to be challenged on other fronts as well. See id.
88. See Akayesu Judgement, supra note 77, at 21. Throughout this Comment, in referring to this judgment, the spelling of “Judgement” that was used at the ICTR will be employed. White church leaders also began to shift their support to the Hutu upon realizing the challenge of the Tutsi elite to their power. See Prunier, supra note 24, at 44.
89. Akayesu Judgement, supra note 77, at 22.
90. See Prunier, supra note 24, at 45. The Manifesto was published as Notes on the Social Aspect of the Racial Native Problem in Rwanda. See id. It pointed to the “humiliation and socioeconomic inferiority of the Hutu community.” Id.
91. The idea that the Tutsi were from Ethiopia came from the writings of Nile explorer, John Hanning Speke, who “decided without a shred of evidence” that the Tutsi were descendants of the Galla of southern Ethiopia. See id. at 7.
92. See Destexhe, supra note 71, at 43-44. During the conflict which is the subject of the ICTR, the Hutu sent bodies of the Tutsi down River Nyaborongo towards Lake Victoria claiming this to be “the shortest way back to Ethiopia.” Id. at 49. See Akayesu Judgement, supra note 77, at 26 (explaining the testimony of Dr. Alison Desforges in which she stated that the underlying motivation for putting bodies in the river was to “send the Tutsi back to their place of origin”). Forty-thousand bodies were found in Lake Victoria after the war ended. See Prunier, supra note 24, at 255.
93. See Prunier, supra note 24, at 47. Political parties were formed immediately. See id. The Hutu formed the Hutu Social Movement, created by Grégoire Kayibanda, and the Association for the Social Promotion of the Masses, created by Joseph Gitera. See id. The Tutsi created the Rwandese Nation Union, which favored a monarchy and independence from Belgium. See id.
94. See id. at 48. Dominique Mbonyumutwa was severely beaten by members of a Tutsi political party. See id. Though Mbonyumutwa did not die, false news of his death sparked Hutu action. See id.
95. See Destexhe, supra note 71, at 43-44. Destexhe claims that there were 20,000 Tutsi killed in the revolution of 1959. See id. at 44. However, Prunier argues that this is a mathemati-
point in the political history of Rwanda.”\textsuperscript{96} Just three years later, on July 1, 1962, Rwanda declared its independence from Belgium, naming Grégoire Kayibanda, leader of the Hutu Social Movement party, as its president.\textsuperscript{97} The Hutu, thus, became the governing party, holding thirty-five of the legislative seats while the Tutsi held only seven.\textsuperscript{98} The Tutsi, who were exiled in the 1959 revolution, continuously made incursions into Rwanda during this “First Republic,” leading to “reprisals” against those Tutsi still living inside Rwanda.\textsuperscript{99} These reprisals led to the deaths of tens of thousands of Tutsi, forcing many of those not killed into exile.\textsuperscript{100} During Kayibanda’s presidency,\textsuperscript{101} a campaign against the Tutsi was pressed so that power, money, and land once belonging to the Tutsi was redistributed to the Hutu. Likewise, the identification card system once used to discriminate against the Hutu was now used against the Tutsi.\textsuperscript{102}

The “Second Republic” of Rwanda was established in 1973 when General Juvénal Habyarimana, a Hutu, seized power from Kayibanda through a military coup.\textsuperscript{103} From 1973 to 1990, there were no massacres under Habyarimana, though his administration implemented a “policy of systematic discrimination” against the Tutsi.\textsuperscript{104} Habyarimana also outlawed all political parties except his own.\textsuperscript{105} During this stifling rule, “[v]iolent rumblings could be heard just below the surface if one stopped to listen.”\textsuperscript{106} Evidence of these rumblings is found in the formation of the Rwanda Patriotic Front (“RPF”) by exiled Tutsi and dissident Hutu. Habyarimana faced mounting pressure from the international community to negotiate with the RPF regarding the exiles’ return to Rwanda.\textsuperscript{107} Shortly after Habyarimana finally

\begin{thebibliography}{99}
\bibitem{96} Destexhe, supra note 71, at 43-44.
\bibitem{97} See Akayesu Judgement, supra note 77, at 22.
\bibitem{98} See Prunier, supra note 24, at 53.
\bibitem{99} See Akayesu Judgement, supra note 77, at 22. These Tutsi “commandos” seemingly did not care about the consequences of their actions on the Tutsi civilians of Rwanda when carrying out these terrorist acts. See Prunier, supra note 24, at 54.
\bibitem{100} See Akayesu Judgement, supra note 77, at 22.
\bibitem{101} Kayibanda ruled the Republic as if it were a personal dictatorship in which the Hutu had “unquestioning obedience” to him. See Prunier, supra note 24, at 57. In fact, it was this complete dependence and obedience to Hutu leadership that, according to Prunier, led to the genocide of the Tutsi. See id.
\bibitem{102} See Destexhe, supra note 71, at 44.
\bibitem{103} See Akayesu Judgement, supra note 77, at 22.
\bibitem{104} See Destexhe, supra note 71, at 45.
\bibitem{105} See Prunier, supra note 24, at 76.
\bibitem{106} Id. at 82.
\bibitem{107} See Destexhe, supra note 71, at 46.
\end{thebibliography}
agreed to negotiate the formation of a constitution, though, the RPF attacked Rwanda from Uganda on October 1, 1990.\textsuperscript{108} Though the RPF was comprised of both Tutsi and Hutu, the Habyarimana government viewed this attack as an attempt to reestablish Tutsi hegemony and, therefore, called for the unification of the Hutu to defend against the threat of the Tutsi.\textsuperscript{109} After the initial attack and subsequent retreat, the RPF switched tactics, adopting a “hit-and-run” strategy for the next several years.\textsuperscript{110} The Hutu government responded with massive propaganda to incite the Hutu and encourage the killing of Tutsi in Rwanda.\textsuperscript{111}

The propaganda and sporadic massacres continued. On July 14, 1992, a cease-fire agreement was signed and peace talks began in Arusha, Tanzania;\textsuperscript{112} however, Habyarimana would not support any peace agreements which would threaten his despotic reign.\textsuperscript{113} Therefore, the violence and massacres continued while the Arusha peace talks dragged on.\textsuperscript{114} While the peace talks continued, two major events set the eventual genocide of the Tutsi in motion. First, on October 21, 1993, the Hutu President of Burundi, Melchior Ndadaye, was assassinated by Tutsi extremists, sharpening the Hutu fear of the reestablishment of Tutsi domination.\textsuperscript{115} This assassination led to a “torrent of propaganda” professing fear of enslavement by the Tutsi, “majority democracy,” calls to action, and a renewed “paranoid vision” of the Hutu situation.\textsuperscript{116} Second, on April 6, 1994, Habyarimana

\textsuperscript{108} See id. The RPF was made up of about 2,500 soldiers with Major-General Fred Rwigyema as its leader. See Prunier, supra note 24, at 93. Rwigyema was killed on the second day of the invasion, causing massive confusion for the troops. See id. at 94-96. The Rwandan regular forces, supported by the Rwandan government, counterattacked, eventually leading to the RPF’s retreat around October 30, 1990, a month after the invasion had begun. See id. at 96.

\textsuperscript{109} See Destexhe, supra note 71, at 46.

\textsuperscript{110} See Prunier, supra note 24, at 135. Attacks occurred in Ruhengeri, Bugogwe, Kanama, Rwerere, Gisenyi, Bugesera, and Murambi. See id. at 135-39. By 1994, the RPF troops numbered nearly 25,000. See id. at 117.

\textsuperscript{111} See Akayesu Judgement, supra note 77, at 24. In one instance, a report was broadcast on the radio that a leaflet had been found calling on the Tutsi “to rise up and massacre their Hutu neighbors.” Prunier, supra note 24, at 137. This prompted the Hutu population to massacre Tutsi under the guise of self-defense. See id.

\textsuperscript{112} See Prunier, supra note 24, at 150.

\textsuperscript{113} See id. at 162.

\textsuperscript{114} Four days after Habyarimana gave a radio address reinforcing his position to protect himself, ethnic massacres began in Kibuye. See id. The Arusha Accords were signed on August 4, 1993. See Destexhe, supra note 71, at 81. They “offered credible possibilities for national reconciliation and peace for the majority of Rwandans at the expense of the ruling Hutu parties.” Id. at 28. After the Arusha Accords were signed, the “Hutu extremists decided on the relentless pursuit of Tutsis and moderate Hutus.” Id.

\textsuperscript{115} See Prunier, supra note 24, at 199. Ndadaye was elected in Burundi in June of 1993, beating a Tutsi candidate. See id.

\textsuperscript{116} Id. at 200.
was killed when his aircraft was shot down by a missile from an unknown source.\textsuperscript{117} The Presidential Guard, believing the assassination to be the work of the RPF, immediately began killing all Tutsi, any Hutu known to oppose the President, and any persons opposing the killings.\textsuperscript{118} With the encouragement of public authorities through radio propaganda,\textsuperscript{119} 500,000 people, mostly Tutsi, were killed within two weeks.\textsuperscript{120} Over the four-year period, from 1990 to 1994, between 800,000 and 850,000 Tutsi were killed.\textsuperscript{121} This extended massacre is the subject of the prosecutions at the ICTR.

\section*{B. Tribunals}

\subsection*{1. \textit{International Criminal Tribunal of the Former Yugoslavia, The Hague, Netherlands}}

Bosnia-Herzegovina deteriorated quickly under the continuous onslaught of the Serbs.\textsuperscript{122} Desperately seeking assistance, the Ambassador and Permanent Representative of Bosnia-Herzegovina to the United Nations, Muhamed Sacirbey, wrote a letter to the Security Council requesting intervention.\textsuperscript{123} The United Nations responded by preparing a preliminary report regarding possible violations of international human rights law in Bosnia-Herzegovina\textsuperscript{124} and creating an

\begin{itemize}
  \item[117.] See DESTEXHE, \textit{supra} note 71, at 31. Three theories were set forth by various sources just after Habyarimana’s death to explain what happened. The first theory, set forth by a Belgian journalist, argues that Habyarimana’s plane was brought down by the shots of French soldiers. See PRUNIER, \textit{supra} note 24, at 213. This theory is unlikely, Prunier says, because the French really had no interest in seeing Habyarimana dead considering he had been a French ally. See \textit{id.} at 214. The second theory, set forth by the Rwandese ambassador in Kinshasa, Tanzania, suggests that Habyarimana’s plane was gunned down by Belgian soldiers. See \textit{id.} Again, this seems unlikely because the Belgians had no interest in seeing him dead. See \textit{id.} The third theory, presented by several parties, claims that the plane had been shot down by the RPF. See \textit{id.} at 215. Interestingly, though, as Prunier points out, eyewitnesses claimed that they saw white men fleeing the scene of the shooting suggesting the culpability of someone other than the RPF. See \textit{id.} at 214.
  \item[118.] See Akayesu Judgement, \textit{supra} note 77, at 25; see also PRUNIER, \textit{supra} note 24, at 229, 231. During Akayesu’s trial, a document, which was entered into evidence, separated the enemies of the Hutu into two categories: (1) the primary enemy, or the extremist Tutsi who refused to acknowledge the revolution of 1959 and wished to regain power; and (2) “anyone who lent support in whatever form to the primary enemy.” Akayesu Judgement, \textit{supra} at 28.
  \item[119.] See PRUNIER, \textit{supra} note 24, at 231. Habyarimana’s wife and her adviser appeared on an extremist radio program claiming they had proof that Habyarimana’s plane was shot down by RPF terrorists. This alleged proof included tape recordings, photographs, and missile launchers from an area under RPF control. See \textit{id.} at 217.
  \item[120.] See DESTEXHE, \textit{supra} note 71, at 69.
  \item[121.] See PRUNIER, \textit{supra} note 24, at 265.
  \item[122.] See Bland, \textit{supra} note 10, at 239.
  \item[123.] See \textit{id.}
  \item[124.] The preliminary report was prepared by a designated Special Rapporteur, Tadeusz Mazowiecki, from Poland under Resolution 771. See \textit{id.} at 240.
\end{itemize}
impartial commission of experts to investigate the findings in the preliminary report. Four months after its establishment, the Commission of Experts ("Commission") presented a report of its investigation, recommending the establishment of an ad hoc tribunal to prosecute its findings of grave breaches of the 1949 Geneva Conventions, crimes against humanity in the form of ethnic cleansing, possible war crimes, and genocide.

The Security Council decided, pursuant to the Commission’s findings, to establish the ICTY. On February 22, 1993, by adopting Resolution 808, the Security Council formally committed to the creation of the ICTY. The Secretary-General was then asked to prepare a report regarding the ICTY’s implementation. Three months after the adoption of Resolution 808, on May 25, 1993, the Security Council adopted Resolution 827, the Tribunal’s statute. The Statute of the ICTY was adopted pursuant to Chapter VII of the Charter of

125. See id. The Commission of Experts was created pursuant to Resolution 780 after the preliminary report concluded that there were “massive and systematic violations of human rights, as well as serious grave violations of humanitarian law.” id.

126. The first five members of the Commission were Fritz Kalshoven (the first Chairman), M. Cherif Bassiouni, professor of international law at DePaul University, Torkel Opsahl, human rights professor at University of Oslo, William Fenrick, a Canadian war crimes expert, and Judge Keba Mbaye of Senegal. See Virginia Morris & Michael P. Scharf, I An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia 26-27 n.102 (1995) [hereinafter 1 Morris & Scharf]. After Opsahl died of a heart attack and Fritz Kalshoven resigned in 1993, M. Cherif Bassiouni became the Chairman, and the vacancies were filled by Christine Cleiren, a professor of criminal law at Erasmus University in Rotterdam and Hanne Sophie Greve, a Norwegian court of appeals judge. See id.


128. See 1 Morris & Scharf, supra note 126, at 28-29. The Commission produced “65,000 pages of documents, a database cataloguing the information in these documents, over 300 hours of videotape, and 3300 pages of analysis.” M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. RTS. J. 11, 40 (1997) [hereinafter Bassiouni, From Versailles to Rwanda]. To formulate its investigative report, the Commission carried out 35 missions to the former Yugoslavia. See id. at 41.

129. Formally, the International Tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” 1 Morris & Scharf, supra note 126, at 8.

130. See Scharf, supra note 24, at 54. Under Resolution 808, the Security Council simply decided that an international tribunal would be established. See id.

131. See 1 Morris & Scharf, supra note 126, at 33-34.

132. See Scharf, supra note 24, at 62.

the United Nations, which allows the United Nations to take measures to "maintain or restore international peace and security," following the requisite determination of the "existence of any threat to the peace, breach of the peace, or act of aggression."

a. Statute: Jurisdiction

A tribunal, to be effective, must be able to assert jurisdiction over the conflict, the subject-matter, and the person. Also, it must delineate the territory, and the time period over which it has jurisdiction. The ICTY has jurisdiction over the Balkan conflict based on the 1949 Geneva Conventions and the 1977 Additional Protocols regarding international armed conflict. Its subject-matter jurisdiction extends to those crimes in violation of international humanitarian law which have been established "beyond doubt" under customary law. Generally, international law applies and affects States only, however, a new trend has developed pursuant to which individuals, because they carry out the objectives of the State, can be held criminally responsible. Therefore, the ICTY, under Article 6 of its Statute, asserts personal jurisdiction over those individuals who participate in the "planning, preparation or execution of serious violations of international humanitarian law." The exact territory over which the ICTY


135. The former Yugoslavia was party to the Geneva Conventions and the Security Council on July 13, 1992, adopted Resolution 764, mandating that all those involved in the Yugoslav conflict comply with these Conventions. Morris & Scharf, supra note 126, at 22.

136. See id. at 52. Confining subject-matter jurisdiction in this way allows for protection against any person being prosecuted for a crime not clearly prohibited when it occurred. Also, limiting jurisdiction in this way provides a legal standard to determine criminal responsibility that is "beyond question." Id. The absence of such protections was one of the major criticisms of the Nuremberg Trials. See Jose E. Alvarez, Rush To Closure: Lessons of the Tadic Judgment, 96 Mich. L. Rev. 2031, 2037 n.24 (1998).

137. Whereas domestic laws bind all people of that country, international treaties, which primarily govern international law, have been historically held to bind only those parties to the agreement—States. See Steiner & Alston, supra note 133, at 30-33.


139. Statute of the International Tribunal, Art. 6
has jurisdiction is defined under Article 8 of the Statute as "the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters." As to temporal jurisdiction, the ICTY only has jurisdiction over those crimes which have occurred since January 1, 1991. Finally, according to Article 9, the ICTY and national courts have concurrent jurisdiction, but the ICTY has "primacy over national courts."

b. Statute: Crimes and Organization

The ICTY Statute governs both the scope of the crimes that may be tried as well as the organizational structure of the Tribunal itself. The Statute provides for the prosecution of three types of crimes: (1) war crimes (Articles 2 & 3), which consist of grave breaches of the Geneva Conventions and violations of the laws or customs of war; (2) crimes against humanity (Article 5), which include two groups—(a) murder, extermination, enslavement, deportation, and other inhumane acts against any civilian population, and (b) persecutions on political, racial, or religious grounds; and (3) genocide (Article 4), which means the "intent to destroy, in whole or in part, a national, ethnic, racial or religious group" by "killing members of the group," "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births within the group," or "forcibly transferring children of the group to another group."

The Statute also provides an organizational structure for the Tribunal. It stipulates the composition of the Tribunal’s trial and appellate Chambers (Article 12), the election of a Tribunal president (Article

140. Id. at Art. 8.
141. See id. Even though the ICTY was established in 1993, it is interesting to note that its jurisdiction extends to the 1999 massacre and exile of ethnic Albanians in Kosovo by the Serbs.
142. Id. at Art. 9. This is very much unlike the jurisdiction of the ICC which does not have primacy over national courts. Rather, the ICC only has jurisdiction if a State Party or the Security Council refers a situation to the Prosecutor or the Prosecutor initiates an investigation according to the provisions of the Statute. See The Statute of the International Criminal Court: A Documentary History 46, art. 13 (compiled by M. Cherif Bassiouni 1998) [hereinafter STATUTE OF THE ICC].
143. See ICTY Statute, supra note 139, at Arts. 2, 3, 5, 12, 14, 16, 17.
144. See id. at Arts. 2, 3. The appropriate methods of warfare are detailed in the Geneva Conventions and the Hague Convention. See 1 Morris & Scharf, supra note 126, at 10.
145. See 2 Morris & Scharf, supra note 134, at 12.
146. Id.
147. See ICTY Statute, supra note 139, at Art. 12. The Trial Chamber consists of three judges while the appellate Chamber consists of five judges. See id. The judges of the first Trial Cham-
14), Chamber assignment and rotation procedures, and the responsibilities of both the Prosecutor (Article 16) and the Registry (Article 17). 148

2. The International Criminal Tribunal for Rwanda, Arusha, Tanzania

After receiving a report from the Commission on Human Rights of the United Nations as to the “gravity of the Rwandan situation,” the Security Council, on June 30, 1994, adopted Resolution 935 establishing an impartial Commission of Experts to investigate the violations of international humanitarian law in Rwanda. 149 The Commission recommended the creation of a criminal tribunal for Rwanda, similar to the one in the former Yugoslavia and the Security Council subsequently adopted Resolution 955, establishing the ICTR. 150 Interestingly, Rwanda, after urging intervention by the United Nations, dissented from the creation of the ICTR for three reasons: (1) the Tribunal’s temporal jurisdiction was seen as insufficient; 151 (2) the procedural rules did not include the death penalty; 152 and (3) the ICTR would neither use Rwandan judges nor hold trials in Rwanda. 153 The Tribunal was created despite Rwanda’s dissent. 154
a. Statute

The ICTR’s jurisdictional requirements are the same as those of the ICTY. Jurisdiction over the conflict, subject-matter, and persons are all identical. The only differences, obviously, pertain to the territory and time period covered. Territorial jurisdiction includes both Rwanda and its neighboring states where Rwandan citizens committed genocide or other violations after January 1, 1994. Just like the ICTY, the ICTR has concurrent jurisdiction with national courts but has primacy over them. The ICTR provides for the prosecution of the same crimes as the ICTY: war crimes (Article 4), genocide (Article 2), and crimes against humanity (Article 3).


In order to develop the Rules of Procedure and Evidence, the ICTY’s first two Trial Chambers "relied heavily on proposals from the United States government," non-governmental organizations ("NGO’s"), and other major legal systems in the world. The rules adopted are in keeping with the common law more than its civil counterpart, hence, the Tribunals primarily follow an adversarial model rather than inquisitorial one. The rules adopted to apply to the ICTY and ICTR are broad, leaving much room for interpretation and variation. This “generality indicates that the Rules are not intended to be comprehensive,” which, in turn, ensures that the “international rules on evidentiary matters before the Tribunals can be developed through their own decisions.” The discretion of the Trial Chamber to develop new rules within the context of an actual trial became

155. See id.
156. At its inception, the ICTY was comprised of two Trial Chambers. Judges Gabrielle Kirk McDonald (United States), Rustan Sidwa (Pakistan), and Lal Chand Vohra (Malaysia) made up one Chamber while Adolphus Karibi-Whyte (Nigeria), Germain Le Foyer De Costil (France) (later replaced by Claude Jord, also of France), and Elizabeth Odio Benito (Costa Rica) comprised the other. See 2 MORRIS & SCHARF, supra note 134, at 646. Judge McDonald and Judge Karibi-Whyte were both elected presiding judge of their respective Chambers. See id. After serving one year, the judges would rotate among both Trial Chambers and the appellate Chamber so as to vary the make-up of the individual Chambers. See id. This rotation system presents some questions of fairness for a defendant who upon appealing her or his trial court decision has the same judges for his appeal as she or he had at trial.
158. See id. The differences between common law and civil law systems have become blurred over time, yet, in general, common law systems are usually “public, oral and adversarial” while civil law systems are usually “secret, unilateral and written.” Rod Dixon, Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals, 1 TRANSNAT'L L. & CONTEMP. PROBS. 81, 96 (1997). See Bassiouni, Sources and Content, supra note 4, at 17.
159. Dixon, supra note 158, at 95-96.
THE TADIC & AKAYESU TRIALS

2000]

problematic in the Dusko Tadic trial, the first case heard before either Tribunal. The evidentiary rules established in the Tadic trial created the framework upon which future trials will be based.

II. ANALYSIS

A. The Trial of Dusko Tadic

Dusko Tadic, a Serb, was born on October 1, 1955 in Kozarac, Prijedor, Bosnia. Kozarac was a predominantly Muslim community, yet Tadic and his family remained there until 1991. He was well known throughout the community, a fact that was apparent during the testimony of the many witnesses at his trial who knew him as the man who taught karate and managed a pub. Tadic became involved in the Bosnian conflict in 1990 when he joined the Serbian Democratic Party ("SDS") and banned all Muslims from entering his pub. Shortly thereafter, Kozarac, allegedly upon the suggestion of Tadic, became the target of an artillery barrage by Serbs. Of its "15,000 Muslim residents, 2,000 were killed in the artillery barrage. Another 5,000 were summarily executed after the town's surrender." The remaining Muslim residents were forced into concentration camps. Tadic was alleged to have played a role in the execution and detention of many of the Muslim residents of Kozarac.

After the seizure of Kozarac was completed, Tadic moved his family to Munich, Germany, and several months later joined them there. He and his family were among the more than 350,000 refugees from Bosnia and Croatia who had taken refuge in Germany since 1992. Accusations about Tadic, known as "the Butcher," began to circulate among refugees in Germany. Tadic's presence was brought to the attention of the German government, which subsequently launched an investigation of all war criminals within its borders in response to ex-

161. See id. at 181.
162. See SCHARF, supra note 24, at 94.
163. See Tadic Judgment, supra note 160, at 46.
164. See SCHARF, supra note 24, at 95. This bombardment was allegedly undertaken because the vast majority of the population was Muslim. See id.
165. Id.
166. See id.
167. See generally Tadic Indictment, supra note 67.
168. See SCHARF, supra note 24, at 96.
169. See id. at 96-97.
170. See id. at 97.
treme pressure brought to bear by human rights organizations.\textsuperscript{171} Tadic was arrested on February 12, 1994, and indicted in Germany;\textsuperscript{172} however, the ICTY requested that his case be transferred for prosecution at the Hague.\textsuperscript{173} Mistakenly believing he had “a better chance of acquittal at the Hague than in Germany,” Tadic had no objections to the transfer of his trial.\textsuperscript{174} Just over one year after his initial capture in Germany, Tadic was indicted on February 13, 1995 on thirty-four counts, including breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity.\textsuperscript{175} It was not until April 24, 1995 that Germany sent Tadic to the ICTY, where he was held throughout his trial.\textsuperscript{176}

After journalists were finally allowed into Bosnia to examine the detention camps and interview victims, many believed it was clear that the Serbs had engaged in genocide to destroy all Muslims and Croats.\textsuperscript{177} It was quite interesting, therefore, that the ICTY chose as its first defendant a man not charged with genocide. Due to various procedural delays, Tadic’s trial did not begin until May 7, 1996.\textsuperscript{178} In all, 125 witnesses testified during the seven-month trial.\textsuperscript{179}

\textbf{B. The Trial of Jean Paul Akayesu}

Jean Paul Akayesu was born in 1953 in Taba commune, Rwanda.\textsuperscript{180} For much of his life, Akayesu taught in the commune schools and

\begin{itemize}
  \item \textsuperscript{171} See id. at 96-97.
  \item \textsuperscript{172} See id. at 97.
  \item \textsuperscript{173} See id. at 98.
  \item \textsuperscript{174} SCHARF, supra note 24, at 98. Scharf suggests Tadic’s belief that he would have a better chance at the ICTY was a “miscalculation” because other “Yugoslav war criminals who had been tried by other European countries had managed quite well in the national courts.” Id. These other criminals included Dusko Cvetkovic, a Serb, and Refic Saric, a Muslim, both of whom were acquitted. See id. Scharf also suggests that because Tadic was the first criminal tried at the ICTY, “much more was at stake.” Id.
  \item \textsuperscript{175} See Tadic Indictment, supra note 67, at 4.1-4.4.
  \item \textsuperscript{176} See SCHARF, supra note 24, at 101.
  \item \textsuperscript{177} See COHEN, supra note 25, at 169 (asserting that genocide is “a sober description of the Serbian rampage against the Muslims in the first six months of the Bosnian conflict”).
  \item \textsuperscript{178} See SCHARF, supra note 24, at 111.
  \item \textsuperscript{179} See id. at 205. The members of the prosecution were Lieutenant Colonel Brenda Hollis of the Air Force Judge Advocate General’s office, Grant Niemann, an attorney from Australia, Alan Tieger, a United States attorney, and Major Michael Keegan of the Marine Corps Judge Advocate General’s office. See id. at 112. The defense team was headed by Michail Wladimiroff, the “dean of the Dutch criminal defense bar” and partner at the biggest criminal defense firm in the Netherlands. See id. at 102. Also defending Tadic were Alfons Orie, a partner at Wladimiroff’s firm and later a judge on the Dutch Supreme Court, Steven Kay, a British barrister, and Sylvia de Bertondano, another British barrister. See id. at 102-03.
  \item \textsuperscript{180} See Akayesu Judgement, supra note 77, at 17. Rwanda is divided into 11 prefectures, which are further subdivided into communes (similar to United States’ cities divided into districts). See id. at 18. The Taba commune is within the Gitarama prefecture. See id. at 4.
\end{itemize}
eventually became Primary School Inspector in Taba. This job entailed “inspecting the education in the commune” and acting as “head of the teachers.” Akayesu was a “well known and popular figure in the local community” who became involved in the politics of Taba in 1991 when Rwanda returned to a multiparty system. He helped bring a new political party to Tabă called Mouvement Démocratique Républicain (“MDR”), which was an extension of the 1957 “Hutu grassroots movement” of the same name. The MDR’s main focus was the improvement of the commune’s infrastructure, roads, schools, hospitals, and electricity. It also undertook the controversial task of highlighting the mistakes of the “Mouvement révolutionnaire national pour le développement” (“MRND”), the former “State-party” of Rwanda. Upon the emergence of the MDR, many Rwandans, desperate for change, left the MRND to join the new party, prompting intense animosity between the parties.

Because Akayesu was considered “a man of high morals, intelligence and integrity, possessing the qualities of a leader,” he was elected bourgmestre of Taba in 1993. Before the emergence of the multiparty system in Rwanda, the bourgmestre had “sole responsibility and authority over the communal police” and because he was considered a “trusted representative” of the State President, had “considerable sway over the communal council.”

Though the introduction of the multiparty system removed the bourgmestre’s standing as the representative to the president, he still remained “the most important local [representative]” within the commune. Akayesu, therefore, had significant unofficial power within Tabă during his term as bourgmestre from April 1993 to June 1994. He personally had oversight of the “economy,

181. See id.
182. Id.
183. See id. at 17.
184. See id. at 22.
185. See id. This political party was instituted by President Habyarimana in 1975 as part of his plan to transform Rwanda into a single-party system. See id. Upon birth, every Rwandan became a member, “ipso facto,” of the MRND. See id.
186. See Akayesu Judgement, supra note 77, at 17.
187. Id. A bourgmestre governs each commune along with the communal council, which includes representatives of each sector of the commune. See id. at 18. Before the dissolution of the single-party system, the bourgmestre acted as a representative to the central government, but operated the commune as a “semi-autonomous unit.” See id.
188. Id. at 18.
189. Id.
190. See id. at 17. Many of the witnesses who testified at Akayesu’s trial affirmed the contention that Akayesu held substantial power. Witness “E” stated that “the bourgmestre was considered as the ‘parent’ of all the population whose every order would be respected.” Id. at 20. Similarly, Witness “S” said that “the people would normally follow the orders of the . . . bourgmestre, even if those orders were illegal or wrongful.” Id. Some witnesses, who were
infrastructure, markets, medical care, and . . . social life." Jean Paul Akayesu was in a different position in Rwanda than was Dusko Tadic in the former Yugoslavia. Akayesu was a leader, and as such, provided a far more appropriate target for an accusation of the promulgation of genocide. Because of his role as bourgmestre of Taba, in which over 2,000 Tutsi were killed while he was in power, Akayesu was charged with numerous counts of “genocide,” “complicity in genocide,” “direct and public incitement to commit genocide,” “extermination,” “murder,” “torture,” “cruel treatment,” “rape,” and “crimes against humanity.”

Other than the genocidal extermination of Tutsi, which occurred all over Rwanda during the period covered by the ICTR, in Taba acts of sexual violence, beatings, and murders were also common. Akayesu was deemed to have “facilitated the commission” of these crimes because he allowed them to happen “on or near the bureau communal premises.” Besides passively facilitating the effectuation of crimes, Akayesu himself ordered many of the beatings, killings, and acts of torture.

Akayesu was arrested on October 10, 1995 in Zambia by authorities there and was subsequently turned over to the Detention Facilities of the ICTR in Arusha, Tanzania, on May 26, 1996. Akayesu’s trial began on January 9, 1997 after several procedural delays. The trial lasted fourteen months, ending March 26, 1998, after the testimony of forty-one witnesses—twenty-eight for the prosecution and thirteen, including the defendant, for the defense.

former bourgmestres themselves, claimed that they had to operate “within the ambit of the law,” conceding, however, that the “popularity of a bourgmestre might affect the extent to which his orders and advice were obeyed within the Commune.”

191. See id. at 17.
192. See Akayesu Judgement, supra note 77, at 18.
193. Id. at 6-8.
194. Id.
195. See id. at 5. The examples in which Akayesu facilitated or ordered the commission of criminal acts are abundant. After an incident in which a school teacher was killed for allegedly associating with the RPF, made up of exiled Tutsi and dissident Hutu, Akayesu did not take steps to have the killer, a Hutu, arrested. See id. Also, on April 19, 1994, Akayesu “urged the population [of Taba] to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis.” Id. Similarly, on several occasions, Akayesu ordered the torture and murder of intellectual or influential people within Taba. See id.
196. See id. at 10-11.
197. See id. at 10-12.
198. See Akayesu Judgement, supra note 77, at 13. The Prosecutors in the Akayesu trial were Pierre-Richard Prosper, Honoré Rakotomanana, and Yacob Haile-Mariam. See id. at 11. Akayesu’s attorneys were Nicolas Tiangaye and Patrice Monthé. See id.
One of the biggest evidentiary problems in the Tadic case arose before it even began, and involved the use of anonymous witnesses.\(^{199}\) The Trial Chamber of the ICTY granted a motion by the Prosecution allowing for the admission of anonymous testimony by several witnesses.\(^{200}\) Some of the witnesses’ identities would remain unknown not only to the public, but also to the accused and his attorney.\(^{201}\) The arguments for and against the propriety of anonymous testimony center primarily on the tension between the protection of victims and witnesses and the protection of the rights of the accused.\(^{202}\)

The Sixth Amendment to the United States Constitution provides a criminal defendant with the right “to be confronted with the witnesses against him . . . .”\(^{203}\) However, this right is often hedged by protective measures to shield victims and witnesses during trials. It is frequently the case in domestic trials that courts allow adult rape victims, for example, to remain anonymous to the media and the public.\(^{204}\) Other instances in the domestic setting in which certain witnesses’ or victims’ identities are kept from the public include rape trials involving child

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199. See, e.g., Monroe Leigh, Comment, The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused, 90 AM. J. INT’L L. 235, 235 (1996) (contending that allowing anonymous testimony denied the accused a fair trial and right to confront his accusers); Alex C. Lakatos, Note, Evaluating The Rules of Procedure and Evidence For The International Tribunal In The Former Yugoslavia: Balancing Witnesses’ Needs Against Defendant’s Rights, 46 HASTINGS L.J. 909, 918-32 (1995) (arguing for the need of witness protection and the lack of an absolute right to confront accusers); Sherman, supra note 138, at 867-75 (asserting that testimony of an anonymous witness hampers a defendant’s ability to fully cross-examine or impeach that witness).


201. See id. at 29. Only one witness, “L,” whose testimony will be later examined in great detail, testified anonymously to the defendant and his counsel. See infra notes 279-297 and accompanying text.

202. See Lakatos, supra note 199, at 932-37; Leigh, supra note 199, at 235; Merceheh Momeni, Note, Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rule of the International Criminal Tribunal for the Former Yugoslavia, 41 HOW. L.J. 155, 155, 156-57 (1997); Sherman, supra note 138, at 833-34.

203. U.S. CONST. amend. VI.

204. See Douglas v. Wainwright, 714 F.2d 1532, 1545 (11th Cir. 1983) (holding that protection against embarrassment of an adult witness in a rape trial was sufficient to require partial closure of trial to the public); United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 695 (7th Cir. 1977) (holding that excluding the public from courtroom was appropriate to protect an adult witness’ “dignity” during a rape trial); Aaron v. Capps, 507 F.2d 685, 687-88 (5th Cir. 1975) (permitting rape trial to be closed to the public); Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966) (allowing exclusion of spectators during the testimony of rape victim).
witnesses,205 trials involving minors as rape victims,206 trials in which a
witness or her family is threatened,207 trials using the testimony of un-
dercover agents,208 and trials involving trade secrets.209 The rationale
for these types of measures is threefold. First, they are necessary to
shelter those involved from exposure to public scrutiny. Second, they
seek to prevent “a second round of victimization as the witness ‘runs
the gauntlet’ of reliving a painful experience” in front of “an indiffer-
ent bureaucracy, an assaultive defense team, or an unsympathetic me-
dia.”210 Finally, these measures may be deemed necessary to prevent
retaliation by a particularly menacing defendant.211
The ICTY and ICTR provide similar protection to witnesses and
victims as that offered in domestic trials. Initial protection is afforded
through Article 22 of each Statute, which states that “[t]he Interna-
tional Tribunal shall provide in its rules of procedure and evidence for
the protection of victims and witnesses. Such protection measures
shall include, but shall not be limited to, the conduct of in camera
proceedings and the protection of the victim’s identity.”212 Nominal
protection is also offered through the Victims and Witnesses Unit (“VWU”), established by the Rules of Procedure and Evidence.213
The VWU was created to protect victims who are afraid to testify be-
cause of fear of retribution or exile from their communities.214 The
unit, however, had not received adequate funding from the United
Nations to render it fully operational at the time of the Tadic trial.215
Any mechanism designed to protect witnesses and victims should be
considered in light of the defendant’s right to receive a fair trial, most

205. See Geise v. United States, 262 F.2d 151, 155 (9th Cir. 1958) (holding closure to the
public appropriate where child witness to rape testifies).
206. See United States v. Sherlock, 962 F.2d 1349, 1357-58 (9th Cir. 1989) (holding that testi-
mony of minor rape victim outside hearing of defendant’s family appropriate).
207. See United States v. Hernandez, 608 F.2d 741, 747-48 (9th Cir. 1979) (allowing closure to
public where witness and his family were threatened).
208. See United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir. 1975) (holding
complete closure of courtroom to public appropriate to prevent disclosure of undercover agent’s
identity).
209. See Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539-40 (2d Cir. 1974) (hold-
ing complete closure of courtroom to public appropriate to prevent disclosure of undercover agent’s
identity).
210. Lakatos, supra note 199, at 911.
211. See id. at 910.
212. ICTY Statute, supra note 139, at Art. 22. Because the statutes of the ICTY and ICTR
are virtually identical, in this analysis, the ICTY Statute will only be cited, as it was drafted first
and provided the model for the ICTR’s statute.
213. See ICTY R. of P. & EVID. 34 <http://www.un.org/icty/basic/rpe/IT32_rev15.htm> [here-
inafter ICTY Rules].
214. See SCHARF, supra note 24, at 108.
215. See id.
particularly by confronting his accusers. Even the most scrupulous examination of the Tribunals' Statutes together with their Rules of Procedure and Evidence will disclose no solution to the anonymity versus confrontation problem. As was mentioned above, Article 22 of the Statute governs the protection of victims and witnesses. The key question is—from whom does the Statute envision these victims and witnesses needing protection? Does the Statute contemplate protection from the defendant? If so, it may be objected that anonymity undermines the defendant's right to confront his accusers, and thus secure a fair trial. As to a fair trial, Article 21(2) of the ICTY Statute protects that right; however, the provision also clearly states that it is subject to the mandate of Article 22. Thus, the arguments for and against the nondisclosure of a witness's identity to the defendant become circular—the defendant's right to a fair trial is subject to the protection of victims and witnesses, and the protection of victims and witnesses is subject to the defendant's right to a fair trial. The same circularity arises when considering a defendant's right to confront. The more difficult question as to any right to confront, however, is whether it exists at all and if so, to what extent. The Statute seemingly addresses this right in Article 21 when it states that "the accused shall be entitled . . . to examine, or have examined, the witnesses against him . . . ." The Statute provides little or no guidance as to what exact limitations may be placed on these rights in light of the need to protect victims or witnesses. It might be argued that the language leaves open the possibility of someone other than the defendant, or defendant's counsel, questioning a witness. The Statute does not, however, provide any particular guidance as to what exact

216. See Leigh, supra note 199, at 236.
217. See ICTY Statute, supra note 139, at Art. 22.
218. See id.
219. See id.
220. See id.
221. See ICTY Statute, supra note 139, at Art. 21(2).
222. A similar analysis is set forth by Antonia Sherman in reference to the circular argument involved in resolving the tension between a defendant's right to confront his accusers and the protection of victims and witnesses. See Sherman, supra note 138, at 835.
223. See id. (asserting the circularity of the argument).
224. ICTY Statute, supra note 139, at Art. 21(4)(e).
225. See Lakatos, supra note 199, at 923-24. Lakatos argues that because Article 21 also expressly guarantees a defendant's right to counsel, there would be no need for the Statute to include "or have examined" if it were merely referring to defense counsel. See id. at 923. Counsel's right to conduct an examination on behalf of the defendant is implied. Lakatos explains that to interpret this language as excluding the possibility of someone other than the accused or his counsel from examining a witness would render "to be examined" unnecessary. See id. Similarly, if this phrase was intended to refer only to defense counsel, why did the drafters not specifically say so?
circumstances authorize the limitation of the confrontation right. It becomes necessary, then, to look to other relevant sources for interpretative assistance.

The Rules of Procedure and Evidence provide a tool to assist in the resolution of the protection question, though not a completely conclusive one. Rule 69(A) allows for the nondisclosure of a witness’s identity “[i]n exceptional circumstances” until that witness is “brought under the protection of the Tribunal.” The Rule adds in subsection (C) that, subject to Rule 75, the identity of the witness or victim must be “disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.” Rule 75(A) states that one judge or the Chamber may “order appropriate measures for the privacy and protection of victims and witnesses...” Rule 69(A) seems to conflict with any reading of Article 22 to include the defendant as one from whom identity can be kept, at least when the witness has been taken under the protection of the Tribunal. This is underscored by Rule 75(A)’s fiat that the protections granted witnesses must remain “consistent with the rights of the accused.” Rule 75 also allows for an in camera proceeding to ascertain whether “measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or witness” are needed. Given the explicit mention of preventing disclosure to the public or media, the omission of any reference to the defendant suggests that anonymity to the defendant was not contemplated by the Rule. Finally, Rule 75(C) confers on the Chamber the right to “control the manner of questioning to avoid any harassment or intimidation” of a witness. This grant of power indicates the Rule’s cognizance of the chance that a witness may be revictimized on the stand during cross-examination. The Rule does not, however, seem to consider that anyone other than the defendant might be performing the cross-examination. Rules 69 and 75 together implicitly recognize a defendant’s right to confront his accusers by acknowledging his need to prepare a defense. It is only by

226. ICTY Rules, supra note 213, at Rule 69(A). As with the statutes of the Tribunals, the Rules of Evidence of the ICTY will only be cited in this section because they are the same as those of the ICTR.
227. Id. at Rule 69(C).
228. Id. at Rule 75(A).
229. See Leigh, supra note 199, at 236-37.
230. ICTY Rules, supra note 213, at Rule 75(A).
231. Id. at Rule 75(B)(i).
232. Id. at Rule 75(C).
233. See Fionnuala Ni Aolain, Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War, 60 ALB. L. REV. 883, 896 (1997) (arguing that Rule 75(C) helps protect the victim from revictimization on the stand during cross-examination).
knowing the identity of the witnesses that the defense can prepare an effective cross-examination.  

Further authority as to a defendant’s rights may be found in the domain of international rules and norms. Such rights should be consistent with “internationally recognized standards” drawn from customary law and general principles of international law. The most obvious places to look when considering these standards is the Nuremberg and Tokyo trials. Both Tribunals recognized confrontation rights but with some limitations. At Nuremberg, for example, the Tribunal often admitted ex parte affidavits, disallowing any cross-examination by the defense. Likewise, in the Tokyo trials, “reasonable restrictions” on a defendant’s right to cross-examine witnesses were recognized. A second source to examine is the other war crimes Tribunals established by the Allied Powers after World War II. A survey of these Tribunals, done by Alex C. Lakatos, indicates that, as at Nuremberg, ex parte affidavits were used, though a defendant had the right to cross-examine testifying witnesses. Though the ex parte affidavits utilized at Nuremberg and other Tribunals were not anonymous, they do bridge the gap between an absolute right to confront and the severely limited right in operation when anonymous testimony is admitted. Finally, of sixteen international instruments, also surveyed by Lakatos, “only two explicitly protect the defendant’s right to confrontation.” It is clear from this examination of international tribunals and instruments that little customary law exists governing the right to confrontation.

234. See Leigh, supra note 199, at 236.

235. Lakatos, supra note 199, at 925. Customary law is “conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international legal order.” Steiner & Alston, supra note 133, at 28. Customary law is traditionally made up of three components: (1) general and consistent state practice; (2) which spans over time; (3) based on a sense of legal obligation (or opinio juris). See id. at 28-29. One author has identified five categories of general principles of international law: (1) “the principles of municipal law ‘recognized by civilized nations’”; (2) “general principles of law ‘derived from the specific nature of the international community’”; (3) “principles ‘intrinsic to the idea of law and basic to all legal systems’”; (4) “principles ‘valid through all kinds of societies in relationships of hierarchy and coordination’”; (5) “principles of justice founded on ‘the very nature of man as a rational and social being.”’ Oscar Schachter, International Law In Theory And Practice 50 (1991).

236. See Lakatos, supra note 199, at 927-28.

237. See id. at 927.

238. See id.

239. See id. at 928.

240. See id.

241. Id. These two are the International Convention on Civil and Political Rights and the American Convention on Human Rights. See id. at 929.

242. See Lakatos, supra note 199, at 929.
Next, then, it must be determined whether there is a general principle of international law that governs the right to confrontation. In yet another survey, Lakatos discovered that of 180 national constitutions, only thirty-three explicitly granted a right to confrontation, and mostly in generic terms.\textsuperscript{243} A general principle governing the right to confrontation, therefore, could not be said to exist.\textsuperscript{244}

Having exhausted all possible sources from which an answer might be drawn, a resolution to the protection dilemma cannot be positively established. However, it is clear that all the sources examined—the Statute, the Rules, and international standards—do show some sensitivity to claims regarding a defendant's right to confront. This right, it is also agreed, can legitimately be limited in the interests of protecting victims—no absolute confrontation right exists in any forum.\textsuperscript{245} The question becomes, then, what types of restrictions would cause a defendant's right to be unacceptably limited?

In the \textit{Tadic} trial, the first to take place at the ICTY, the Trial Chamber pushed the envelope concerning what limitations are acceptable regarding the reception of anonymous testimony. The Prosecution brought a motion seeking to keep some victims' and witnesses' identities not only from the public and media, but also from the accused and his counsel. It argued that these protective measures were necessary to shield the witnesses and victims from "retraumatization" caused by "confrontation with the accused."\textsuperscript{246}

The defense agreed to keep the identities of witnesses "P," "Q," and "R" from the public and media.\textsuperscript{247} It argued, however, that to keep the identity of any witness from the defendant and his counsel would deny him a fair trial, a right protected by Article 20 of the Statute.\textsuperscript{248} The defense also stated that in order to adequately prepare for the cross-examination of the witnesses and victims in question, it needed, at least, their addresses.\textsuperscript{249} This argument is unsatisfactory given that an address invariably leads to a name. The defense contended, though, that it had "no interest in knowing the present whereabouts of any of the pseudonymed witnesses."\textsuperscript{250} It seems likely that \textit{defense counsel} had no extraneous interest in these matters. However, in an emotionally charged arena where horrifying accusations

\begin{footnotes}
\item 243. See id. at 930.
\item 244. See id. at 931.
\item 245. See id. at 932.
\item 246. \textit{Decision on Protective Measures, supra} note 200, at 4-5.
\item 247. See \textit{SCHARF, supra} note 24, at 133, 139, 156.
\item 248. See \textit{Decision on Protective Measures, supra} note 200, at 5.
\item 249. See id.
\item 250. Id.
\end{footnotes}
were being made about the defendant, retribution by the accused or his political allies was a real concern.251

The Trial Chamber declared that it would only bar anonymous testimony if "the need to assure a fair trial substantively [outweighed] this testimony."252 The Chamber found that its duty to assure a fair trial, which in this case was "substantially obviated by procedural safeguards," was not outweighed by the need to protect "genuinely frightened" witnesses.253 It ruled, therefore, that it would allow the testimony of witnesses "H," "J," and "K," all victims of sexual assault, without their identities being disclosed to Dusko Tadic or his counsel.254 The Chamber later granted this same protection to witness

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251. See id. at 25
252. Id. at 26.
253. Id. Among the "procedural safeguards" referred to, the Chamber also outlined the following guidelines to insure fairness for the defendant: (1) the "[j]udges must be able to observe the demeanour of the witnesses, in order to assess the reliability of the testimony"; (2) the "[j]udges must be aware of the identity of the witnesses, in order to test the reliability of the witness"; (3) "the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable"; and (4) "the identity of the witness must be released when there are no longer reasons to fear for the security of the witness." Id. at 22.
254. See Decision on Protective Measures, supra note 200, at 22. To arrive at its decision, the Chamber relied on a five-prong balancing test. First, it decided, there must be a "real fear for the safety of the witness or her or his family." Id. at 20. To meet this part of the test, the Chamber applied an objective standard to decipher whether a witness's "fear for her safety" was "legitimate and reasonable." Momeni, supra note 202, at 171. Second, "the evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it." Decision on Protective Measures, supra at 21. The Prosecution was able to fulfill this part of the test because many of its witnesses would not testify without a grant of anonymity. Without these witnesses, the Prosecution would have no case because it relied almost exclusively on eyewitness testimony. See Momeni, supra at 165. This portion of the test also raises the question as to how the judges can determine the relevance and quality of the future testimony before hearing it. See id. at 173. The judges must determine the importance of a witness's testimony based on what the prosecution tells them that testimony will entail. Third, the Chamber "must be satisfied that there is no prima facie evidence that the witness is untrustworthy." Decision on Protective Measures, supra at 21. Under this part of the test, the Chamber required that the Prosecution establish that the particular witness in question was veracious. One of the problems with this requirement is that because the Prosecution often lacks the resources to fully investigate a witness' background and determine whether any "ulterior motives" exist, prejudice to the defendant may result if questionable motives are not discovered. See Momeni, supra at 173. Fourth, there must be an "ineffectiveness or non-existence of a witness protection programme." Decision on Protective Measures, supra at 21. This was perhaps the most compelling reason to allow anonymous testimony in the Tadic case because the witness protection program offered by the ICTY was insufficient. Therefore, "[r]eleasing [the witnesses'] identities may [have] [compromised] their testimony before the Tribunal and [deterred] others from doing the same." Momeni, supra at 174. Finally, the Chamber found that "any measures taken should be strictly necessary" so that "[i]f a less restrictive measure can secure the required protection, that measure should be applied." Decision on Protective Measures, supra at 21. This part of the test can be understood to mean that anonymity will only be granted under
“L,” a former guard at the Trnopolje camp. After the Chamber’s ruling, defense attorney Michail Wladimiroff stated that though the ICTY was “not a normal court” the defense would file for a mistrial “if the accepted standards of fairness [were] violated.” Graham Blewitt, the deputy Prosecutor at the ICTY, felt “personally very uncomfortable with the notion of going forward with witnesses whose identity [sic] are not disclosed to the accused.”

Even anonymity proved insufficient security for one particular victim. Tadic was charged with the rape of a female prisoner at the Omarska camp, identified only as victim “F.” As soon as the proceedings began, the rape charges were dropped because victim “F” was too afraid to testify. This seemed a clear indication that the protective measures offered by the ICTY were perceived to be inadequate, at least by some witnesses. Even with the prospect of testifying completely anonymously to the accused and his attorneys, victim “F” felt insecure. Such fears were far from irrational in light of the lack of an ICTY police force or an operational witness protection program to ensure her safety.

Witnesses “P” and “Q” were not victims of Serbian crimes, but desired anonymity from the public for fear of possible retribution when they returned to their homes in Serbia. Witness “P” was the first anonymous witness to testify, and began his testimony on May 30, 1996 in closed session. “P,” a “Serb turncoat,” testified in great detail about the Serbian nationalist movement and the Serbian attack on Prijedor Bosnia, revealing the specifics of Serb military action. “P”

“exceptional circumstances.” The Chamber stated that “[t]he situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance par excellence. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees.”

Therefore, under the Chamber’s reasoning, derogation from a defendant’s right to confront his accusers was appropriate in light of the exceptional circumstances in which the Tadic trial was taking place.

255. See SCHARF, supra note 24, at 108.
256. Id. at 109.
257. Id. at 108.
258. See Tadic Indictment, supra note 67, at 4.1.
259. See SCHARF, supra note 24, at 113.
260. This was also a major setback for international law in general because of the hope that this trial would “[confirm] that rape is an international crime” and that proof of this charge of rape would lead to the establishment of a record that the Bosnian Serbs used rape as a form of genocide it their attempts to destroy the Muslim and Croat populations. Id.
261. See Momeni, supra note 202, at 166 (arguing that in the Tadic case the Tribunal could not protect its witnesses).
also told of Tadic's political role within Kozarac.\(^{264}\) Witness "Q," a Muslim who tried to guard Kozarac institutions against Serbian takeover, testified behind closed doors, on June 12th, that he had witnessed Tadic marking Muslim targets with flares during the Serb attack on Kozarac.\(^{265}\) The importance of granting anonymity to these witnesses is quite clear. It is unlikely "P" or "Q" would have testified at all absent this protection because they would go home as targets for violence. Without witnesses like them, it would have been very difficult for the Prosecution to prove that atrocities in Kozarac were, in fact, Serb-initiated strikes on Muslims.\(^{266}\)

Witness "R," a Muslim Omarska survivor, testified on July 16th in the courtroom, but behind screens so as to be concealed from the gallery.\(^{267}\) He testified that while he was at Omarska, prisoners around him once pointed to a man leaving the white house (known to be the place where dead bodies were stored and where "interrogations" or beatings occurred) and said, "That is Dusko."\(^{268}\) "R" stated that he recognized the man as Tadic immediately because of photographs he had once seen of Tadic in a weekly newspaper, Kozarski Vjesnik, when the defendant was a karate instructor.\(^{269}\) Because "R" testified that Tadic had come from behind the white house, where "R" had been a witness to several deadly beatings, it became apparent that Tadic was not only present at Omarska, but that he also knew about the massive killings taking place there.\(^{270}\) The grant of anonymity from the public, here, is untroubling, given that it comports with the general goal of anonymity in domestic trials and the ICTY's Statute and Rules of Evidence affording some protection to witnesses and victims to guard against retribution. Without such protection, "R" may have been the target of further violence for helping convict a Serb.

The real controversy arose with respect to the testimony of victims "H," "J," "K," and "L." The identities of these victims were, initially, not to be disclosed to the public, as well as to the defendant. Victim


\(^{266}\) "Q"s testimony was not actually revealed until closing arguments. See SCHARF, supra note 24, at 139.

\(^{267}\) In order for the ICTY to have jurisdiction over the conflict in the former Yugoslavia, the Prosecution had to prove the existence of an "international conflict." See SCHARF, supra note 24, at 120. In future cases, the Tribunal is likely to try Serbs for genocide, in which case testimony from Serbs themselves might be helpful.

\(^{268}\) See id. at 156.

\(^{269}\) See id. at 29 <http://www.un.org/icty/transel/960717it.DOC> [hereinafter Testimony of "R"].

\(^{270}\) See id. at 30.
“H” was involved in the so-called “castration incident” in which he and a man, identified only as “G,” were allegedly forced to castrate Fikret Harambasic upon orders by Serbs, including Tadic.\(^{271}\) “H,” a Muslim and former karate student of Tadic, testified that he was ordered to “lick the arse” of Harambasic.\(^{272}\) After he did this, he testified, “G” was ordered to first “suck Harambasic’s penis” and then “bite his testicles” off.\(^{273}\) At this point, it seemed the Prosecution was very close to proving one of the main charges in the indictment—that Tadic had participated in the castration and murder of Harambasic, and was therefore guilty of a “grave breach,” violations of the laws or customs of war, and a crime against humanity.\(^{274}\) In a question that would have settled Tadic’s guilt, the Prosecutor, Michael Keegan, asked “H,” “Was the defendant there during the incident?” To the surprise of many observers in the courtroom, “H” said, “No.”\(^{275}\) This was a devastating blow to the Prosecution’s case and on cross-examination, “H” testified that he had never even seen Tadic at the Omarska camp at all.\(^{276}\) According to Michael Scharf, Michael Keegan described this mishap, later, as stemming from translation problems from Serbo-Croatian to English.\(^{277}\) Keegan’s explanation does not really seem likely, though, and suggests inadequate investigation of “H”’s story. After the fight the defense had put up regarding the anonymous testimony of witnesses, “H”’s testimony did not seem to have hurt the defense at all, and may have even helped it.\(^{278}\)

Witness “L,” who was to be the Prosecution’s “star witness” in attempting to prove the allegations against Tadic in Count One of the indictment, testified anonymously to the defendant and his counsel in order to protect himself and his family from possible reprisals.\(^{279}\) As a former guard at the Trnopolje camp, “L” testified that Tadic “was one

\(^{271}\) See SCHARF, supra note 24, at 160-61.
\(^{272}\) See Testimony of witness “H” <http://www.un.org/icty/transel/960724it.htm> [hereinafter Testimony of “H”].
\(^{273}\) Id.
\(^{274}\) See Tadic Indictment, supra note 67, at 5.20-5.25.
\(^{275}\) See Testimony of “H,” supra note 272.
\(^{276}\) See id.
\(^{277}\) See SCHARF, supra note 24, at 162. One could argue, as Michael Keegan did to me in a personal conversation, that “H” was called only to prove the horrific acts that occurred during the “castration incident” and that Tadic’s connection to those acts were not to be proven until later, through the testimony of Hussein Hodzic. See supra Part II.D.2.
\(^{278}\) In its final judgment, the ICTY found that Tadic was present during the incident involving the castration of Fikret Harambasic, but that he did not actively participate. See Tadic Judgment, supra note 160, at 59-60. This mishap with “H” was later partially rehabilitated through the testimony of Hussein Hodzic, which is addressed in the hearsay section of this Comment. See supra Part II.D.2.
\(^{279}\) See SCHARF, supra note 24, at 171-72.
of the armed [sic] who was a Commander in the camp at Trnopolje." At this point in his testimony, witness "L" looked particularly promising for the prosecution, mostly because he was able to place Tadic at the Trnopolje camp.

During the rest of his testimony, "L"'s story seemed to get better and better for the Prosecution. "L" testified that on numerous occasions, while at Trnopolje, he was told to follow Tadic and three other guards, Milan Cavic, Bosko Dragicic, and Zoran Karajica, into the basement of a cellar after they had taken a young female prisoner from the white house where the prisoners were kept. Once there, each guard would take a turn raping the victim while his companions held her down. "L" testified that on several occasions he was ordered to undress and was then pushed down on top of a girl while Tadic and the others stood by laughing. "L" also claimed that during some of these incidents Tadic threatened the girls, telling them "he would kill [them], that he would slit [their] throat[s] if [anyone at the camp] ever learned . . . what had happened to [them]." "L" also recalled an incident in which Tadic, after raping one girl, directed her and a second girl to "beat each other" so that the other prisoners would not know what had really happened to them. "L" testified that Tadic himself shot two Muslim inmates in the head with a pistol and ordered "L" to kill eight others by firing three bullets into each prisoner.

After recounting many other horrific occurrences explicitly involving Tadic, "L" stated that he, a member of the Bosnian Serb forces since December of 1992, had been shot and captured by the Muslim-led Army of Bosnia-Herzegovina on October 20, 1994. The importance of this particular part of "L"'s testimony was not realized until just before the defense rested its case months later when the Prosecution announced that witness "L" had lied in his testimony that Tadic had committed atrocities at Trnopolje. It was discovered through the inquiries of Tribunal investigator Robert Reid, that upon his own admission, "L," whose actual name was Drago Opacic, has been "or-

281. See id. at 41-42.
282. See id. at 42.
283. Id.
284. Testimony of witness "L" at 6 <http://www.un.org/icty/transe1/960814RD.txt> [hereinafter Testimony of "L" II].
285. See id. at 9.
286. See id. at 15.
287. See SCHARF, supra note 24, at 199.
dered by Bosnian Muslim authorities” to testify as he did, or face execu-
tion.288 The first time Opacic had ever seen Tadic was on a video
shown to him by Muslim officials in Sarajevo, Bosnia.289

One of the defense’s most persuasive arguments against the use of
anonymous testimony was that there was no way for the defense to
investigate a witness’s background or to demonstrate prejudice in such
circumstances.290 The defense was precluded in just this manner from
any attempt to impeach the truthfulness of Drago Opacic. The impli-
cation of the Chamber’s decision to allow completely anonymous tes-
timony here is very clear—but for a stroke of luck, Dusko Tadic’s
defense would have been unfairly prejudiced. Tadic’s attorney
claimed that had Opacic’s lies not been uncovered, “Tadic would
likely have been convicted on the strength of Opacic’s statement.”291

The propriety of the Chamber’s decision to allow witnesses to tes-
tify anonymously must be examined in light of what transpired at the
trial. It is true that the Chamber did not have the benefit of hindsight
in determining how to best protect the witnesses and victims who
could help convict Tadic; however, it is also true that even without this
benefit, the Chamber neglected to consider crucial factors available
during the trial. Upon reading the testimony of Drago Opacic (wit-
ness “L”), particular language patterns arise, which, had they been
carefully scrutinized, may have unveiled his fabrications. Throughout
his testimony, Opacic seemed to have had no trouble answering any of
the questions he was asked about himself or general background in-
formation. When asked these types of queries, he responded pre-
cisely, often repeating the Prosecutor’s language in his answer.292

As soon as the questions turned to the involvement of Tadic,
though, Opacic’s answers became less certain and he began to falter,
frequently asking the Prosecutor to repeat or rephrase his questions.
It is certainly true that Opacic’s problems with the Prosecutor’s ques-
tions could have resulted from difficulties in translation. However,
while some questions seemed linguistically difficult for Opacic to an-

288. See id.
289. See id.
290. See id. at 200.
291. Id.
292. For example, the Prosecutor asked, “Did you join the army?” and Opacic confidently,
without apparent problems understanding, said, “No, I was not in the army.” Testimony of “L”
I, supra note 280, at 34. Similarly, the Prosecutor asked, “Do you know where the supplies of
humanitarian aid were coming from that were being distributed?” Opacic answered, “As far as I
knew, it was brought over from Prijedor, but it was brought in by the United Nations.” Id. at 35.
swer, others, like those regarding Tadic's physical characteristics (which Opacic could have more easily ascertained from the video tape he was shown) appeared simple. In most instances where Opacic stumbled with his answers, it appears from reading the transcript that translation was not his most significant problem. Rather, it seems that Opacic was laboring to create a fiction about Tadic's involvement.

Throughout his testimony, when the Prosecutor asked Opacic who participated in the criminal behavior to which he was referring, Opacic listed the names of those involved, always mentioning Tadic last, almost as an afterthought. For example, when asked, "Did you see who it was that took [the girl] out?" Opacic responded, "I cannot remember, but there were Bosko Dragicevic, Zoran Karajica, Milan Cavic and Dusko Tadic were [sic] there." Opacic continuously responded this way, always adding Tadic at the end. At other times, Opacic seemingly forgot to mention Tadic at all until specifically asked:

QUESTION: When you got to the basement what did you see?
ANSWER: We saw the girl, Zoran Karajica and Cavic.

QUESTION: Did you see Tadic at this stage?
ANSWER: Tadic was there too.

Given that Opacic was a witness for the prosecution of Tadic, why, when asked such a direct question, would he respond confidently as to who was present, but not mention Tadic until after being specifically asked whether he was there?

Opacic attributed the most horrific behavior to Tadic, and seemingly could have convicted Tadic by himself. It should be clear that when a defendant like Tadic is denied any opportunity to discover

293. During one exchange, the Prosecutor inquired about the time Opacic was introduced to Tadic while Tadic distributed humanitarian aid cards to Serb refugees, "For how long were you at the premises on this day, do you remember, approximately?" Opacic answered, "Sorry, you were in the house—we were receiving the humanitarian aid." Id. at 36.

294. The Prosecutor asked, "Can you describe what you remember of his physical appearance on that day?" Opacic, without apparent hesitation, answered, "He was clean shaven, clean, big. He had civilian clothes. He had black hair, curly with sideburns... He was not armed." Id.

295. Testimony of "L" II, supra note 284, at 3.

296. For example, when asked "Who led these men out of the camp?" Opacic answered, "They were Dragicevic, Zoran Karajica and Cavic, and Dusko Tadic arrived." Id. at 10 (emphasis added). Also, when asked "Did you see who it was that was leading them out of the building?" Opacic responded, "There was Zoran Karajica, Cavic, Bosko Dragicevic and then Dusko Tadic arrived." Id. at 11 (emphasis added). Finally, when asked "What did they do with these old men when they led them out of the co-operative?" Opacic said, "They were taken out of the co-operative building and taken towards the railway. The police went along with them and Dusko Tadic also." Id. at 12 (emphasis added).

297. Id. at 43.
possible ulterior motivations because of anonymity granted to a witness, like Opacic, that defendant is likely to be denied a fair trial. Because there was other strong evidence to convict Tadic, the impact of allowing anonymous witnesses was not as detrimental as it might have been. The decision to allow this type of testimony, though, could at any time produce profoundly unfair results. In future Tribunal cases, reliance on anonymous testimony, where other evidence is not as strong, may result in a serious miscarriage of justice.

It is true that the Trial Chamber, in applying its guidelines for ensuring a fair trial for the defendant, is empowered to give whatever weight it deems appropriate to anonymous testimony. A foreseeable problem arises, though, when the testimony in question involves multiple translations, as it did in Tadic. The Chamber could believe incredible answers to be merely an issue of translation, rather than an indication of deceit. Likewise, if ulterior motives are present, but never revealed due to inadequate inquiries by the Prosecution, or the inability of the defense to conduct any discovery into the witness’s background, there is the potential for a wrongful conviction.

In the Akayesu trial, the Trial Chamber permitted the vast majority of witnesses to testify behind screens so that their identities would be kept from the public. Both witnesses for the Prosecution and the defense (many of whom were refugees living in other countries) testified this way. However, no witnesses testified anonymously to the defendant or his counsel. This clearly suggests something about the decision made by the Trial Chamber in the Tadic case. It may indicate that the ICTR disagreed with the decision of the ICTY and decided not to follow such drastic steps. The more likely explanation, though, seems to be that the ICTR had much better protective measures in 1997 than did the ICTY in 1995. When witnesses came to the ICTR to testify, accommodations were provided so they could stay in “safe houses where medical and psychiatric assistance was available.” This is decidedly different from the protections offered by the ICTY. There, each witness was on his or her own in terms of physical safety and the psychological stress of testifying. It is unclear whether the ICTR’s additional protective measures were implemented in response

298. See supra note 253 (discussing the procedural safeguards to ensure a fair trial).
299. See Akayesu Judgement, supra note 77, at 12. The transcripts for Akayesu’s trial were not yet available at the time this Comment was written; therefore, the analysis of the relevant issues is based on the judgement and opinion issued by the ICTR.
301. See Akayesu Judgement, supra note 77, at 12.
302. Id. at 31.
to the inadequate procedures at the Hague, as a means of avoiding a controversial decision similar to the one made by the ICTY, or simply without any specific concerns about the ICTY at all.

It is likely that with the passage of time both Tribunals will realize the increasing importance of protective measures for victims and witnesses. This is especially true the more frequently officials, like Akayesu, are tried. Because higher officials presumably have more power, fear of retribution may be exacerbated so that greater protection is necessary. The justifications for effectuating a better witness protection program surely apply as forcefully to the ICTY as to the ICTR.

Proposed Solutions for the Anonymous Witness “Problem”

Because of the problems associated with the use of anonymous testimony, other measures must be adopted to ensure the protection of victims and witnesses who testify before international tribunals. There seemed to be no acceptable solutions to the dilemma faced by the Trial Chamber of the ICTY. Even those proposed in what follows present seemingly insurmountable barriers to a comfortable resolution of the tension between the protection of witnesses and the defendant’s right to a fair trial. Possible solutions must be considered by separating witnesses into two groups: (1) those who are afraid to testify because they do not want to re-live the trauma they have experienced; and (2) those who are afraid to testify because of possible retribution. First, for those who fear being “revictimized” on the stand, several safeguards can be implemented. For example, the Trial Chamber could be empowered to collect lists of proffered questions before the examination of the potential witness. In this way, the judges could antecedently control the inquiries made by the defense attorney and “strive to minimize the psychological trauma” that accompanies testifying. This solution, however, curtails the discretion of the defense attorney, derogating from standard adversarial procedures. There is something disquieting about a forum that requires

303. See Lakatos, supra note 199, at 936-37; see also Alford v. United States, 282 U.S. 687, 694 (1931) (holding that trial court has a duty to protect witnesses from questions which “go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate”).

304. Lakatos, supra note 199, at 919.

305. Any derogation from such adversarial procedures is not troublesome in many respects because the ICTY and ICTR were formed on the basis of both adversarial and inquisitorial systems of justice.
the approval of each prospective question by a judge before the content of a witness's testimony is clear.\textsuperscript{306}

Second, the ICTY's VWU could be vitalized so that those testifying actually feel secure, as in the case of the ICTR. To do this, steps must be taken to guarantee that witness participation is consented to, rather than coerced.\textsuperscript{307} Witnesses should be permitted to have loved ones present at the Tribunal and suspend their testimony if it becomes too difficult to continue.\textsuperscript{308} This approach seems viable, but if a witness begins to testify and then decides it is too painful, prejudicial material may be exposed that will not be subject to cross-examination, and valuable time may be wasted in trials that already take too long. Yet the effort may be worthwhile because under the protection of these safeguards, more victims may be willing to bring their perpetrators to justice. Moreover, their experiences may encourage others to come forward to tell their stories as well.

For those witnesses afraid of possible retribution, one solution is to offer them asylum and a new identity in another country.\textsuperscript{309} A witness, by accepting this offer, could testify openly, yet remain certain that she would be protected from retribution. The problem with this offer, though, is that many of the witnesses have families subject to retribution as well. The proffer of asylum and a new identity does nothing for those who are left behind. Similarly, a witness may not be willing to leave his family for a new country even if it does mean bringing a war criminal to justice.

Another solution, applicable to both types of witnesses, and one that might be the most practical, is to allow the Trial Chamber to hear anonymous testimony and then “strike [it] from the record and disregard” it if the defendant's right to a fair trial is in jeopardy.\textsuperscript{310} This approach might have been utilized in the Tadic trial had Opacic's background never been revealed since the Chamber had reserved its right to give only appropriate weight to anonymous testimony.\textsuperscript{311} However, there is a real problem in requiring judges to forget what they hear after they have heard it. To disregard extensive testimony

\textsuperscript{306} This solution may be more acceptable if the question list is not shown to the witness beforehand. In this way, the witness would not be allowed to prepare for cross-examination and have time to fabricate her or his answers.
\textsuperscript{307} See Lakatos, supra note 199, at 937.
\textsuperscript{308} See id. at 937-39.
\textsuperscript{309} See Leigh, supra note 199, at 237.
\textsuperscript{310} Id.
\textsuperscript{311} See Decision on Protective Measures, supra note 200, at 22.
about the commission of horrific acts would be extremely difficult even for experienced judges.\textsuperscript{312}

A final possible resolution of the tension between the defendant’s rights and the protection of witnesses is to appoint a “devil’s advocate.” This specially appointed advocate would stand in the place of the defense attorney to conduct interviews of witnesses and victims who fear revealing their identities. He or she might also make inquiries into the reliability of the potential witness’s testimony. Because a Tribunal investigator, Robert Reid, helped to unveil the fabrications of Drago Opacic,\textsuperscript{313} there is a strong indication that the United Nations-established Tribunal may be in a uniquely effective position to undertake such an approach. Therefore, the ICTY could appoint a neutral attorney who would explore the backgrounds and current whereabouts of victims and witnesses independently of the Prosecution’s investigators. In this way, the defense could be assured that the testimony given anonymously was less likely to have been coerced by the Prosecutors or outsiders.

There is no easy solution to the dilemma of simultaneously protecting vulnerable victims and witnesses and ensuring a fair trial for the defendant. There are, however, many steps that must be taken to improve the current situation at both the ICTY and ICTR. Improvement of witness protection is obviously one of them, yet the others suggested above can help to improve the entire process from the beginning. Allowing witnesses to testify without having their identities revealed to the public is certainly acceptable given the unsettled political situations in both the former Yugoslavia and Rwanda. Testimony which is anonymous to the defendant and his counsel, however, presents a variety of problems, addressed in the Tadic analysis, that just do not seem soluble.

\subsection*{D. Admittance of Hearsay Evidence}

The admission of hearsay evidence, also, can severely limit a defendant’s right to confront. Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted.\textsuperscript{314} In adversarial systems, hearsay evidence is generally deemed unreliable,

\begin{footnotesize}
\textsuperscript{312} See Stephan Landsman \& Richard F. Rakos, Research Essay: A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 \textit{Behav. Sci. \& L.} 113, 120-26 (1994) [hereinafter Landsman \& Rakos, Biasing Information on Judges and Jurors] (conducting an experiment which shows the difficulty of both judges and juries in disregarding testimony after it is given).

\textsuperscript{313} See \textit{Scharf}, supra note 24, at 199.

\textsuperscript{314} \textit{Fed. R. Evid.} 801.
\end{footnotesize}
and thus inadmissible. This view is exemplified by the United States' Federal Rules of Evidence prohibition of hearsay evidence unless it falls within one of the enumerated exceptions.\textsuperscript{315} Hearsay evidence is deemed unreliable because it is usually unsworn, vulnerable to error in its "oral transmission," and impervious to cross-examination.\textsuperscript{316} Also, the "hearsay declarant's demeanor while speaking" cannot be observed by the factfinder, thus inhibiting scrutiny of credibility.\textsuperscript{317} The idea behind the hearsay rule is to "protect lay jurors from potentially misleading information."\textsuperscript{318} It is thought that if exposed to hearsay evidence, the naive jury will give undue weight to what an experienced judge would know to be dubious testimony. Inquisitorial legal systems have neither rules against the admission of hearsay evidence nor juries.\textsuperscript{319} The argument supporting this approach is that because a judge has years of experience, she will, unlike a juror, be able to identify and disregard such untrustworthy testimony.\textsuperscript{320}

When the legal principles of both the adversarial and inquisitorial models were considered in the promulgation of the Tribunals' Rules of Evidence, the inquisitorial paradigm clearly won out with regard to hearsay evidence.\textsuperscript{321} The Tribunals' rules do not address hearsay evidence, probably because the Tribunals are comprised of professional judges rather than lay jurors. The only Tribunal rules remotely relevant to hearsay are 89(C) and 89(D). Rule 89(C) states: "A Chamber may admit any relevant evidence which it deems to have probative

\textsuperscript{315} The hearsay rule reads: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme court pursuant to statutory authority or by Act of Congress." \textsc{Fed. R. Evid.} 802. Rules 803 and 804 govern the exceptions to the hearsay rule. See \textsc{Fed. R. Evid.} 803, 804.

\textsuperscript{316} See Ronald L. Carlson et al., \textit{Evidence: Teaching materials for an age of science and statutes} 437 (4th ed. 1997).

\textsuperscript{317} Id.


\textsuperscript{319} Countries that have inquisitorial legal systems include France, Spain, Russia, and many others.

\textsuperscript{320} See Landsman & Rakos, \textit{Biasing Information on Judges and Jurors}, supra note 312, at 113.

\textsuperscript{321} This is so because there is no hearsay rule in the ICTY or ICTR's Rules of Evidence. As previously explained, two legal systems, civil and common law, were combined and compromised to create the rules that govern the ICTY and ICTR. See supra note 158 and accompanying text. The civil system is also referred to as the inquisitorial model. In this type of legal system, the evidence is first presented to a magistrate judge, who compiles that evidence in a dossier. See Taylor, supra note 1, at 63. This compilation, if sufficient for prosecution, is then given to the trial court and the defendant. See id. During the actual trial, the judges ask questions of the witnesses. In fact, cross-examination often does not occur. See id. Also, the defendant is not permitted to testify under oath, "but may make an unsworn statement to the court." Id.
value.” Rule 89(D) reads: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” Because the decisionmakers at the ICTY and ICTR are experienced judges, the admission of hearsay evidence should not, theoretically, present any problems. However, problems did arise because much of the evidence presented in both the Tadic and Akayesu trials was eyewitness testimony interspersed with hearsay evidence—all of which was invariably admitted.

Two types of hearsay evidence will be examined below: (1) the testimony offered by an “expert” witness in the Tadic trial based primarily on compiled interviews and newspaper articles, and an expert in the Akayesu trial; and (2) the testimony of lay witnesses identifying the accused after his having been pointed out by an absent declarant. Both types of hearsay evidence present reliability problems because they are based on out-of-court statements not amenable to cross-examination.

1. Expert Testimony

In the Tadic and Akayesu trials, expert witnesses were called to demonstrate the existence of ethnic cleansing in the former Yugoslavia, and genocide in Rwanda, respectively. The problem with this type of evidence is that it is “‘based on second, third, and even fourth-hand testimony’” of victims and witnesses. The use of experts as hearsay conduits renders usually inadmissible evidence admissible and legitimates apparently unreliable out-of-court statements. Because the Tribunals do not bar hearsay evidence, it can be argued that expert testimony based on victim interviews is perfectly acceptable. The judges, in theory, will be able to discern when the out-of-court statements are reliable and when they are not.

The problem, though, is that the various arguments for the admission of hearsay tend to break down when concerned with expert witnesses. For example, when a lay witness takes the stand and testifies

322. ICTY Rules, supra note 213, at Rule 89(C).
323. Id. Rules 89(C) and 89(D) are similar to Rule 403 of the Federal Rules of Evidence which states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.
324. Specific instances in which hearsay evidence was admitted will be discussed in detail below. See infra notes 325-414 and accompanying text.
325. SCHARF, supra note 24, at 128. In Tadic, Hanne Sophie Greve testified to the ethnic cleansing in the former Yugoslavia. See id.
as to what he or she heard an individual say, the judges have at least some chance of determining the trustworthiness of his or her testimony based on the context in which the conversation took place. However, the likelihood of a judge determining the veracity of hearsay statements brought in through a witness clothed in the mantle of expertise, who testifies as to what hundreds of victims told her, is miniscule. There seems no practicable way for judges to ascertain the reliability of the victims’ statements. Generally, it is argued that it is the expert’s skills which render the hearsay he or she relies on admissible. Even this argument falters, though, if the “expert” does not have the necessary skills, as was the case in Tadic. Also, because the expert is deemed to be a professional, the judges may, even if subconsciously, assign undue weight to this less than dependable portion of the expert’s opinion.

Another problem with the expert testimony in Tadic was a linguistic one. The expert in Tadic did not personally conduct the interviews of the witnesses and victims about which she testified. Rather, other officials conducted the interviews and then reported their findings to her. The language of the people being interviewed was Serbo-Croatian while the interviewers spoke different languages depending on what country they were from. This meant that the victims and witnesses spoke in one language, which had to be translated to the language of the interviewer (often officials from countries in which victims took refuge), then translated again to the language of the testifying expert, and finally translated once more to the languages used at the Tribunals. Multiple translation greatly increases the possibility of mistaken interpretation—this in a case where the Prosecution could not even ascertain (due to supposed translation difficulties) whether one of its own witnesses had actually seen the defendant at the scene of criminal activity.

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327. See id.
328. See SCHARF, supra note 24, at 128.
329. See DENTICH, supra note 63, at 28.
330. See id. The majority of “Yugoslavs” speak either “Serbo-Croatian” or “Croato-Serbian,” whose differences resemble “the differences between British and American versions of the English language.” Id. Most Rwandans speak Kinyarwanda. See Akayesu Judgement, supra note 77, at 31.
331. The official languages of the ICTY were English and French. See ICTY Statute, supra note 139, at Art. 33. At the ICTR, many of the witnesses spoke in Kinyarwanda, which was translated first into French and then into English. See Akayesu Judgement, supra note 77, at 31. When differences arose between the French and English versions of the translated testimony, the Chamber relied on the French. See id.
332. See supra Part II.C.
ously compounds the problem. Use of expert testimony of this sort invites mistakes in oral transmission.

In the Tadic trial, Hanne Sophie Greve testified as an expert. She was a member of the Commission of Experts developed to investigate international human rights abuses in the former Yugoslavia. Her investigation focused primarily on the Prijedor region (in which Tadic had lived) and encompassed information based on interviews from 400 witnesses. The purpose of Greve's testimony was to establish the background, nature, and extent of the conflict in Prijedor through the use of these interviews. The interviews, however, were conducted by others—lawyers, government officials, and police officers—"at [Greve's] behest." The defense objected to the Prosecution's calling Greve as an expert witness because, it claimed, she would merely offer an opinion based on hearsay evidence. The objection Tadic's attorney, Steven Kay, raised regarding Greve's testimony was a poignant one: "[Greve's testimony] strays beyond the traditional band of expertise that would be required into an area of opinion and comment that is seeking to provide conclusions to the Tribunal based on research otherwise provided to it."

Kay's point was clear—expertise is not needed to summarize and interpret 400 interviews, especially in light of the fact that some of those witnesses would be testifying themselves. By way of her testimony, Kay argued, Greve would be "usurping the role of [the] Court" by making her own findings of fact—the Court's duty. He stressed that an expert witness is supposed to "assist the Court in relation to matters that the Court may not otherwise understand and need guidance upon."

Kay, in asserting this point, was seemingly referring to the common adversarial tenet that "expert" witnesses may only testify if they provide some "scientific, technical, or other specialized knowledge" to the court.  

333. See Testimony of Hanne Sophie Greve at 27 <http://www.un.org/icty/transe1/960520ED.txt> [hereinafter Greve Testimony I]. At the time of the Tadic trial, Greve was a judge in the Court of Appeals in Norway. See id. at 28.
334. See id.
335. See id.
336. See id.
337. Id. at 29. One of the reasons Greve enlisted others to conduct the interviews of the victims and witnesses was that the Commission of Experts had very little resources. See id. at 42. In order to interview witnesses, the Commission needed to find survivors of the conflict located in other countries—Sweden, Norway, the Netherlands, Malaysia, Germany, and Croatia. See id. Because the interviewers could not be paid, the Commission relied on the governments of these various countries to assist in finding people to conduct the interviews. See id.
338. Id. at 31-32.
340. See id. at 29.
341. See id. Kay, in asserting this point, was seemingly referring to the common adversarial tenet that "expert" witnesses may only testify if they provide some "scientific, technical, or other specialized knowledge" to the court. Fed. R. Evid. 702.
rule governing expert testimony existed in the ICTY Rules of Evidence. Nonetheless, Rule 89(A)'s mandate that "a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial," Kay argued, supported his objection to Greve's testimony.342

Prosecutor Alan Tieger disputed Kay's arguments stating that Greve would not testify as to specific instances of conduct but only to the general conflict in Prijedor.343 Tieger also argued that Greve’s testimony would simply be "her conclusions based on the intersection of all information available," not just a summary of the interviews.344 Tieger insisted that the Chamber could give as much or as little weight to any witness' testimony as it deemed appropriate; therefore, if Greve's testimony did turn out to be premised solely on the witness's interviews, the Chamber could devalue or disregard it.345 This argument was a good one because Tieger essentially told the Chamber that it had nothing to lose by listening to Greve’s testimony.

The Chamber ruled that Greve’s testimony was relevant and probative and could be offered by the Prosecution under Rule 89.346 The Chamber explained that its decision did not "in any way bind [it] from excluding the testimony, should [it] make such a determination after hearing the testimony and hearing the context in which it is given."347 The presiding judge, Gabrielle Kirk McDonald, explicitly defended the decision by claiming that as experienced judges, and not lay jurors, the panel would be able to listen to the proffered testimony and "give it the appropriate weight."348 The real question that this approach poses, though, is whether the judges, after listening to endless layers of hearsay can truly "unring" the bell.349

Greve’s testimony should disturb even those with no training regarding the laws of evidence. She predicated her opinion almost entirely on witness interviews and newspaper articles.350 First, under the guise of "expert," Greve testified repeatedly to what other people said and the way other people (the victims) felt.351 At the beginning of

343. See id. at 33.
344. Id.
345. See id. at 35.
346. See id. at 36.
347. Id.
349. See supra note 312.
350. See, e.g., Greve Testimony I, supra note 333.
351. See id. at 45 (testifying that after the takeover of the Prijedor region by the Serbs, non-Serbs "started to feel that they were being isolated"); id. at 54 (testifying that based on her "impression" from victim interviews, "people were really surprised" about the
Greve’s testimony, Kay asked the Chamber to require Greve to explain the basis upon which she would testify—suspecting that her testimony was based solely on witness interviews. Greve had previously testified that she had never been to Prijedor, so Kay’s apprehension about her testifying as to what happened on specific dates was more than reasonable. Tieger agreed that Greve would tell the Chamber how she came upon her information, but stressed the difficulty she would have in identifying “each and every source which converges on particular pieces of information.” Tieger suggested that there was no possible way for Greve to identify where she got all her information.

Kay’s request that a basis be given was certainly an appropriate one for a defense attorney to make. Experts usually must have a basis for their opinions. In the United States, an expert may predicate his or her opinion on first-hand knowledge or various other identifiable sources, even if those sources are not by themselves admissible. Here, as it turned out, Greve’s testimony was not, for the most part, based on either first-hand knowledge or identifiable sources. It is true that the ICTY does not utilize the Federal Rules of Evidence; however, it is not acceptable in any forum for a witness to simply summarize what masses of unidentified others have said. This unquestionably violates a defendant’s right to a fair trial by denying the defense an opportunity to effectively cross-examine. Greve’s testimony should have been excluded under Rule 89(A) because its probative value was substantially outweighed by the need to ensure the defendant’s right to a fair trial. Greve’s inability to reveal the exact sources upon which she relied made it abundantly clear that she was simply summarizing the information the victim interviews had unveiled.

unfolding situation in Prijedor); id. at 58 (testifying that the Muslims in Prijedor were really “frightened” by the Serb use of propaganda). See Testimony of Greve at 16 <http://www.un.org/icty/transel/960521it.htm> [hereinafter Greve Testimony II] (testifying that “people were confused” about the actions of the political parties within Bosnia-Herzegovina and “did not really feel that they knew enough about the situation”); id. at 51 (claiming that “people in Kozarac felt as if they were bombarded from every side at the same time”).

352. See Greve Testimony I, supra note 333, at 42. Kay asked that the Chamber be told “how she is able to tell us what happened in Prijedor” given that she had never been there. Id.

353. See id. at 43-44.

354. Id. at 44.

355. See FED. R. EVID. 703.

356. See id.

357. In the United States, under the Federal Rules of Evidence, an expert can base her opinion on those things “perceived by or made known to the expert at or before the hearing” if it is information “reasonably relied upon by experts” in that field. Id.

358. See ICTY Rules, supra note 213, at Rule 89(D).
Other than the witness interviews, Greve relied heavily on newspaper articles throughout her testimony.\textsuperscript{359} This seems particularly dubious especially given the fact that the press in Bosnia during this time was not free. It was controlled by Serb forces, who routinely propagandaed the circumstances of the conflict. It seems almost laughable to rely on propaganda, which is distorted and deceptive by definition,\textsuperscript{360} as a means of determining the true nature of the conflict in Prijedor.

Greve based much of her testimony on the Prijedor newspaper, \textit{Kozarski Vjesnik}.\textsuperscript{361} She used the reports in this newspaper in three ways to prove the nature of the conflict in Prijedor. First, Greve relied on newspaper reports to fashion her central thesis—that the initial infiltration by Serbs into Prijedor determined everything that happened thereafter.\textsuperscript{362} To explain the beginning of the Serbian takeover, Greve’s “best source” was an interview given in the newspaper by a Serbian police officer a \textit{full year} after the takeover.\textsuperscript{363} A number of serious problems arise when considering this portion of Greve’s opinion. As was mentioned above, it is very likely that the newspaper article was partially or entirely fabricated, and thus fundamentally unreliable. Moreover, the person interviewed was a Serb police officer, likely to have presented a severely skewed version of the particular facts concerning the Prijedor takeover. The interview occurred a \textit{year} after the incident in question, rendering the officer’s story especially susceptible to misrecollection.\textsuperscript{364} Finally, when Greve testified regarding this interview, she did not have the article in front of her. Therefore, she too, could have incorrectly relayed its contents to the Chamber. The very premise upon which much of Greve’s testimony rested was infected by layers of untested and potentially unreliable hearsay.

\begin{itemize}
\item \textsuperscript{359} Greve Testimony I, \textit{supra} note 333, at 45, 52, 53; Greve Testimony II, \textit{supra} note 351, at 9, 28, 29, 40, 46, 59, 64, 65, 71.
\item \textsuperscript{360} See \textsc{Webster’s New World Dictionary} 1078 (3d ed. 1991). “[I]deas, doctrines, or allegations so spread: now often used disparagingly to connote deception or distortion.” \textit{Id.}
\item \textsuperscript{361} See Greve Testimony I, \textit{supra} note 333, at 45.
\item \textsuperscript{362} See \textit{id.} at 50-54. The “takeover” of Prijedor by Serbian forces occurred on April 30, 1992. See Tadic Judgment, \textit{supra} note 160, at 24.
\item \textsuperscript{363} Greve Testimony I, \textit{supra} note 333, at 45.
\item \textsuperscript{364} See State v. Saporen, 285 N.W. 898, 900-01 (Minn. 1939) (stating, “[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth”).
\end{itemize}
Greve next utilized newspaper articles to explain the mechanics of Serbian seizure of Muslim-dominated regions. For example, when discussing the importance of the "corridor" which linked Serbia proper to Prijedor and other regions, Greve relied on a speech printed in the newspaper to characterize the importance of this corridor to "Serbian officials." To formulate her opinion, Greve not only speculated about Serbian officials' views, but did so after these views were filtered by Kozarski Vjesnik. It seems that it would have been much simpler just to offer the speech into evidence. Greve also relied on articles to describe the Serbian ploy of creating illegal police stations in Prijedor to install Serb forces before the takeover.

Prosecutor Alan Tieger asked Greve questions and in reply, Greve did nothing more than read the contents of a newspaper article containing the answer:

Q: "[L]et me direct your attention first to the first line [of the article]. Does the interview with Simo Drljaca indicate who selected him to set up these illegal police stations?

A: Yes, it is indicated that it was done by the Serb Democratic Party, the SDS."

Finally, Greve used newspaper articles to prove the extinction and genocide of Muslims and Croats by Serbs in Prijedor. For example, in order to prove when the slaughter of Muslims and Croats began, Greve read from a translated newspaper article from an unknown publisher. It is hard to believe that this type of evidence could be admitted as more probative than prejudicial. Cross-examination of the declarant was unavailable and the declarant was not even known, so any attempt to assess his credibility would be absolutely futile. Similarly, in one of the more egregious examples of inappropriately

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365. See id. at 28-29 (reading an article characterizing military commander, Simo Radanovic); id. at 59 (testifying to what the Chairman of the Serbian Municipal Assembly of Prijedor, Dr. Milomir Stakic, saw at the concentration camps in Prijedor by summarizing the contents of a newspaper article); id. at 64-65 (reading an article describing Milomir Stakic's feelings about reports of killings in Omarska).

366. See id. at 50-54. This "corridor" was a special passageway which enabled Serbs to travel easily from Serbia proper to areas in Bosnia-Herzegovina without having to use the highways or railroads. See id.

367. See id. at 53.

368. See id. Greve described the article's report of the officials' characterization of the corridor, "'The word 'corridor' is too weak to describe that bond [between Serbia and Bosnia-Herzegovina]. The neck is not a corridor between the head and the body; it is all one being, the being of the Serbian nation.'" Id.


370. Id. at 9.

371. See id. at 40, 65-80.

372. See id. at 40.
admitted hearsay evidence, Greve read from an interview of Simo Drlijaca, head of Serb police forces in Prijedor. Greve, under Alan Tieger's direction, stated that one portion of the interview explained Serb officials' anger about not being "permitted to impose just punishment on those Muslims and Croats who had been proven to have participated in genocide."

In this instance, both Greve and Tieger interpreted the out-of-court words of Drlijaca and drew conclusions as to what his words meant—presumably the duty of the Chamber, not the witness or the Prosecutor.

It is questionable whether Greve's testimony was needed at all. The Chamber could have skipped the middleman (woman) and gained the same insight simply by reading the *Kozarski Vjesnik* and other articles itself. Why were four days wasted so that Greve could summarize the interviews of witnesses (many of whom would testify themselves) and read newspaper articles to the Chamber? It is difficult to determine how much weight the Trial Chamber gave Greve's testimony. Because she provided only background information, determining her effect on Tadic's fate is impossible. The most likely result of Greve's testimony was to color the general impression the judges came to hold about the conflict in Prijedor. Whether these general impressions impacted the result in Tadic's trial is debatable, yet the admission of "expert" opinion similar to Greve's is likely to become more troublesome in future ICTY or ICTR cases. If the instigators or planners of the Serbian attack on Prijedor are tried, instead of a man like Tadic (considered to be low on the totem pole), reliance on hearsay evidence through an "expert" could produce unjust results. Evidence of this type supposedly establishes that one group of people (in this case the Serbs) committed serious crimes against another group (the Muslims or Croats). By proving that the accused was part of the former group, then, the Prosecution could use the expert hearsay evidence to convict him.

The use of expert testimony as a conduit for inadmissible hearsay evidence did not play as large a role in *Akayesu* as it did in *Tadic*. Alison DesForges testified as an expert witness in the *Akayesu* trial.

She is an American human rights activist who had studied Rwanda for over thirty years while working for Human Rights Watch/Africa.

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373. See id. at 70-71.
374. *Id.* at 71. Greve explained indications in the interview that during the "informative talks" (or interviews) with Muslims and Croats, the Serbs "extracted" from them confessions to their participation in genocide. *Id.*
Her credentials—those of a bonafide expert—are starkly different from those of Hanne Sophie Greve. Greve, a Norwegian judge, was specially appointed to study the atrocities in Prijedor. DesForges, on the other hand, had studied Rwanda as a human rights activist. Abstractly, it could be argued that Greve would make a better impartial expert because of her juridical background and experience. In fact, though, DesForges provided the Tribunal with much more assistance than did Greve because of her extensive knowledge of Rwanda. Greve studied Prijedor for only a few months, contrasted to DesForges' thirty years. Also, DesForges knew the tenor of Rwanda even before the conflict at issue in the ICTR had developed, while Greve studied Prijedor only after the conflict there had fully erupted.

The most substantial difference between the testimony of Hanne Sophie Greve and Alison DesForges, however, was the type of information upon which each based her respective opinion. As discussed above, Greve's opinion was largely based on dubious and legally unreliable sources, such as second-hand witness interviews and newspaper articles. DesForges, by contrast, was not a member of the Commission of Experts created to investigate the crimes in Rwanda, so her opinion was based primarily on her own independent research. She was called as an expert regarding the history of and conflict in Rwanda. She was not asked to speculate, as was Greve, about the feelings and impressions of victims and witnesses, but rather to explain the impetus and results of the conflict. The Prosecution in Akayesu used DesForges in a much more limited and appropriate manner. Instead of permitting an "expert" to summarize the way witnesses felt, the Prosecutor at the ICTR allowed the victims to tell their own stories. In this way, the ICTR Chamber could assess both DesForges' credibility as an expert and each victim's veracity as a witness. This is a much better approach than requiring the Chamber to sift through layers of hearsay evidence to winnow the credible from the incredible. Also, the ICTR's approach was fairer because it allowed the defendant an opportunity to cross-examine the witnesses against him.

377. The Commission of Experts for Rwanda was made up of three men who spent only a week in Rwanda, conducting no investigations. See Bassiouni, From Versailles to Rwanda, supra note 128, at 46.
379. See id.
2. Lay Testimony

Aside from the hearsay problems associated with expert testimony, lay testimony presented hearsay questions of its own during both the Tadic and Akayesu trials. In Tadic’s trial, a great deal of hearsay evidence was admitted through the testimony of lay witnesses. It is likely that most of the hearsay evidence was innocuous; however, some objectionable hearsay was admitted that explicitly placed the defendant at the scene of criminal activity. For example, Azra Blazevic, a veterinarian from Kozarac, told of her experiences during the Serb takeover of that town. Blazevic operated an animal hospital there, but when the Serbs attacked, she was taken, along with many other civilians, to the Trnopolje concentration camp. While Serbs escorted her and others to the buses which would travel to Trnopolje, Blazevic testified that she heard Tadic call out the name of a man, Nihad Bahonijic, a Muslim ambulance driver. Blazevic testified that Bahonijic was left in Kozarac with Tadic and never seen again, implying that Tadic had killed him.

The problem with Blazevic’s testimony was her identification of Tadic during this incident. She claimed that while she was standing on the side of a road surrounded by a group of soldiers, somebody whispered, “There is Dule.” It was not until this was said that Blazevic looked up and saw a man crossing the street carrying a weapon. She saw his face for only a few seconds, she admitted, yet seemed positive that it was Tadic. This type of testimony is suspicious because the witness did not recognize the defendant until the out-of-court declarant pointed him out. Because Tadic was some distance away, a question arises as to whether the original declarant actually knew this to be Tadic, or if the man crossing the street only looked like him. Unfortunately for the defense, the declarant was not present at the trial to be cross-examined as to his identification. It is conceivable that the man crossing the street looked very similar to Tadic and when the declarant identified him, Blazevic accepted the remark. Of course, it very well might have been the defendant, yet this type of

381. See id. at 12-13.
382. See id. at 6.
383. See id. at 11.
384. Id. at 7. “Dule” is a nickname for “Dusko.” Tadic is often referred to as Dule throughout witness testimony.
385. See id.
386. See Blazevic Testimony, supra note 380, at 7.
evidence should not be admitted because Tadic was not given the opportunity to test the veracity of the identification.

On cross-examination, Tadic's attorney, Michail Wladimiroff, questioned the accuracy of Blazevic's recollection of Tadic crossing the street. Blazevic admitted she could not describe Tadic's face at the time he was purportedly crossing the street, and in fact, was no longer sure that Tadic had been in Kozarac just before the attack as she claimed on direct examination. Had Blazevic's testimony been limited so as to eliminate the hearsay statement, Wladimiroff's cross-examination would have been entirely effective in discrediting Blazevic's identification of Tadic. However, as things stood, the hearsay identification was still before the court as evidence of Tadic's presence and this identification would not be confronted and discredited. The admission of hearsay evidence, here, raised serious questions regarding Tadic's ability to confront his accusers. Without the declarant present, there was no way the defense could inquire about who the declarant referred to when he said, "There is Dule"—a serious matter because "Dule" is a very common diminutive in the region.

Another example of the admission of damaging hearsay evidence occurred in the testimony of Hussein Hodzic, a former mining technician in Kozarac who was forced into the Omarska concentration camp. Hodzic, along with many others, shared a room with Emir Karabasic, the man killed in the castration incident. Hodzic testified that Karabasic was frequently called out of the room only to return with "very marked signs of beatings." Hodzic explained how Karabasic felt about Tadic—"he was very frightened" and "full of fear." Hodzic continued by telling the Chamber that on several occasions, Karabasic said, "If Dule comes, then I am gone, I am finished." Defense attorney Wladimiroff did not take issue with Hodzic's speculation about how Karabasic felt, but quickly objected.

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387. See id. at 63-66.
388. See id. at 64.
389. On cross-examination, Wladimiroff also presented the possibility that when the declarant said, "There is Dule," he was referring to another Dule, not Tadic. Id. at 63. He pointed out that Blazevic herself knew "[a] few" people with this name, leaving open the chance that the "Dule" referred to was someone with the same name, but not Tadic. Id.
391. See id. at 22.
392. Id. Hodzic explained, "You could clearly see the marks from the chain which were on his chest, from some iron bars, because there was a straight line. About 90 percent of his body was black . . . ." Id.
393. Id.
394. Id. at 24.
to Hodzic’s retelling of Karabasic’s statements about Tadic. In response, Prosecutor Tieger argued that Hodzic’s testimony involved prejudicial hearsay evidence which would prevent the defendant from receiving a fair trial (the test under Rule 89(C)). In response, Prosecutor Tieger argued that even under adversarial hearsay rules Hodzic’s testimony as to what Karabasic said would fall under the “state of mind exception.”

This argument may have been effective in the United States where hearsay evidence offered to prove the state of mind of the declarant has been admitted. One court held out-of-court declarations admissible if the statement tended “to prove the declarant’s intention at the time it was made,” was stated “under circumstances which naturally give verity to the utterance,” and was “relevant to an issue in the case.” Tieger could have attempted to fit Hodzic’s testimony into the test outlined above, yet there are serious questions about whether “[a] declaration as to what one person intended to do” can “safely be accepted as evidence of what another probably did.” Thus, it would have been understandable to admit Karabasic’s statements to show what he intended to do. However, to admit evidence regarding Karabasic’s state of mind to prove what Tadic did is inappropriate. Tieger proffered Karabasic’s statements as evidence that he was scared of Tadic; however, what these statements actually showed, was Tadic’s probable involvement in the castration of Karabasic—an untenable use of hearsay evidence. The admission of this hearsay evidence also refuted the testimony of witness “H” that Tadic was not involved in the castration incident, seemingly giving preference to hearsay evidence over “H”’s eyewitness testimony. In response to Wladimiroff’s objections, the presiding judge, McDonald, again defended the Chamber’s ability to subsequently exclude Karabasic’s statements if it found them to be more prejudicial than probative. Because of the almost inconceivable nature of the crime at issue, the

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395. See id. at 22.
396. See Hodzic Testimony, supra note 390, at 22-23.
397. Id. at 23.
398. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892) (holding that “[t]he existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be”).
400. Id. at 633 (Traynor, J., dissenting).
401. See supra Part II.C (analyzing “H”’s testimony).
402. See Hodzic Testimony, supra note 390, at 23.
castration of Karabasic, the Chamber's disregard of Karabasic's statements seems unlikely.\textsuperscript{403}

A great deal of witness testimony in \textit{Tadic} contained hearsay evidence similar to that described above and placed Tadic at the scene of criminal activity.\textsuperscript{404} Throughout the trial, the Chamber claimed to be able to disregard any unreliable testimony if it chose to do so. The implications of the admission of this hearsay evidence, here, are not provable, yet there is some literature which suggests judges are not able to disregard potentially unreliable evidence as readily as they claim.\textsuperscript{405} Therefore, it is possible that the admission of hearsay evidence was more prejudicial to the accused's right to a fair trial than it was probative.

Hearsay evidence admitted through lay testimony presented special problems in Akayesu's trial. This was because of the difficulty of translating the Rwandan language, Kinyarwanda, to French or English. The problem was so serious that the Prosecution called a linguistics expert, Dr. Mathias Ruzindana, to explain the problematic translation of Kinyarwanda.\textsuperscript{406} Dr. Ruzindana warned the Chamber that "while a word for seeing and hearing was, like in other languages, not the same, Rwandans tended to describe events without distinguishing between the two."\textsuperscript{407} Hence, this makes the law's concerns with hearsay identification exceedingly difficult to operationalize. Similarly, in Kinyarwanda, one word can have different meanings depending on the time and context of its use.\textsuperscript{408} For example, the word "Inyenzi" means "cockroach" in everyday use, yet during the Rwandan conflict, this word was used to describe the Tutsi and Hutu refugees who participated in the clandestine incursions into Rwanda.\textsuperscript{409} When a witness said the word "Inyenzi," therefore, the translator and the Chamber had to be fully aware of its connotation when used. This problem is enhanced when a witness testifies to a statement made by an out-of-court declarant because the possibility for misinterpretation increases.

\textsuperscript{403} See generally Landsman & Rakos, \textit{Biasing Information on Judges and Jurors}, supra note 312.
\textsuperscript{405} See supra note 312.
\textsuperscript{406} See Akayesu Judgement, supra note 77, at 31.
\textsuperscript{407} Muna et al., supra note 300, at 1480.
\textsuperscript{408} See Akayesu Judgement, supra note 77, at 31.
\textsuperscript{409} See id. at 32.
Another problem is that many different Kinyarwanda words translate into a single word in French or English.410 For example, the words “gusambanya, kurungora, kuryamana, and gufata ku ngufu” were all translated to mean “rape” in English and French.411 In Kinyarwanda, however, each word means something slightly different.412 “Gusambanya” actually means “to bring (a person) to commit adultery or fornication,” whereas “kurungora” means “to have sexual intercourse with a woman.”413 Similarly, “kuryamana” means “to share a bed or to have sexual intercourse,” while “gufata ku ngufu” means “to take (anything) by force” and “to rape.”414 Ignorance of these slight distinctions could result in a mistaken rape conviction. Again, hearsay evidence compounds this already complicated linguistic issue.

Because many of the witnesses in Akayesu’s trial were native Rwandans, it was critical that the Chamber understand this distinction between languages. However, even with Dr. Ruzindana’s caveat, the Chamber had to confront several problems to assess the credibility of each witness’s testimony. It had to first decide whether the witness had actually seen the incident he testified to, or whether he had only heard about it. If the witness had only heard about the incident and was reporting an out-of-court statement, the Chamber had to somehow determine whether the original declarant’s words were accurately interpreted by the witness and whether that interpretation was translated correctly. This duty was made extraordinarily difficult by the distinctions Dr. Ruzindana outlined. Translation problems underscored the likelihood of mistaken oral transmission and thus unreliable testimony.

III. IMPLICATIONS FOR THE INTERNATIONAL CRIMINAL COURT

Various attempts have been made since 1946 to establish a permanent forum in which international criminals can be tried,415 but it was not until 1996 that a draft statute for the ICC was accepted by the General Assembly of the United Nations.416 The final Statute for the

410. See id. at 31.
411. Id. at 32.
412. See id.
413. Id.
414. Akayesu Judgement, supra note 77, at 32.
415. See generally Bassiouni, From Versailles to Rwanda, supra note 128 (discussing the legal and political struggles since the 1919 Treaty of Versailles to the ICTR within the context of a trend toward creating an international criminal court); M. Cherif Bassiouni, Historical Survey: 1919-1998, in Statute of the ICC, supra note 142, at 1 [hereinafter Bassiouni, Historical Survey] (presenting an historical overview of international law since 1919 in the context of creating an international criminal court).
416. See Bassiouni, Historical Survey, supra note 415, at 18.
ICC was adopted on July 17, 1998 at the Rome Diplomatic Conference after six sessions of debate and discussion of the Preparatory Committee. The Statute will be open for signature until December 31, 2000. At the time this Comment was written, there had been ninety-four signatories and seven ratifications. It is unlikely that the ICC will begin operation for at least a few years. This is because it does not, according to its own terms, enter into force until “the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification . . . with the Secretary-General of the United Nations.” This means before the ICC will become effective, fifty-three more ratifications are necessary.

In drafting the Statute, the drafting committee and the Rapporteur of the International Law Commission drew on the experiences of the ICTY and ICTR, as is clear by the similarity of crimes covered and language used. The ICC Statute is similar to the Tribunals’ statutes in the crimes it governs and the culpability it requires. The ICC, like the ICTY and ICTR, has the power to bring persons to justice for “the most serious crimes of concern to the international community as a whole;” however, the ICC provides a permanent forum for the prosecution of such crimes. With the establishment of the ICC, there need not be ad hoc tribunals created to cover tragic events like those that have occurred in the former Yugoslavia and Rwanda. One substantial difference, though, between the ICC’s jurisdiction and that of the ICTY and ICTR, is that the ICC’s jurisdiction will be complemen-

417. See id. at 20. The Preparatory Committee was set up by the General Assembly in 1996 to debate and discuss the draft statute presented by the International Law Commission and create a draft of its own. See id. The sessions of the Preparatory Committee met on March 25th through April 12th 1996, August 12th through August 30th 1996, February 11th through 21st 1997, August 4th through 15th 1997, December 1st through 12th 1997, and March 16th through April 3rd 1998. See id.

418. See id. at 33. The Statute, like any other treaty, is first signed by governments, but does not become law until after the treaty has been ratified under domestic law. For a discussion on the operation of treaties, see Steiner & Alston, supra note 133, at 30-40.


420. Statute of the ICC, supra note 142, at art. 126.

421. For example, compare arts. 5, 6, 7 of the ICC Statute, with arts. 2, 3, 4, 5 of the ICTY Statute, supra note 139.

422. The ICC has jurisdiction over genocide, aggression, war crimes, and crimes against humanity. See Statute of the ICC, supra note 142, at 40-44 (arts. 5-8).

423. Id. at 40 (art. 5).
tary to national criminal courts. Therefore, unlike the ICTY and ICTR, the ICC will not be able to require that certain war criminals be tried before it. Rather, it will have to follow the very particular procedures laid out in Article 13 of the Statute to garner jurisdiction from domestic courts.

The ICC’s Rules of Procedure and Evidence, at the time of this Comment, have been and are currently being promulgated by a Preparatory Commission established by the General Assembly. The rules are yet to be adopted, but are largely modeled after the Rules utilized by the ICTY and ICTR. This makes perfect sense because the Tribunal rules have been applied to cases similar to the ones that are expected to be tried at the ICC. In creating the rules for the ICC, it was critical for the drafters to consider the evidentiary problems that arose in the Tadic and Akayesu trials in order to avoid repeating them. Though there are thousands of potential defendants waiting to be tried in both the ICTY and ICTR, “the Security Council’s ability to keep these ad hoc tribunals in operation may prove difficult” because they could, in theory, continue forever. It is likely, then, that the remaining tribunal cases could be taken over by the ICC after it has been fully activated. A question arises about how to accomplish the goal of preventing evidentiary problems discussed above from recurring—should the Tribunals’ Rules be changed or should they simply be applied more carefully?

A. Anonymous Testimony

Because the Tribunals’ Rules do not explicitly allow for the testimony of anonymous witnesses, it seems clear that the ICTY’s error in allowing such testimony (if it is to be considered an error) can be remedied through more cautious application of the rules. It is conceivable, however, that the ICC could accept the testimony of anonymous witnesses if the reasoning of the Tadic trial is followed because the

424. See id. at 46 (art. 13).
425. See id.
427. At the Intersessional Meeting held in Siracusa, Sicily in June-July of 1999, attended by the author, Michael Keegan, a deputy prosecutor at the ICTY, played a major role in drafting what has become the eventual rules of evidence of procedure. He shared with the other diplomats and drafters at the conference the problems and successes of the rules of evidence and procedure in place at the ICTY. Without his contributions, the rules would not have looked the way they do.
428. Bassiouni, From Versailles to Rwanda, supra note 128, at 57.
429. See id.
ICC Statute contains the same language that was relied upon by the Trial Chamber in *Tadic*. The Statute, in Article 67, paragraph 1, section (e) provides that the defendant is entitled “[t]o examine, or have examined, the witnesses against him or her . . . .” 430 If this section of Article 67 is read in conjunction with paragraph 5 of Article 68, entitled “Protection of the victims and witnesses and their participation in the proceedings,” it seems that anonymous testimony may be admitted. Paragraph 5 of Article 68 states:

Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. 431

This Article leaves open the possibility that the testimony of a victim or witness may be presented in summary form by the Prosecutor, and thus not subject to cross-examination by the defense. The tension between the protection of victims and witnesses and the defendant’s right to a fair trial again arises seemingly without an acceptable solution. Articles 67 and 68 seem to be in direct conflict with each other—one protecting the defendant’s right to confront, the other one allowing for no cross-examination. Though the Statute can no longer be changed, except through amendment, 432 the Rules of Evidence and Procedure could provide specific protection against anonymous witness testimony. Perhaps the ICC’s rules should include a provision which explicitly confronts the issues the ICTY grappled with in *Tadic*—“to ensure a fair trial, no witness’ identity shall remain anonymous to the defendant or his counsel,” for example. 433

In order to alleviate the need for anonymous witnesses, the ICC should provide adequate protective measures to witnesses and victims so that they feel secure testifying. These measures should include physical safety while at the ICC, psychological assistance to cope with the trauma of testifying, and the ability to have family members present during difficult testimony. Also, protection should be made available after the witness has testified to prevent possible retribution against the witness or her family. There are significant protections for


432. Amendment procedures appear in articles 121 and 122. See *id*. at 97-98.

433. As of the writing of this Comment, this type of language was not included in the Rules of the ICC.
victims and witnesses laid out in Article 68 of the Statute, but whether these safeguards will work can only be anticipated. 434

B. Hearsay Evidence

To solve the hearsay problems discussed above, the drafters will have to think more seriously about a manageable compromise between the adversarial and inquisitorial approaches. With no hearsay rule at all, as was demonstrated in Tadic, a great deal of potentially unreliable and incriminating evidence gains admission. 435 Though the ICC Rules of Procedure and Evidence do not include a hearsay rule, the closest they come to protecting against the potential hearsay problems is to allow the “Chamber of the Court to determine [the] relevance and admissibility” of the evidence presented. 436 Of course, this same protection was available, really to no avail, in the Tadic trial. 437 Therefore, it will be necessary for the ICC’s future Chambers to be more careful and scrutinizing in their application of this rule in order to prevent the admission of layered hearsay evidence.

Surely, expert testimony should be reigned in to avoid the admission of massive amounts of unreliable and untested hearsay evidence. If all the witnesses and victims in a particular case cannot be called to testify because there are too many or can no longer be located, the investigator who actually conducted the interviews should testify. This, at least, eliminates one layer of hearsay evidence. Also, because of potential translation problems, the judiciary should be warned, as it was in Akayesu, about possible errors and should require the translators to take an oath or affirmation to accurately translate. 438

Finally, some variant on the hearsay rules in the Federal Rules of Evidence should be employed by the judges to at least limit the situations in which hearsay is admitted. For example, hearsay evidence could be admissible where a Commission of Experts has been appointed to conduct interviews of victims and witnesses. 439 The rule would allow a qualified expert who had actually conducted interviews

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434. See Statute of the ICC, supra note 142, at art. 68.

435. As of the writing of this Comment, there was no hearsay rule in the ICC’s Rules. It is very unlikely, if not impossible, that a hearsay rule will be included in the Rules, primarily because most of the States debating on this topic believe that the experienced judges who will govern the trials at the ICC will be able to decipher between reliable and unreliable testimony.


437. See supra Part II.D.

438. This is required under the Federal Rule of Evidence 604, which states: “An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.” FED. R. EVID. 604.

439. This type of limitation on the admittance of hearsay is similar to the exceptions allowed for in Federal Rule of Evidence 802 which reads: “Hearsay is not admissible except as provided
to testify about the general feelings of the victims and witnesses, but not about specific criminal acts of the accused. The changes suggested are not significant ones, yet are nonetheless critical to avoid serious evidentiary problems and ensure the effectiveness of the ICC.

IV. CONCLUSION

Protecting victims and witnesses and preventing unreliable evidence from prejudicing a defendant are not new ideas and are not limited to the international arena. Rather, these evidentiary problems arise in domestic trials as well. The difficulty in international criminal trials, though, has been exacerbated by the inability to adequately marry two legal systems—the adversarial and inquisitorial. With the establishment of the ICC, we must hope that the Rules of Evidence operating at the ICTY and ICTR can be refined so as to avoid many of the problems that arose in the Tadic and Akayesu trials.

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