Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61†

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I. INTRODUCTION

Representing the first international attempt to prosecute violations of humanitarian law since the end of World War II, the United Nations International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (Tribunal or ICTY) promises to be an extraordinary countermeasure to the collapse in public order that occurred in this jurisdiction during the early 1990s. More generally, the Tribunal stands ready to contribute to the evolution of laws and customs pertaining to the conduct of armed hostilities. For this reason, it has received close scrutiny from observers tracking legal developments at the international level. Meanwhile, others have evaluated the role that the Tribunal will play in the conflict resolution process that different facets of the international community have been relentlessly pursuing in the region. In contrast, few have examined such subjects as the internal procedures that regulate the operation of the Tribunal and their consistency with international human rights norms and the imperatives of justice in polities that, like those of the former Yugoslavia, are undergoing rapid transitions from one order to another.

This Article attempts to correct this imbalance. More specifically, it focuses on a mechanism, set out in Rule 61 of the Tribunal's Rules of Procedure and Evidence, that provides for the reconfirmation of indictments of
individuals accused of committing criminal offenses that the ICTY is competent to prosecute. Our investigation centers on two aspects of Rule 61: its politics and the propriety of its implementation. After explaining how the procedural rule fits into the Tribunal's founding and operation, Part II of this Article attempts to clarify its political dimensions. Toward this end, we examine the decisionmaking process that produced Rule 61 as well as the way in which the proceedings authorized by this provision are to unfold. In particular, we discuss the various purposes of the Rule 61 mechanism and consider how subjects are selected for Rule 61 treatment.

In Part III, in discussing Rule 61's propriety, we assess the extent to which Rule 61 functions as a trial in absentia in disguise. A survey of international and municipal regimes pertaining to the right to be present during a criminal proceeding informs our assessment of whether, assuming that this proceeding amounts to a trial in absentia, it is permissible for the Tribunal to employ Rule 61. Following on the heels of this discussion is an estimate of the extent to which this procedural device is compatible with the larger operational objectives of the Tribunal and the requirements of justice in politically transitional contexts.

The beginnings of a global assessment of Rule 61 crystallize in the course of this Article's inquiry into the issues that we address. Our analysis suggests that the Tribunal's employment of Rule 61 flowed largely from idealistic, yet flawed, assumptions about the mechanics of the criminal justice process at the international level. In short, Tribunal decisionmakers may have believed, somewhat naively, that their use of Rule 61 would shame national and supranational political structures into cooperation with the ICTY,


especially if those subjected to this instrument were, in the public’s mind, associated with the breathtaking breakdown of the former Yugoslavia. The failure of this collaboration to become entrenched could account for the relative brevity of the period during which Rule 61 proceedings loomed large in the Tribunal’s operation. The failure could also account for the adoption of more pragmatic approaches to the apprehension of those suspected of committing criminal wrongdoing.

Beyond addressing such timely empirical queries as why the Tribunal integrated the Rule 61 proceeding into its operation, this Article argues that this highly inventive instrument, even if it is characterized as the functional equivalent of a trial in absentia, is consistent with international law. Rule 61 is also a viable, although potentially problematic, response to the inevitable problems of attempting to administer justice in politically fluid environments.

II. THE POLITICS OF RULE 61

A. The Evolution of Rule 61

The novelty of Rule 61 may be a result of the rushed nature of the decisionmaking process that spawned the Tribunal and its procedural regime. The diverse characteristics of the actors, including governments and individual jurists, who helped establish the ICTY and drafted its Rules of Procedure and Evidence could also explain its innovative nature. Fewer than twenty-one months elapsed between the Security Council’s decision to create the Tribunal and the confirmation of the first indictment. The intervening period was one of intense activity. The fact that a statute and set of procedural

5. Section II.C, which reviews the purposes of Rule 61, discusses this claim in more detail.
7. See infra Section III.C.
9. This interval saw the adoption of the Tribunal’s Statute. See Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Annex, U.N. Doc. S/25704 (1993), 32 I.L.M. 1163, 1192 (1993) [hereinafter ICTY Statute]. For a discussion of the process through which the Statute was created, see 1 MORRIS & SCHARF, supra note 3, at 32–35. Other obviously time-consuming activities included appointing 11 judges, selecting a chief prosecutor, hiring a staff to support prosecution activities and to provide administrative services to the Tribunal, choosing a building to house the Tribunal, and drafting and adopting a procedural regime to govern the Tribunal’s operation.
rules were hammered out with such dispatch is particularly surprising given the long debates that have accompanied other efforts to construct international mechanisms to prosecute violations of legal norms.

The process of creating a new international legal arrangement began on February 22, 1993, when the Security Council adopted Resolution 808. This directive amounted to a formal declaration of intent to establish a tribunal for adjudicating breaches of international humanitarian law arising out of the fighting in the former Yugoslavia. This unprecedented measure, in turn, came as an immediate response to the first interim report of the U.N. Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia (Commission of Experts), a body created by the Security Council to evaluate the increasing evidence of serious criminal wrongdoing resulting from the violence in the region. U.N. decisionmakers decided neither the exact structure and form the tribunal ultimately would assume nor the legal basis upon which it would be founded; Resolution 808 merely requested that the Secretary General study the situation and submit a report on all relevant matters. Furthermore, it encouraged him to take into account any recommendations submitted by states.10

By May, this exercise was complete. In response to the Security Council’s request for specific proposals, the Secretary General submitted with his report a draft statute for the Tribunal, a document largely based on the proposals submitted by numerous governments, multilateral entities, and nongovernmental organizations (NGOs).11 Given that the deterrence of further atrocities and the elimination of an ongoing threat to international peace and security were to be the Tribunal’s principal aims,12 the Secretary General proposed that the Security Council use its Chapter VII powers under the U.N. Charter to create an ad hoc court (alternative treaty-based approaches,
it was thought, would have been too arduous and time-consuming). The Security Council adopted this draft statute without revision on May 25, 1993, and appended it to Resolution 827, the instrument that formally created the ICTY.  

Besides delineating the Tribunal’s jurisdiction and guaranteeing minimum rights to the accused, the Statute vested power in the Tribunal’s eleven judges to adopt the procedural and evidentiary rules necessary to conduct trials. Once elected and sworn in, these individuals made adoption of standards an immediate priority. With a collection of proposals submitted by various states and organizations as well as drafts penned by the judges themselves, negotiations concerning the proposed rules dominated the Tribunal’s first and second plenary sessions in late 1993 and early 1994. Although the Statute provided a general framework for the rule-drafting work, the challenges of the process were unique. Following extensive debate at the second plenary session, the judges ultimately adopted a set of procedural and evidentiary standards on February 11, 1994.  

13. See ICTY Statute, supra note 9, ¶ 22. The Commission on Security and Cooperation in Europe (CSCE) had proposed that the Tribunal be created through the conclusion of a treaty and that the court be empowered to adjudicate violations of Yugoslav national law interpreted in the light of Yugoslavia’s international commitments. See CSCE PROPOSAL, supra note 11, at 240, 251.  


15. See ICTY Statute, supra note 9, art. 15.  


17. The Nuremberg and Tokyo war crimes trials provided the ICTY judges with only sparse precedent to guide them in drafting the rules. In both previous instances, many of the procedural matters usually determined by a prewritten set of rules were decided in case-by-case judicial rulings. The procedural guidelines that regulated the operation of the Nuremberg Tribunal were set out in 11 rules; at Tokyo, there were only nine. The judges of the ICTY, however, adopted 125 rules. See First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 49th Sess., Agenda Item 132, ¶ 54, U.N. Doc. S/1994/1007 (1994) [hereinafter First Annual Report]. In their discussion of the difficulties encountered in the rule-drafting process, Morris and Scharf note the “striking difference in the attention devoted to the substantive and the procedural aspects of international criminal law since Nuremberg,” a discrepancy that “is understandable given the failed efforts to establish an international criminal court which would require consideration of the procedural and evidentiary rules of law governing its proceedings.” 1 MORRIS & SCHARF, supra note 3, at 175.  

18. See First Annual Report, supra note 17, ¶ 55.  

19. See Current ICTY Rules, supra note 3, at 1. Judging from the proposals for the Statute and Rules officially submitted by states, NGOs, and multilateral organizations, the idea of a public reconfirmation of indictments as a response to state noncooperation and nonappearance of the accused seems to have first been hatched outside the Tribunal’s chambers. Submissions by both the Organization of the Islamic Conference and Amnesty International called for public reconfirmation proceedings to be included in the Tribunal’s procedures months before the judges debated the rules. Amnesty International’s proposal, which bears a striking resemblance to the rule ultimately adopted, recommended:  

If the accused has been properly notified of the date and place of the trial and he or she willfully refuses to appear, the Tribunal could hold a preliminary hearing. By establishing the facts of where, how and when a particular incident occurred, this hearing could begin to reveal the truth, for the benefit of victims and the community. . . . The determination of guilt or innocence of an individual, however, would be left to a subsequent trial in the presence of the accused.  

AI PROPOSAL, supra note 11, at 426.
B. **Rule 61 in Its Current Form**

In its current form, Rule 61 provides:

**Procedure in Case of Failure to Execute a Warrant**

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures he has taken. When the Judge is satisfied that:

(i) the Prosecutor has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and

(ii) the Prosecutor has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (A) above.

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as he thinks fit.

A quintessential example of what Antonio Cassese, the Tribunal's first President and a prominent scholar of international law, has described as "purpose-made rules," Rule 61 called for an innovative procedural solution:

If... the accused does not present himself or is not surrendered to the Tribunal, the indictment may then be submitted to one of the trial chambers for reconfirmation. At that time the indictment and all supporting evidence will be submitted in open session. If the Trial Chamber is satisfied that a *prima facie* case has been established, it shall issue an international arrest warrant to be transmitted to all States through the International Criminal Police Organization (INTERPOL). Furthermore, if the Trial Chamber is satisfied that the failure to execute the warrant was the result of failure by a State to cooperate with the Tribunal, the President shall notify the Security Council accordingly.

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22. *Id.* ¶ 93.
With the rule-drafting process completed, the Tribunal was functionally prepared to commence operation. The rules essentially were a work in progress, however: Not only were they assembled hastily, but they contained liberal amendment provisions. The judges, the Prosecutor, and the Registrar could suggest alterations. As a result, through July 1995, forty-one of the 125 original rules adopted in February 1994 were amended at least once, and one completely new rule was added. To date, Rule 61 has been altered on at least five occasions.

The modifications made to Rule 61 mean that the proceedings it authorizes now begin with the confirming judge inviting the Prosecutor to report on the measures taken to execute an arrest warrant in a given case. If the Prosecutor satisfies the judge that a credible effort to effect service has occurred, the indictment, along with all previously tendered evidence, is submitted to the judge’s trial chamber. At the discretion of the Prosecutor, witnesses may be called and examined in an open courtroom proceeding. If, upon completion of this process, a majority of the chamber finds that “that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment,” the Prosecutor reads out the relevant parts of the reconfirmed indictment.

The reconfirmation of an indictment gives Tribunal judges several additional options to facilitate the arrest of individuals wanted by the ICTY. First, they gain the authority to issue international arrest warrants with respect to the accused. Whereas the original warrant is operative only in the

23. President Cassese has proffered four reasons for the rapidity with which the rules were adopted: Drafting the rules quickly increased the likelihood that the Tribunal’s work might have a deterrent effect; neither the work of the court nor that of the Prosecutor could commence until the rules were complete; early adoption would give states additional time to enact domestic legislation governing cooperation with the Tribunal; and the rapid publication of rules would allow interested parties to recommend amendments. See id. ¶ 56.

24. Rule 6 reads:
(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than seven Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges.
(B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the Judges.
(C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

Current ICTY Rules, supra note 3, Rule 6. The provision allowing for amendment based on the agreement of seven Judges is particularly interesting given that only those standards upon which the Judges reached broad consensus were adopted in the original set of rules. See First Annual Report, supra note 17, ¶ 53.


26. Notwithstanding the fact that Rule 61 requires that the Prosecutor prove that all reasonable steps have been taken to effect personal service, transmission of arrest warrants to states falls within the purview of the Registry—the administrative arm of the Tribunal—as set out in Rule 55(B). This task is also ultimately implemented by the Registry. See id. Rule 55(B).

27. The Tribunal is staffed by 11 judges. Five comprise the Appeals Chamber; there are also two trial chambers, each with three judges. For information on the selection of judges, see Judges in Elec

28. See Current ICTY Rules, supra note 3, Rule 61(C).

29. See id.
jurisdiction where the confirmee is thought to reside, authorities can execute reconfirmation warrants anywhere. Moreover, if the Tribunal President believes that the failure to effect personal service stems from the relevant authorities’ unwillingness to cooperate with the Tribunal, he or she may, after consulting with the presiding judges, notify the Security Council of this lack of assistance. Under the U.N. Charter, this entity would be empowered not only to order the arrest of an individual suspected of criminal wrongdoing but also to employ any means necessary to ensure his or her conveyance into the Tribunal’s custody. Finally, only in the wake of a Rule 61 proceeding may the ICTY preside over the seizure of assets thought to belong to the accused.

C. Possible Rationales for Rule 61

Rule 61 was designed to enable the Tribunal to accomplish a variety of goals, including pressuring influential actors in the Yugoslav drama to comply with its dictates. Several indicators point to this political aspect of the Rule.

1. Rule 61 and the Subversion of Political Obstacles Facing the Tribunal

The Tribunal’s decision to create the Rule 61 proceeding can be seen as a way to avoid being thwarted by uncooperative political actors. These entities include the disputants in the former Yugoslavia themselves, countries

30. See id. Rule 61(e). The evidentiary standards required for reconfirmation of an indictment under Rule 61 are identical to those of the initial confirmation process. According to Rule 47(A), once the Prosecutor finds that there is “sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge.” Current ICTY Rules, supra note 3, Rule 47(A). The Statute, however, requires in article 18(4) that the Prosecutor determine that a prima facie case exists before submitting an indictment. Morris and Scharf report that because the definition of “prima facie” varies from one legal system to another, the judges avoided having to confront this ambiguity head-on by establishing a set standard for reconfirmation in the rules and omitting the phrase “prima facie” altogether. See 1 MORRIS & SCHARF, supra note 3, at 202. For another view on the evidentiary rules utilized by the Tribunal, see Rod Dixon, Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals, 7 TRANSNAT’L. & CONTEMP. PROBS. 81 (1997).

31. This Section’s theoretical underpinnings are rooted in the legal realist claim that both substantive and procedural law (assuming that there is a meaningful distinction between these two realms) are driven by their underlying political, social, and economic context.

32. In his second annual report, former President Cassese noted that “[t]he degree of cooperation with the Tribunal exhibited by the different States and authorities varies considerably, from excellent (Sarajevo and Zagreb) to poor (Belgrade, Knin, and Pale).” Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 50th Sess., Agenda Item 49, ¶ 50, U.N. Doc. S/1995/728 (1995) [hereinafter Second Annual Report]. Only in February and March of 1996 did Serbia begin to cooperate with the Tribunal. See Bosnia Killings Inquiry Advances, BOSTON GLOBE, Mar. 15, 1996, at 2 (reporting that Serbia agreed to hand over two key witnesses of Srebrenica massacre). At the same time, this collaboration proved to be fleeting. In late April, Cassese called for sanctions against Serbia after it stopped cooperating with the Tribunal. Some prosecution officials have predicted publicly that the Serb posture towards the ICTY may change as Serbia realizes that cooperation is
around the world that might attempt to harbor individuals suspected of committing criminal wrongdoing in this region since 1991, and jurisdictions that, for various reasons, have displayed a lack of enthusiasm for the Tribunal venture.33 Without its own policing organ, the ICTY ran the risk of existing on the border of irrelevance. What was then left of Yugoslavia (Serbia and Montenegro) openly challenged the Tribunal’s legitimacy in May 1993.34 Moreover, as the judges began to draft the rules, reports increased that amnesties might be included in the bundle of inducements to settle their differences being dangled in front of the warring factions.35 Besides transforming the Tribunal into a more multidimensional entity in terms of the activities it carried out,36 Rule 61 hearings ensured that the failure on the part of authorities in various national and non-state entity jurisdictions to comply with its dictates did not render it impotent. In fact, individuals attached to the Tribunal have continually invoked this justification for the Rule 61 procedure.37

...
2. Reconfirmation as a Prod to the Security Council

Rule 61 proceedings may function as a vehicle by which the Tribunal can pressure the Security Council to use its authority, including its enforcement powers pursuant to Chapter VII of the U.N. Charter, to compel those the ICTY has accused to appear before it.\(^38\) Justice Richard Goldstone’s assertion that “[t]he success of these Rule 61 proceedings will depend upon the actions of Member States and of the Security Council” lends support to this idea.\(^39\) The scenario set out in Rule 61(E) actually marks the second point during the prosecution process at which the judges are authorized to notify the Security Council of a given jurisdiction’s lack of cooperation with the Tribunal. The first opportunity arises upon the failure to execute the initial indictment. Rule 59 provides:

(A) Where the State to which a warrant of arrest has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefor.

(B) If, within a reasonable time after the warrant of arrest has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest and the Tribunal, through the President, may notify the Security Council accordingly.\(^40\)

Although little might come about as a result of the Tribunal’s notification of the Security Council that its initial arrest warrant had gone unexecuted, a
Rule 61 proceeding might propel the Security Council to act. Such hearings, after all, might include emotionally charged testimony by witnesses and victims and receive extensive media play.

The Security Council, upon establishing the ICTY, may not have envisioned being called by it to take specific actions vis-à-vis the situation in the former Yugoslavia. Indeed, neither Security Council Resolution 827 nor the Tribunal's Statute specifically empowers the ICTY President to notify the Security Council of a given state's failure to cooperate. The language of Resolution 827 mandating state cooperation with the Tribunal, if read rather expansively, might be construed to confer upon ICTY personnel an implied license to inform the Security Council that states had failed to comply with its orders. However, the Tribunal's lack of leverage over this body has been painfully apparent to key ICTY decisionmakers. Justice Goldstone, for example, has observed:

As one would expect, the Rules of the Tribunal do not attempt to prescribe appropriate action by the Security Council in the event of a notification to it by the President under Rule 61. The [U.N.] Charter gives a wide discretion to the Security Council in such an event and obviously the imposition of sanctions or at least the threat of sanctions is the kind of action that readily comes to mind. Nor is the Security Council under an explicit legal obligation to take any particular measure to ensure the execution of the Tribunal's international arrest warrants. Moreover, now that the United Nations has subcontracted day-to-day operational control of the international community's military activities in Bosnia-Herzegovina to the North Atlantic Treaty Organization

41. Only article 34 of the Statute, which mandates that the Tribunal submit a yearly report to the Security Council on its activities, imposes any sort of reporting or notification obligation on the Tribunal. See ICTY Statute, supra note 9, art. 34.

42. See Resolution 827, supra note 14, at 2. The Security Council's general exhortation regarding the importance of state cooperation with the ICTY, which has formed part of various resolutions, including 1031, 1034, and 1037, can be read as the Security Council's response to the communications from the Tribunal. See S.C. Res. 1037, U.N. SCOR, 51st Sess., 3619th mtg. ¶ 20, U.N. Doc. S/RES/1037 (1996) (reaffirming that "all States shall cooperate fully" with the ICTY); S.C. Res. 1034, U.N. SCOR, 50th Sess., 3612th mtg. ¶ 12, U.N. Doc. S/RES/1034 (1995) (same); S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. ¶ 4, U.N. Doc. S/RES/1031 (1995) (same). From a diplomatic standpoint, it makes sense to keep dialogue between the Security Council and the Tribunal to a minimum. After all, a noncompliant state might occupy one of the rotating seats on the Security Council. In an even less desirable scenario, the object of the Tribunal's ire might be one of the five permanent members of this body. In this case, such moves by the Tribunal would be likely to produce much ill will. In 1996, however, President Cassese became more vociferous in his calls for the international community, acting through the Security Council, to take a harder line with the parties in the Balkans that had proven uncooperative with the Tribunal. See UN Should Punish Belgrade for Refusing to Deliver Karadzic, AGENCIE FRANCE PRESAE, July 12, 1996, available in 1996 WL 3886752 (describing Cassese's calls to reimpose limited economic sanctions).

43. Nikolic Opening Statement, supra note 37, ¶ 7.

44. The importance of maintaining clear lines of communication between the Security Council and entities in the U.N. system that are attempting to resolve disputes through judicial means has been hammered home by the struggle between the International Court of Justice (ICJ) and the Security Council over managing the international community's response to the destruction of Pan Am 103 over Lockerbie, Scotland in 1988. See W. Michael Reisman, The Constitutional Crisis in the United Nations, 83 AM. J. INT'L. L. 87, 89 (1993) (including detailed analysis of this episode as well as sophisticated policy prescription for avoiding future problems).
(NATO)," it is not clear that the Security Council possesses the authority to compel this military alliance's implementation force (IFOR) or stabilization force (SFOR) to take any specific actions. Although article 53 of the U.N. Charter does empower the Security Council to "utilize . . . regional arrangements or agencies for enforcement actions," NATO has refused to be classified as such, even though it has become heavily involved in the international community's response to the Bosnia conflict.

During its existence, IFOR did provide some support to the Tribunal by protecting its investigators and conducting suspected war criminals to the Tribunal's seat at The Hague. However, the commanders of this force, like their United Nations

45. See S.C. Res. 1031, supra note 42.
46. For the 12-month period following the signing of the Dayton Agreement, NATO's military activities in Bosnia were carried out under the auspices of IFOR. See Joseph W. Ralston, U.S. Policy on Bosnia, Federal Document Clearing House, Sept. 25, 1996, available in 1997 WL 10831421 (discussing IFOR's accomplishments).
47. Planners changed the IFOR designation to the more optimistic-sounding acronym SFOR, or stabilization force, after the first year of NATO's involvement in the former Yugoslavia.
48. Given the changing nature of the international community's engagement in the Balkans, which was codified in the Dayton Agreement, the fact that there is little mention of NATO or the Organization for Security and Cooperation in Europe (OSCE) in the latest version of the Rules of Procedure and Evidence is surprising. See Dayton Agreement, supra note 55, art. 10, at 134 (providing for formulation of procedures). In theory, these two organizations are ideally situated to provide support to the Tribunal.

There are also advantages to the Tribunal's dealing with them directly. First, complicated chains of command would be avoided. These have already hampered the activities of the international community in the former Yugoslavia. Observers criticized the "dual key" approach to the activation of military force by the international community that called for "U.N. civilians to approve NATO air power." Tom Post & Rod Nordland, For Shame, NEWSWEEK, July 31, 1995, at 21, 26. This system was abandoned in the face of the protest against the United Nations' decision not to contest the seizure of the "safe havens" of Zepa and Srebrenica by Bosnian Serb military units in July 1995. By September, NATO warplanes were engaged in punishing air strikes against Bosnian Serb military positions to compel this party to negotiate with the other disputants in the region. See NATO Continues Air Assault, DES MOINES REG., Sept. 1, 1995, at 12 (reporting that "NATO jets struck at Bosnian Serb ammunition depots near Sarajevo today, the third consecutive day of airstrikes intended to punish the rebels for shelling civilians and push them toward a negotiated peace").

Also, by interacting with NATO and the OSCE directly, the Tribunal would effectively be able to execute an end run around possible Russian and Chinese vetoes of enforcement actions to bring suspected criminals to justice. Both countries are more apt than France, the United Kingdom, or the United States to oppose such moves. Moscow sees the situation in the Balkans from behind a generally pro-Serb lens. Meanwhile, the Chinese, who can be counted upon to be very conscious of national sovereignty, will oppose international action directed at particular members of the international community because of the precedent that such efforts set. For example, China abstained from the Security Council directive authorizing the use of force by the Desert Storm military alliance against Iraq in 1991. See Major Garrett, White House Faces Battle on Beijing's Status, WASH. TIMES, May 28, 1991, at A3 (reporting that "China voted to 'abstain' during U.N. Security Council deliberations over the resolution authorizing force against Iraq").
49. U.N. CHARTER art. 53, ¶ 1.
50. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 730 (Bruno Simma ed., 1995). If NATO possesses the authority to carry out unilateral military interventions, it would seem to follow that it could refuse to abide by the Security Council's dictates. As a practical matter, the fact that three permanent members of the Security Council play important roles in NATO decreases the likelihood of conflicts breaking out between these two organizations.
51. See Gregory Katz, 2 Bosnian Serbs Extradited to Face War-Crimes Tribunal, DALLAS MORNING NEWS, Feb. 13, 1996, at A1 (reporting apprehension of two Serb officers suspected of crimes); NATO Must Safeguard Evidence, MILWAUKEE J. SENTINEL, Jan. 23, 1996, at 8 (noting NATO's refusal to help guard suspected grave sites and alleging inadequate NATO role in arrests). It is clear that IFOR/SFOR does not provide protection to all aspects of the Tribunal's investigative activities in the former Yugoslavia but merely tries to create a safe environment for its operations. See, e.g., Morning Edition: Admiral
Protection Force (UNPROFOR) counterparts, resisted the urge to cross the “Mogadishu Line.”\textsuperscript{52} To a limited extent, IFOR’s successor, SFOR, has bowed to pressure from various constituencies and ventured into the ambitious but risky business of gaining custody over those wanted by the Tribunal.\textsuperscript{53}

3. \textit{Rule 61 and the Provision of Artificial Respiration to the Tribunal}

The decision to integrate a reconfirmation proceeding into the Tribunal’s procedural regime might be an attempt to justify the Tribunal’s continued existence. From the time of Rule 61’s creation in May 1993 until Germany agreed to convey Dusan Tadic, a Bosnian Serb, into the Tribunal’s custody nearly two years later, it was unclear whether any trials would take place. During an interview with \textit{American Lawyer}, M. Cherif Bassiouni, a head of the U.N. Commission, who has sometimes been critical of the ICTY, asserted: “You should call your story the ‘Potemkin Tribunal’ . . . . They have a magnificent building in The Hague, a great prosecution team. But in the end when you look behind that to see what’s there, the answer is ‘not much.’”\textsuperscript{54} Thus, Rule 61 may function as a rejoinder to those who complained about the Tribunal’s inaction in the face of the massive denials of human rights and serious violations of international humanitarian law that were, until late 1995, still occurring in the former Yugoslavia.\textsuperscript{55} The fact that the judges altered the Rules of Procedure and Evidence to allow them to

\textit{Leighton Smith Relates NATO Progress in Bosnia} (National Public Radio broadcast, Jan. 22, 1996) (“Our mission is to provide general security in the area so that those agencies [like the Tribunal] doing the work can go about their business uninterrupted. So, I would tell you we’re not going to be providing security for individuals, we’re going to be establishing a secure environment in which these kinds of jobs can be undertaken.”).

\textsuperscript{52} This term was coined by Sir Michael Rose, a British military officer who served as commander of UNPROFOR. He insisted that U.N. forces never become involved in the ongoing hostilities in Bosnia. \textit{See} Christopher Bellamy, \textit{Army Thinkers Draw Line Between Peace and War}, \textit{INDEPENDENT} (London), Jan. 24, 1997, at 12 (asserting that “[c]rossing the consent line, what Gen. Sir Michael Rose called the ‘Mogadishu line’ after the US switch to more warlike operations in Somalia in October 1993, was akin to crossing the Rubicon”).


\textsuperscript{54} Horne, \textit{supra} note 2, at 61 (quoting M. Cherif Bassiouni). Contemporary journalistic accounts bolster this claim. Indeed, Tyler Marshall, a reporter, sees Rule 61 as a device “to create a semblance of movement.” Tyler Marshall, \textit{Lack of Arrests Undercuts Tribunal}, \textit{L.A. TIMES}, Mar. 2, 1996, at 14; \textit{see also} Second Annual Report, \textit{supra} note 32, ¶ 171 (admitting that initial administrative tasks faced by Prosecution “were not initially helpful to the Tribunal when it came to overcoming the skepticism expressed throughout the first months of its existence”).

\textsuperscript{55} In his annual report, former President Cassese noted that during late April 1995, which saw the transfer of Tadic to the Tribunal’s custody and the announcement of investigations of key members of the Bosnian Serb leadership, “[m]any articles and televised reports (134 were counted) were published or broadcast . . . . The most eloquent headline was probably the one which appeared in the Amsterdam daily \textit{De Telegraaf} on 27 April 1995: ‘The paper tiger is roaring.’” \textit{Second Annual Report}, \textit{supra} note 32, ¶ 180. Since then, the credibility of the Tribunal has continued to grow. \textit{See} Therese Raphael, \textit{The War Crimes Tribunal Has Clout}, \textit{WALL ST. J.}, Apr. 2, 1996, at A14. Over a year later, in the wake of various “snatch” missions that netted several more suspects, key observers are still impressed. \textit{See Bosnia Trial Shows Court’s Rising Clout}, \textit{CHRISTIAN SCI. MONITOR}, Oct. 1, 1997, at 6.
initiate Rule 61 proceedings *sua sponte* lends credence to this view.\(^{56}\) So does the Tribunal’s preoccupation with the image that it projects to the outside world and its portrayal by the media.\(^{57}\) If Rule 61 proceedings did function as a way for the Tribunal to prove its commitment to bringing to justice those accused of criminal wrongdoing, it could be argued that there will be fewer such proceedings in the near future. In May 1997, the Tribunal convicted the first individual to be tried, Dusan Tadic.\(^{58}\) Moreover, as of December 1997, twenty individuals were in the Tribunal’s custody and awaiting trial.\(^{59}\) These proceedings likely will eclipse the symbolic value of holding Rule 61 hearings.\(^{60}\)

Observers of the Tribunal ignore the politics undergirding Rule 61 at their peril. At the same time, other imperatives, although secondary to the political motivations lying behind the utilization of this procedural rule, play a role in the Rule 61 story. These include the realization of such worthwhile goals as vindicating international legal principles as well as offering solace to the victims of the trauma that enveloped the former Yugoslavia.

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56. The original version of Rule 61(A) provided that “[i]f, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, and the Prosecutor satisfies a Judge of a Trial Chamber that: (i) . . . .” 1994 I.T.R. PROC. & EVID., supra note 3, at 518. The current version reads: “If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures he has taken. When the Judge is satisfied that: (i) . . . .” Current ICTY Rules, supra note 3, Rule 61(A).

57. Approximately ten percent of the Tribunal’s second annual report to the Security Council deals with the Tribunal’s interactions with the press. See Second Annual Report, supra note 32, ¶¶ 163–64; Third Annual Report, supra note 32, ¶¶ 152–60.


60. In addition, statements made by individuals attached to the Prosecution, combined with the Tribunal’s budgetary constraints, cast doubt on whether the Office of the Prosecutor possesses the capacity simultaneously to try cases, conduct investigations, and participate in reconfirmation proceedings. With trials likely to loom larger in the life of the Tribunal, a limited number of courtrooms may also mean that the days of Rule 61 proceedings are numbered. See Second Annual Report, supra note 32, ¶ 31 (drawing attention to “a critical resource limitation of the Tribunal [ . . . its small capacity to hear trials”); see also Third Annual Report, supra note 32, ¶ 72 (“The need for adequate funding to be provided for the construction of a second courtroom . . . cannot be overemphasized.”). The Tribunal’s shortage of courtroom space has had a very real impact on its ability to administer justice. When Karadzic and Mladic were subjected to a Rule 61 hearing in July 1996, a recess in the Tadic trial lasting several weeks had to be ordered. In 1997, the newly elected British Labour government of Prime Minister Tony Blair came to the Tribunal’s rescue by agreeing to finance the construction of an extra courtroom. See Michael Binyon, *Britain Is to Pay Pounds 330,000 for New War Crimes Court*, TIMES (London), July 18, 1997, at 15.
4. **Rule 61 and the Need to Avoid Holding Trials in Absentia**

During its early days, many observers believed that allowing trials in absentia would be inconsistent with the ICTY’s overall goals. President Cassese was less than specific when he argued, for example, that “a number of reasons” prompted the decision not to integrate trials in absentia into the procedural life of the Tribunal.\(^6\) In addition, Virginia Morris and Michael P. Scharf have contended that the Tribunal’s posture of opposition to trials in absentia sprang from differing views among the actors who played key roles in the ICTY’s founding. Some felt that trials in absentia comport with international law; others feared that such trials could become the norm rather than the exception and believed that verdicts delivered in absentia would undermine the legitimacy of the Tribunal and the United Nations.\(^6\)

5. **Rule 61 as a Norm Articulation Device**

The Tribunal ultimately may live up to expectations and contribute constructively to the Yugoslav conflict resolution process. Nonetheless, the role that it has already played in enunciating international legal norms would seem to have assured its place in the history of the development of international law. Indeed, the widely circulated interlocutory jurisdictional decision that the Tribunal handed down during the Tadic trial\(^6\) contains an exhaustive and authoritative formulation of current customary international law governing the conduct of armed hostilities. Rule 61 proceedings may play an integral role in the Tribunal’s ongoing efforts to enunciate legal norms. By reconfirming an indictment, the judges, it could be argued, have implicitly acknowledged that the activities allegedly committed by the person subjected to a Rule 61 proceeding violate international law, whether customary or codified. Of course, the actual ramifications of norm enunciation are likely to be downplayed by those, like realist political theorists, who equate power with the actual ability to enforce decisions and execute punishments. At the same time, others have attempted to emphasize the ways in which norm enunciation brings about slight shifts in skewed power relationships. The

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\(^6\) See First Annual Report, supra note 17, ¶90.

\(^6\) See 1 MORRIS & SCHARF, supra note 3, at 214–15. Embedded in this analysis is the idea that the Tribunal’s Statute forbids trials in absentia. For an evaluation of this claim, see the discussion infra Subsection III.B.2.

\(^6\) See Tadic Appeal, supra note 4. For commentary on the significance of this ruling, see Theodor Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law, 90 AM. J. INT’L L. 238 (1996), which argues that the ruling demonstrates the renewed vitality of customary law in the development of the law of war. Like treaties, this decision may function as evidence of the existence of customary international law regarding a given issue. According to Richard Baxter, as long as a legal instrument “purports to be declaratory of customary international law or if it can be established that such was the intent of its draftsmen, the treaty may be accepted as valid evidence of the state of customary international law.” R.R. Baxter, Multilateral Treaties as Evidence of Customary International Law, 1965–66 BRIT. Y.B. INT’L L. 275, 298 (1968). As such, it “photographs” the state of the law as at the time of its entry into force as to individual States . . . so long as States remain parties to it.” Id. at 299.
Tribunal’s drive to achieve this important objective may explain the utilization of reconfirmation proceedings.\(^{64}\)

6. The Truth Commission Analogy

Rule 61 may allow the Tribunal to assume the role of a truth commission, an instrument that has been employed in a variety of contexts to document the events of a given time period. Toward the end of his opening statement in the first Rule 61 hearing, Justice Goldstone provided two additional rationales for publicly reconfirming indictments. First, he explained that the publicly presented evidence

will constitute a permanent judicial record for all time of the horrendous war crimes that have been committed in the former Yugoslavia. That public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group. Some national truth commissions have been successful in fulfilling such a role by naming accused persons and revealing the evidence reasonably supporting their guilt.\(^{65}\)

In concluding his statement, Justice Goldstone emphasized another, victim-centered factor:

I have laid much emphasis upon the rights of an accused and of the primary right to a trial in person. However, there can be no justification at all for ignoring the rights of the victims and of their families. They, too, have a right to be heard and thereby begin their own healing process and that of many tens of thousands of victims who will identify with them.\(^{66}\)

It can be argued that several of the assertions embedded within these statements rest on questionable assumptions. These include the notions that the historical record of testimony generated by Rule 61 hearings will be sufficiently comprehensive to contribute to the attribution of individual guilt; that the experience of testifying, or at least of hearing the testimony of

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64. It is, for example, not difficult to imagine a plaintiff in a suit brought in U.S. federal court under the Alien Claims Tort Statute, 28 U.S.C. § 1350 (1994), attempting to use the fact that the ICTY had reconfirmed an indictment charging the accused with rape as evidence that a customary international legal norm proscribing such conduct had emerged. An array of documents, including U.N. General Assembly resolutions, multilateral legal instruments, the constitutions and national laws of various states, reports issued by national truth commissions, and legislative resolutions, have been invoked to establish the emergence of a customary legal norm outlawing or regulating a particular activity. For examples of the evidence that plaintiffs have proffered in section 1350 suits, see Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987).

65. Id. 15.

66. Id. 12.
someone with similar experiences, can initiate or further the healing process of victims; and that the Tribunal will accomplish these ends by incorporating into its operation methods that have been utilized by truth commissions in several jurisdictions around the world that work to establish authoritative records of what transpired during a particular, usually less liberal, time period.

The terms of reference of a body charged with establishing an official account of past abuses are pivotal to its potential for future success. As Priscilla Hayner has observed of the truth commissions used in several Latin American countries, the compilation of a representative history of a given episode depends heavily on the ability of the investigating body to expose and document a universe of problematic activities that is representative of what is perceived actually to have taken place. Commissions with a mandate to examine only a small number of specifically enumerated offenses or to expose only those abuses committed by specific actors have not been able to make the same contribution to a given political community’s reconciliation process as have their counterparts with expansive competencies. Due to the breadth of its subject matter jurisdiction, the ICTY is well-placed to hear cases involving a vast array of offenses.

Unlike most truth commissions, however, the ICTY may not select the testimony that will be presented before it. This undermines its ability to regulate the record it produces. Indeed, the procedural guidelines governing the Tribunal’s operation may, in fact, impede its truth-chronicling efforts. Some truth commissions in Latin America examined the cases of thousands of individuals. Where limited by time or financial constraints, others purposefully selected several dozen individual cases for the historical record based on their illustrative value and their contribution to the overall representativeness of the report later produced. For the ICTY, on the other hand, the question of whether an indictment reaches the reconfirmation stage and subsequently becomes part of the assembled historical record is dictated by discrete procedural imperatives and subject matter constraints. These are divorced from the interests of the history-compiling function. This reality, coupled with the fact that the behavior of numerous autonomous actors will largely determine how and when Rule 61 hearings are held, calls into question the likelihood that the ICTY will be able to use the advantages of its broad mandate and prosecutorial powers to create a historically representa-

68. See id. at 637.
69. See id. at 616.
70. See sources cited supra note 4.
71. The Argentine National Commission on the Disappearance of Persons was presented with 8960 cases, and its Chilean counterpart received 3428 cases for processing. See Hayner, supra note 67, at 645–46.
72. The Commission on the Truth in El Salvador reviewed the details of 22,000 killings, tortures, and kidnappings. From this massive collection, it selected 32 illustrative cases upon which to base its report. See Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 69, 74 (1993).
tive account of the egregious crimes committed during the breakdown of the former Yugoslavia.

The prospects for Rule 61 proceedings to succeed in promoting the individual healing process of victims and their associates may likewise be mixed. According to some procedural justice theorists, participation in a formal proceeding, for some, amounts not only to a means to a liberating outcome—namely a form of declaratory relief—but to an end in itself. Such experiences, for example, could have beneficial psychological effects on victims. One observer has noted the importance in victim-centered procedures of “people being able to tell their story fully before a decision maker who is perceived as neutral, honest and attentive.” The process of testifying on a dark chapter in one’s life may have a cathartic effect for that individual. In theory, Rule 61 proceedings afford the victims as well as surviving family members and friends a valuable opportunity to be made as emotionally whole as possible.

The capacity of Rule 61 hearings to resuscitate those who have been traumatized by the fighting in the former Yugoslavia depends on who plays the role of decisionmaker. Margaret Popkin and Naomi Roht-Arriaza have argued that although representatives of international bodies may validate victims’ stories, the possibility that the experience of testifying before such bodies will spur the recovery of victims is minimized unless authorities associated with the wrongdoing in question publicly accept the truth-compiling body’s conclusions: “[I]t is not simply the compilation of the report that matters; equally important to success with respect to redress for victims is how, and by whom, the report is presented and how the state receives it.”

Such observations provide the beginnings of a framework for evaluating whether the ICTY, when it conducts a Rule 61 hearing, is capable of functioning as a positive force in the lives of those who have been traumatized by the conflict in the former Yugoslavia. Actual examination of this question would seem to yield depressing insights. The ICTY enjoys a relatively low level of legitimacy among many of those believed to be responsible for violations of international humanitarian law that took place in the region, a fact that seems to undermine the Tribunal’s capacity to alleviate victims’ pain.

Intertwined with the question of whether Rule 61 proceedings are capable of constructing an authoritative account of the massive criminal wrongdoing that was visited upon the former Yugoslavia is the issue of whether it

73. See sources cited infra note 194.
75. See id. at 19.
76. For more on the advantages and disadvantages of international sponsorship of truth commissions, see Hayner, supra note 67, at 642–43.
78. See, e.g., COMMISSION ON SEC. AND COOPERATION IN EUROPE, supra note 3, at 13.
should attempt to achieve this end. This question is especially pertinent if it is felt that the record being compiled by these hearings implicitly assigns individual responsibility for the offenses committed. The operation of any truth commission gives rise to profound due process issues. For instance, several such bodies have published the names of those whose wrongdoing is well substantiated.\(^7\) This approach, however, seems problematic so far as affording appropriate safeguards to the accused. After all, it is possible that evidence supporting allegations of illegal activity may come from unnamed sources and that the accused will not be afforded an opportunity to challenge the evidence.

Such deficiencies may be minimized by the fact that many truth commissions are quasi-judicial entities. Indeed, those who support identifying individual violators could quite convincingly argue that failing to do so is to allow impunity to continue its reign. Concerns about the legal rights of those named can be dismissed by stressing that truth commissions may not directly deprive individuals of their property or liberty. Others, however, including Chilean Commissioner José Zalaquett, have argued that naming names is the "moral equivalent" of convicting someone without due process.\(^8\) Several bodies that adopted this posture of restraint decided to submit names of accused individuals to judicial authorities for possible subsequent prosecution.\(^9\) One observer has argued that, legal niceties aside, "the publication of a person's name . . . is popularly understood to indicate their [sic] guilt."\(^1\) This argument would be particularly compelling if a desire to benefit the general population, rather than a narrow segment of the academic or legal community, animated the creation of truth commissions.

Unlike truth commissions, the ICTY can imprison individuals. It is thus crucial that its actions survive at least a minimalist form of due process scrutiny. The Tribunal has argued repeatedly that Rule 61 hearings do not result in conclusive findings of guilt.\(^2\) The assertion that these proceedings can be used to create a historical record of the crimes committed and provide victims with a limited form of redress without simultaneously affecting the legal position of the accused appears conceptually flawed. However, this assertion also points to a degree of tension among the various goals and principles undergirding the Tribunal's work.

7. **The Evidentiary Dimension of Rule 61**

Because many forms of evidence, including the testimony of victims and witnesses, can be admitted during Rule 61 proceedings, they can be seen as opportunities for Tribunal judges to take notice of evidence proffered by

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\(^8\) See 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION xxxii (1993).


\(^1\) See *id.* at 648–50.

the Prosecutor. As argued above, the introduction of information that tends to incriminate the accused during these hearings before the eyes of the world may lessen the trauma of those who suffered abuse in the former Yugoslavia. At the same time, there are a variety of more pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.

In the case of the Tribunal, which operates in a politically charged environment, the possibility that witnesses will be deliberately targeted by indicted individuals or their supporters cannot be ruled out. Although the Tribunal has taken steps to protect those who come forward to testify, even the most sophisticated witness protection programs managed by domestic law enforcement authorities may sometimes be compromised.

Although it is possible to argue for a mechanism that funnels important evidence into the public domain, the fact that this occurs as a result of Rule 61 proceedings may cause some to regard them as problematic. Indeed, it can be argued that the proceedings authorized by this procedural rule amount to free discovery for individuals who, after being subjected to a Rule 61 proceeding, are taken into the Tribunal's custody and tried. The evidentiary showings that a Rule 61 proceeding implies would provide counsel for the defendant with a remarkable glimpse of the Prosecutor's case against his or her client. In addition, Rule 61 hearings may undermine the credibility of witnesses were they also to take part in subsequent trial proceedings. It is quite natural for people to narrate their experiences in different ways, especially if a significant amount of time separates their recitals. This tendency

84. See supra text accompanying notes 73–78.
85. Interestingly, these concerns recently served as part of the basis of a U.S. Supreme Court decision not to delay a suit charging the U.S. President, Bill Clinton, with sexual harassment. See Clinton v. Jones, 117 S. Ct. 1636, 1651 (1997) (ruling that "delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party"). Courts trying criminal cases also have invoked the degradation of evidence to justify trying defendants in absentia. In United States v. Tortora, 464 F.2d 1201 (2d Cir. 1972), for example, the Second Circuit noted that "the greater the delay between the charge and the trial date, the greater the likelihood that witnesses will be unable to appear or that their memories will have faded and their testimony will be less convincing." Id. at 1209. Academics have echoed the judicial concern that degraded evidence may thwart criminal prosecutions. See, e.g., Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 VA. J. INT'L L. 267, 269 (1994) (stressing importance of freshness and immediacy of eyewitness testimony).
86. President Cassese has stated that protecting witnesses against possible physical attacks is a major concern of the [Witness Protection] Unit, which has sought and received expert advice on this matter. The Tribunal does not have its own protection force, but relies on Governments to provide such protection to witnesses whose security is deemed to be at risk.
87. See Communications Daily, WARREN PUB., INC., Apr. 8, 1992, available in 1992 WL 2544659 (raising "possibility that Justice Department witness protection program records could be compromised to disclose identities and locations of protected individuals").
88. This is especially likely to be true if the accused is not present when the witness testifies initially but does appear at a subsequent proceeding. The alleged tormentor, simply by being present, may intimidate the witness, thereby affecting his or her narration.
increases the probability that inconsistencies between the individual’s original and later versions will appear. Any skillful defense lawyer will, in turn, be expected to exploit these inconsistencies.

D. Subjects of Rule 61 Proceedings to Date

The presence of politically relevant personalities among Rule 61 subjects lends added credibility to the claim that this mechanism has played a key role in the Tribunal’s efforts to attain its overarching strategic objectives. For instance, one reconfirmee, Milan Martic, led a breakaway Serbian enclave in the Krajina, a part of Croatia, where he is alleged to have violated international humanitarian law. This entity, however, ceased to exist in the wake of a successful Croatian military offensive called Operation Storm that took place in early August 1995.9 Even more infamous are Radovan Karadzic and Ratko Mladic, who dominated the Bosnian Serb power structure at the height of the fighting in Bosnia-Herzegovina. They have consistently been two of the leading antagonists in the region’s unfolding political drama, although their influence has begun to wane.90

While the prominence of these individuals explains their inclusion, it is unclear why other former Yugoslav newsmakers have not been targeted for Rule 61 treatment. Nor does it seem that the remaining five individuals are immediately distinguishable from the other lesser-known figures who have been indicted by the Tribunal.91

1. The Situation of Targeted Individuals and Their Victims

Rule 61 provides a contingency for the ICTY when there has been a failure to execute an arrest warrant. Given this, those subjected to these hearings may be thought to reside in the components of the former Yugoslavia that have evolved into full-blown members of the international community. U.N. organs have encountered problems interfacing with non-state en-


90. See William Drodziak, Top Serbs Charged with War Crimes, WASH. POST, Dec. 18, 1995, at A17. The decision to hold Rule 61 proceedings for Radovan Karadzic, a heavyweight in Bosnian Serb politics, and Ratko Mladic, the military commander of the Bosnian Serbs, is easily explained. Their political power essentially immunizes them from arrest; simultaneously, the images of both men have been beamed around the world since the early 1990s, which ensures that any legal moves taken against them will attract unrelenting publicity. Finally, and perhaps most importantly, both figures by virtue of their command positions are potentially liable for the atrocities committed to further the efforts to create an ethnically pure Serb territory in Bosnia-Herzegovina.

91. Of the 77 suspects publicly indicted by the Tribunal, eight (Martic, Karadzic, Mladic, Dragan, Nikolic, Mile Mrksic, Miroslav Radic, Veslin Sljivancanin, and Ivica Rajic) have been subjected to Rule 61 proceedings. See International Criminal Tribunal for the Former Yugoslavia, 19 Indictments (visited Oct. 3, 1997) <http://www.un.org/icty/list2.htm>. Mlko and Rajic occupied relatively low rungs in the command structure of the armed forces of Bosnian Serbs and Bosnian Croats, respectively; Mrksic, Radic, and Sljivancanin had achieved high ranks in the Yugoslav army at the time they allegedly committed the offenses in question. See Alister Bull, UN Tribunal to Hear Vukovar Massacre Case, REUTERS, Mar. 15, 1996, available in LEXIS, News Library, CURNWS File.
If the Tribunal could not show that a credible attempt had been made to serve the accused with an arrest warrant, the utilization of the Rule 61 device clearly would be premature. Evidence exists that the Tribunal has experienced difficulty coordinating the logistics of transmitting warrants. Such challenges, however, do not seem to have affected the Tribunal’s selection of subjects for Rule 61 hearings. Exactly half of these subjects originate from non-state entities: Nikolic, Rajic, Karadzic, and Mladic were thought to be based in such jurisdictions.

The fact that only one reconfirmee, Rajic, is a non-Serb is not surprising. More startling is the ethnic profile of the victims. Even though Bosnian Muslims are widely believed to have borne the brunt of the fighting in the former Yugoslavia, four of the eight reconfirmees were involved in activities that specifically targeted Croats. But, since three of the reconfirmees were involved in the same incident—the violations of international humanitarian law that allegedly took place in the wake of the Serb attack on Vukovar—the disproportionate number of Serb reconfirmees ultimately may prove misleading.

Another reason for the preponderance of Croatian victims may be that the majority of the fighting in this country took place early in the conflict. The relative stability in Croatia since early 1992 has permitted possible investigative actions by Tribunal personnel at an early point in the structure’s existence. Meanwhile, in terms of timing, the acts that served as the factual predicates for the reconfirmation hearings held to date were evenly spread over the course of the fighting in the former Yugoslavia, with 1991, 1992, 1993, 1994, and 1995 each seeing at least one incident.


93. For an indictment to be reconfirmed, the Prosecutor must make a showing “that all reasonable steps to effect personal service” have been taken. Current ICTY Rules, supra note 3, Rule 61(A)(i).

94. See Second Annual Report, supra note 32, at 24 (characterizing efforts to complete personal service as “delicate and difficult”).

95. Mikolic, Karadzic, and Mladic are Bosnian Serbs, Martic is a Croatian Serb, and Rajic is a Bosnian Croat. The other three indictees are Serbs from the Republic of Yugoslavia (Serbia and Montenegro). See The Accused, The Allegations; War Crimes Tribunal Indicted 56 Men in Atrocities, WASH. POST, Dec. 18, 1995, at A17.

96. See Roger Cohen, CIA Report on Bosnia Blames Serbs for 90% of the War Crimes, N.Y. TIMES, Mar. 9, 1995, at A8 (reporting that Serbs committed 90% of “ethnic cleansing” that took place in Bosnia and citing conclusions drawn by Human Rights Watch that Serbian forces had committed “most egregious and overwhelming number of violations”).
2. The Original Indictment of Individuals Subjected to Rule 61 Proceedings

Nikolic was the first person involved in the fighting in the former Yugoslavia to be charged with violations of international humanitarian law.\(^9\) He allegedly committed these violations during his tenure as commander of the Susica camp in Bosnia.\(^8\) Eleven months separated his indictment and reconfirmation proceeding, which was the first to be held by the ICTY.\(^9\) The next Rule 61 proceeding, held for Martic, who was the forty-third individual to be indicted, took place in February 1996.\(^10\) Seven months elapsed between these two events.\(^10\)

3. Nature of the Alleged Criminal Wrongdoing Perpetrated by the Subjects of Rule 61 Proceedings

One might ask whether Rule 61 hearings have been used to sanction or deter a variety of discrete forms of criminal wrongdoing that took place in the former Yugoslavia. It is true that some of the subjects of Rule 61 proceedings are accused of committing particularly ghastly crimes that received intense media coverage. Three of the defendants—Mrksic, Radic, and Stjivancanin—occupied key positions in the command structure of the Belgrade-based Guards Brigade of the Yugoslav army. This force allegedly removed 261 non-Serb men from the Vukovar hospital and transport[ed] . . . them to a farm building in Ovcara, two miles from Vukovar, where they were beaten for several hours.

Later, the prisoners—described in the indictments as “wounded patients, hospital staff, soldiers and Croatian political activists”—were taken in groups of 10 to 20 to a site near the farm where Yugoslav soldiers and Serb paramilitary gunmen under Mrksic’s command shot and killed them.\(^10\)

\(^9\). See Tom Squiteri, Trying Bosnia’s War Crimes, USA TODAY, Oct. 10, 1995, at A1 (noting that “proceedings against Nikolic are being conducted under Rule 61, which permits the court to take evidence against an individual and brand them [sic] an ‘international fugitive’ subject to arrest”).

\(^8\). See A War Crimes Court Made Its First Indictment in the Yugoslav Conflict, WALL ST. J. EUR., Nov. 8, 1994, at 1 (reporting that “[t]he Yugoslav War-Crimes Tribunal . . . indicted Dragan Nikolic, commander of the notorious Susica Camp set up by Bosnian Serb forces . . . .”).

\(^9\). See Yugo War Crimes Court Holds First Public Sitting, AGENCE FRANCE PRESSE, Nov. 8, 1994, available in 1994 WL 9634555 (noting that “the war crimes tribunal here handed down its first indictment against Dragan Nikolic, a Bosnian Serb who is still on the run, who allegedly commanded a detention camp in Susica in northeast Bosnia”).


Others are associated with actions that, although brutal, became par for the course in the savage fighting that took place between 1991 and 1995. Rajic, for example, has been "accused of leading the troops that attacked the mountain village of Stupni Do in central Bosnia, killing at least 16 Muslim civilians in October, 1993."103

Given the prevalence of rape and other sex crimes in the violations of international humanitarian law that have taken place in the former Yugoslavia, it is surprising that of the eight individuals subjected to Rule 61 proceedings, only Karadzic and Mladic were accused of this category of offense. The Tribunal repeatedly has stressed its commitment to prosecuting sexual assault and rape. According to former Tribunal President Cassese, "[i]n order conscientiously to address the prevalence of sexual assault allegations committed in the former Yugoslavia . . . , a legal adviser for gender-related crimes has been appointed. The adviser, as a member of the Prosecutor’s secretariat, reports directly to the Prosecutor and the two Deputy Prosecutors."104

In its decision to reconfirm Nikolic’s indictment, the judges invited the Prosecution to amend the charges against him to include accusations of sexual assault. According to Judge Claude Jorda, "[t]he Trial Chamber feels that the Prosecution may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rape and other forms of sexual assault, either as a crime against humanity or as war crimes."105

4. The Subsequent Activities of Subjects of Rule 61 Proceedings After Their Alleged Commission of Criminal Wrongdoing

Since their alleged criminal activity, some of the eight reconfirmees have faded into relative obscurity. Rajic, for example, has become a local politician in the central Bosnian town of Kiseljak since the end of the fighting in the region.106 Others went on to become more influential actors in the Balkans. By July 19, 1995, Mrksic, who had been named commander of the Croatian Serb forces, launched an offensive against the neighboring Bihac

104. Second Annual Report, supra note 32, ¶ 44.
105. Nikolic Indictment, supra note 8, ¶ 33. Following the Prosecutor’s presentation of evidence against Karadzic and Mladic during Rule 61 proceedings, Judge Jorda called upon the Prosecutor to "expand last year’s charges of genocide against . . . [the two] in light of detailed evidence produced before the court by its investigators and testimony by a Muslim survivor and an admitted executioner involved in the Srebrenica killings." Randal, supra note 38, at 1. It could be argued that, by taking these steps, the French judge subverted the criminal prosecution process by questioning its ability to function as "an independent judicial arbiter interposed between the police [or prosecuting authority] and the accused." LAW REFORM COMM’N OF CAN., THE CHARGE DOCUMENT IN CRIMINAL CASES 3 (1987). In a sense, the Chamber’s action brought about a reversal of roles in the parts that the prosecution and judges normally play in common law jurisdictions when charges are lodged against the accused. By formally recommending that the indictment be amended, the judges placed the prosecution in the position of having to evaluate or judge whether such an action was warranted.
pocket—at the behest of Serbian President Slobodan Milosevic, according to Western officials.107

III. THE PROPRIETY OF RULE 61

As it cast about for a strategy to pressure politically powerful members of the international community, the Tribunal presumably sought to develop a lawful approach that could be reconciled with the demands of justice in contexts, such as the former Yugoslavia, where the political landscape has proven to be susceptible to radical transformations.

A. The Tribunal and International Human Rights in the Shadow of the Post–World War II Prosecutions

Compared with the prosecutions brought by the Nuremberg Tribunal in the wake of Germany’s defeat after World War II, the ICTY faces intense pressure to conform to international human rights norms.108 The Nuremberg Tribunal’s inattention to human rights can be partly attributed to the novelty of this concept. Indeed, the idea that a given authority’s interaction with those within its jurisdiction should even register on the radar screens of those not part of it was a residue of the massive Nazi denials of individual and group rights before and during World War II.109 Moreover, some years had to pass before the notion of human rights could become entrenched in the operation of the international system.

The Nuremberg Tribunal’s relative inattention to basic due process concerns also stemmed from the absence of international human rights standards.110 Indeed, it was not until after these trials that the U.N. General Assembly adopted the Universal Declaration of Human Rights.111 To a large extent, this document functioned as an aspirational statement of purpose in the area of human rights. Twenty years then elapsed before the adoption of the International Covenant on Civil and Political Rights (ICCPR),112 which

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107. See John Pomfret, Prescription for More War in Bosnia, WASH. POST, Aug. 12, 1995, at A1. Similarly, by November 1995, one of Mrksic’s deputies, Sljivancanin, was commanding a Yugoslav army brigade. Slobodan Milosevic, the Serbian president, later promoted him to full colonel. See Drozdiak, supra note 102, at A31.


109. See Richard B. Bilder, An Overview of International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICES 3, 5 (Hurst Hannum ed., 2d ed. 1992). In a sense, this lack of concern cut both ways. States were generally free to treat their citizens in any way they saw fit. International organizations had similarly pronounced degrees of freedom of action in the way that they dealt with individuals accused of criminal wrongdoing.


contains more specific standards as well as reporting requirements and an optional monitoring mechanism. Following the entry into force of the ICCPR, states and NGOs, acting through the United Nations, have worked to define with greater specificity the rights of persons and collectivities. Regional efforts to promote human rights have also proliferated since World War II.

The Tribunal is one of the heirs to this legacy. In his report to the Security Council on the creation of an international tribunal to prosecute criminal wrongdoing committed in the former Yugoslavia, the U.N. Secretary General asserted that

[it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.]

Two somewhat contradictory impulses, it can be argued, prompted this concern that the ICTY protect human rights. First, consistency demands strict adherence to human rights standards. In their dealings with members of the international system, international organizations like the United Nations often stress the importance of respecting the rights of individuals and groups. When these same entities have positioned themselves to deprive persons of these same rights, they would confront intense criticism if their operation could not be squared with basic human rights protections.

U.N.T.S. 171 [hereinafter ICCPR].


116. The multilateral peace operations that the United Nations has established around the world also must exist in the shadow of this entity’s concern for human rights. Numerous NGOs have taken the United Nations to task for failing to establish procedures to discipline its own personnel who stand accused of criminal wrongdoing. See generally AMNESTY INT’L, PEACE-KEEPING AND HUMAN RIGHTS 32–34 (1994) (proposing institutional responses to abuses by U.N. personnel); HUMAN RIGHTS WATCH, THE LOST AGENDA: HUMAN RIGHTS AND U.N. FIELD OPERATIONS (1993) (criticizing U.N. operations in Cambodia, the former Yugoslavia, Somalia, and Iraq).

117. ICTY Statute, supra note 9, ¶ 106.

118. This desire for consistency explains the revulsion many felt when revelations surfaced that soldiers attached to peace operations directed by the United Nations and the Economic Community of West African States had engaged in activities that would have been clearly illegal had they been committed during military operations undertaken under the auspices of national authorities. See, e.g., Canadian Charged in Death of Somali, PHOENIX GAZETTE, Jan. 17, 1995, at A10 (reporting that “charges of racism and brutality involving Canadian peacekeepers in Somalia surfaced again this week in a courtroom”).
Meanwhile, cynics might contend the international community's demand that the Tribunal adhere to human rights norms represents a bid to keep the ICTY weak. By prohibiting trials in absentia and embracing a presumption of innocence, the Security Council placed a number of obstacles between the Tribunal and the successful prosecution of persons accused of criminal activity in the former Yugoslavia. Convicting a person of criminal wrongdoing usually implies the deprivation of the individual's liberty, an outcome which, until recently, only state action could legally generate. This procedural straightjacket may also be viewed as a reaction against the perceived excesses of the Nuremberg trials, which some saw as victor's justice.a

Prompted by one or both of these concerns, the Secretary General, in drafting the Tribunal's Statute, integrated into it a number of protections for the accused. Among these is a provision that apparently prohibits trials in absentia.19

B. Rule 61 and Trials in Absentia

1. Two Sides of the Same Coin?

Whether Rule 61 is in keeping with legal provisions like article 22 of the Tribunal's Statute and article 14 of the ICCPR depends on the extent to which it functions as a disguised trial in absentia. There are several key differences between Rule 61 hearings and conventional trials in absentia. First, Rule 61 proceedings do not generate authoritative determinations of guilt or innocence. According to Justice Goldstone, "[a]t the cost of repetition, [the Rule 61 proceeding]... is not a trial in absentia and the primary reason for the issue of an international warrant of arrest is to achieve the objective of bringing the accused for trial." President Cassese has echoed this view, noting that

[a] solution to the problem of being unable to bring an accused before the Tribunal was found, taking into account the Tribunal's decision not to allow trials in absentia, by creating a special procedure—rule 61 proceedings.

119. Cf. Henry T. King, The Judgments and Legacy of Nuremberg, 22 Yale J. Int'l L. 213, 216 (1997) (arguing against notion that Nuremberg was "born of the 'spirit of vengeance'" and in favor of characterization of Nuremberg as "right and... just") That the designers of the Tribunal may have drifted too far in one direction is suggested by the fact that the statute of the proposed permanent international criminal court does not grant as many protections. In one of its incarnations, this document, for example, allowed trials in absentia in some instances. See infra note 136.

120. According to article 21(4) of the Statute, "[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:... (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." ICTY Statute, supra note 9, art. 21(4). One observer has noted that, concerning the rights of the accused, the real difference between the ICTY and the prosecutions mounted immediately after World War II "will lie in what is outside the text. For example, the way the tribunal may be expected to improve upon the performance of the earlier courts will be in how it and the registry implement those guarantees, for example, by providing documents to defendants in a timely fashion." O'Brien, supra note 108, at 654.

Proceedings under rule 61 do not abrogate the accused’s right, under the statute, to be present at his trial, since the proceedings are not a trial nor do they result in a judgment. If the accused were ever to surrender to custody, a whole new trial would take place in his presence, and he would be presumed innocent notwithstanding the rule 61 finding.\textsuperscript{122}

Neither are convictions handed down if the indictment is reconfirmed.\textsuperscript{123} Although formal distinctions between trials in absentia and Rule 61 proceedings may exist, it is possible that reconfirmation hearings function as trials in absentia in all but name. First, the fact that witnesses are allowed to testify publicly at Rule 61 proceedings gives them a trial-like quality.\textsuperscript{124} Similarly, Judge Jorda has argued that “[w]e have taken the French concept [of trial in absentia] to its limits, which has allowed us to establish a procedure which, while not judging the accused in absentia, will allow us to make public the charge against him.”\textsuperscript{125} As noted previously, Justice Goldstone has pointed out that the evidence presented at these hearings will constitute a permanent judicial record for all time of the horrendous war crimes that have been committed in the former Yugoslavia. That public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group.\textsuperscript{126}

This statement could be read as a tacit admission that the reconfirmation process functions as a trial in absentia. It is unclear what mechanism, if any, would be used to attribute guilt for the crimes exposed as a result of the Rule 61 proceeding. The public could use the record that emerges from these hearings to make its own determinations as to who bears responsibility for the breaches of international humanitarian law in the former Yugoslavia. More problematically, if the Tribunal closes down, courts emerging out of

\textsuperscript{122.} Second Annual Report, supra note 32, ¶¶ 197-98. President Cassese’s language is potentially problematic. For example, his argument that “a whole new trial would take place” if the accused were taken into custody implies that the earlier reconfirmation proceeding did, in fact, function as a trial. This statement also exhibits a degree of inconsistency. For example, Cassese first asserts that the Tribunal decided to prohibit trials in absentia, then that “proceedings under rule 61 do not abrogate the accused’s right, under the statute, to be present at his trial.” \textit{id.} Of course, the ICTY Statute is a creature of the Security Council.\textsuperscript{123}

124. Instead, the decision to reconfirm has been termed a “finding.” See \textit{id.} ¶ 198.

125. One of the risks of this liberal evidentiary rule is that witnesses may not feel as constrained as the does Prosecutor to ensure that the accusations made against the defendant fall within the Tribunal’s subject matter jurisdiction, are specific, and otherwise conform to the Tribunal’s rules of evidence. Without defense counsel present to object to improper testimony, there would seem to be few restraints on what becomes part of the judicial record in Rule 61 proceedings. This might be particularly unfair to the defendant. According to the Law Reform Commission of Canada:

An accusation of a crime lodged against an accused is one of the most serious steps our society can take against an individual. The mere fact of being charged can have enormous repercussions on the accused’s life. . . . Thus, we require a charge to be in writing, so that vague or unspecific allegations against a person cannot take the form of gossip through the community: a written document setting the matter in black and white must exist.\textit{Law Reform Comm’n of Can., supra} note 105, at 3.

the rubble of this region, which may not be inclined to show the same con-
cern for the rights of criminal defendants as had the ICTY, might use the
product of Rule 61 proceedings as a basis for convictions in absentia. It is
also unclear whether Justice Goldstone’s statement pertains to moral or legal
culpability for criminal wrongdoing. It is easier to make the case that the re-
confirmation procedure does not function as a trial in absentia if Goldstone
was referring only to moral guilt.

2. Trials in Absentia and International Law

Even if Rule 61 proceedings are the functional equivalent of trials in
absentia, it is not clear that the Tribunal’s Statute should be construed as bar-
ing them. For example, indications exist that the Tribunal’s judges do not
read the Statute as imposing an absolute ban on trials in absentia. Interest-
ingly, President Cassese has referred to the “Tribunal’s decision not to allow
trials in absentia by creating a special procedure.” This phrasing, of

127. As noted below, this is the French position on whether trials in absentia are prohibited by
the Tribunal. See infra text accompanying note 162.
129. Media reports support the inference that Tribunal judges feel they may employ trials in ab-
sentia. Indeed, one journalist has reported:
At the Hague, the president of the Yugoslav war crimes tribunal said the UN court is re-
thinking its ban on trials in absentia, in part because it has not been able to get its hands on
Karadzic and Mladic. Judge Antonio Cassese of Italy said that since the court’s 1994 start-
up, judges have discussed the idea of trials in absentia for suspects who cannot be caught.
Julius Strauss, Dig Indicates Massacre of Bosnia Civilians, Chi. SUN-TIMES, July 13, 1996, at 12.
130. According to this provision, “[i]n the determination of any criminal charge against the ac-
cused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in
full equality: . . . (d) To be tried in his presence, and to defend himself in person or through legal assis-
tance of his own choosing[.]” 112, art. 14(3)d.
131. ICTY Statute, supra note 9; see also M. Cherif Bassiouni, Human Rights in the Context of
Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National
Constitutions, 3 DUKE J. COMP. & INT’L L. 235, 280 (1993) (“Trials in absentia are prohibited by the
ICCPR”); O’Brien, supra note 108, at 656 (concurring with Secretary General’s position); Michael P.
Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, 31
TEX. INT’L L.J. 1, 91 n.121 (1996) (asserting that trials in absentia are generally disfavored under interna-
tional law). But see Wedgwood, supra note 85, at 269 (arguing that “Secretary-General indulged in an
over-reading in his claim that the International Covenant on Civil and Political Rights forbade the trial of

are banned by article 14 of the ICCPR or by the Tribunal's statute. For example, the U.N. Human Rights Committee, the body charged with ensuring the ICCPR's implementation by the parties that sign its Optional Protocol, has noted that there are situations in which trials in absentia are permissible. Similarly, some individuals involved in the formation of a permanent International Criminal Court (ICC) have questioned whether international law truly exhibits no tolerance for this type of legal proceeding. According to commentary on the debate over the component of the ICC's Statute regulating the use of such proceedings,

\[
\begin{align*}
\text{(a) the accused has been indicted but is totally unaware of the proceedings;} \\
\text{(b) the accused has been duly notified but chooses not to appear before the Court;} \\
\text{(c) the accused has already been arrested but escapes before trial is completed. Most of those members thought that while in hypothesis (a), an accused person should not be judged in absentia, in cases (b) and (c) a trial in absentia is perfectly in order . . . .}
\end{align*}
\]

This document's framers have used article 14(3)(d) of the ICCPR as a baseline for formulating the procedural protections that international law mandates for criminal defendants. alleged Yugoslav war criminals not physically present in the Hague); Diane F. Orentlicher, \textit{Arrest the War Criminals}, WASH. POST, Sept. 24, 1996, at A17 (arguing that trials in absentia "can be justified, if at all, only as a last measure if it proves impossible to arrest" war criminals); Herman Schwartz & Lloyd N. Cutler, \textit{Try Them in Absentia}, WASH. POST, Aug. 27, 1996, at A11 ("The rules of the present International War Crimes Tribunal also permit such trials. A defendant has the right to be 'tried in his presence,' but he plainly waives that right if he fails to present himself for trial."). Similarly, Louis Beres has made the more general argument that "anyone who is charged with a criminal offense and offered but declines the opportunity to defend himself in person, is normally not mistreated under law." Louis R. Beres, \textit{Iraqi Crimes and International Law: The Imperative to Punish}, 21 DENV. J. INT'L L. & POL'Y 335, 353 (1993).
3. **European Human Rights Arrangements and Right to be Present During the Criminal Prosecution Process**

Regional and even municipal legal standards of law, which are routinely proffered by practitioners litigating questions of law before the Tribunal and invoked by this body’s judges, play a key role in gauging the international legal system’s receptiveness to trials in absentia. Like the U.N. Human Rights Committee, European bodies charged with maintaining compliance with regional human rights conventions have found that trials in absentia are justified in certain settings.

The European Convention on Human Rights (ECHR)\(^\text{137}\) contains minimum fair trial standards very similar to those in article 14 of the ICCPR. Article 6(3)(c) of the ECHR states that every person charged with a criminal offense has the right

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\text{to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.}^{189}
\]

On several occasions, parties have called upon the European Commission of Human Rights to determine whether this provision constitutes an absolute prohibition of trials in absentia. In *Coloza and Rubinat v. Italy*, this body declared that

\[
\text{undoubtedly... Article 6 § 3(c) does not secure the accused the right to be personally present in all circumstances. His absence may, for example, be due to special circumstances bound up with the way the trial is organised, such as the attitude he himself adopts to the hearing.}^{139}
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In the same case, the Commission ruled that a state conducting a trial in absentia does violate article 6 of the ECHR when it hands down a final judgment not open to appeal or review.\(^\text{140}\)

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On April 24, 1996, the Parliamentary Assembly of the Council of Europe voted to invite Croatia to become its fortieth member. Such membership would have required Croatia to accede to the treaty within a year. On May 14, however, the Committee of Ministers of the Council took the unprecedented step of intervening to block this membership invitation. General human rights and rule of law concerns, intimidation and harassment of the news media, and Zagreb’s lack of cooperation with the Tribunal were invoked to explain the postponement. See Laura Silber & Anthony Robinson, *Tudjman Furious Over European Bar*, Fin. Times, May 16, 1996.

\(^138\) ECHR, supra note 137, at 228.

\(^139\) *Coloza & Rubinat v. Italy*, 89 Eur. Ct. H.R. (ser. A) at 26; *id.* at 29 (1983).

\(^140\) In finding Italy in violation of the Convention for having refused to retry two individuals convicted in absentia, the Commission declared that “[i]n matters would be different if an accused convicted in absentia without his express consent had the opportunity, once he had actually learned of the conviction, of having the proceedings on the merits of the case reopened at his request.” *Id.* § 126, at 30. The European Court of Human Rights also reached this conclusion, holding that:

When domestic law permits a trial to be held notwithstanding the absence of a person...
Like the European Commission on Human Rights, the Council of Europe’s Convention mechanism, the Council of Europe’s Committee of Ministers, adopted norms governing proceedings held in the absence of the accused. In 1975, it formulated a resolution on this subject. In keeping with ECHR case law, this document leaves room for trials in absentia only in cases in which the accused’s presence is not indispensable.

The position on trials in absentia carved out by the other major European human rights standard-setting body, the Organization for Security and Cooperation in Europe (OSCE), is less clear. Article 5.17 of the Document on the Human Dimension guarantees the right to be tried in one’s presence in phrasing similar to that of article 14 of the ICCPR. Unlike the ECHR, which created a commission and court to which individuals may apply for legal remedies in human rights abuse cases, the OSCE Human Dimension procedure provides a diplomatic mechanism through which states may raise human rights complaints. “The Mechanism,” as it is known, has resulted primarily in the establishment of fact-finding missions. Little information is available on the substance of the complaints that it receives. Although the OSCE does not interpret human rights standards, it is worth noting that this body appears to view the ICCPR as an example that states ought to follow.

4. Trials in Absentia and Criminal Procedure in Internal Legal Orders

The proposition that it is permissible for trials in absentia to be held in limited circumstances has also met with favor in authoritative decisions issued by national courts, including those of states whose legal traditions generally regard trials in absentia as unjust. The collective weight of this out-

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142. See id.
143. See Kevin Boyle, Europe: The Council of Europe, the CSCE, and the European Community, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, supra note 109, at 133, 155-56.
144. Given the crucial role that the OSCE has been assigned in implementing the civilian side of the Dayton Agreement, interaction between it and the ICTY may be on the rise. See Dayton Agreement, supra note 35, Annex 10, at 146 (describing role of OSCE in civilian implementation of agreement).
145. See James G. Starkey, Trial in Absentia, 54 N.Y.B. J. 30, 30 (1982) (noting that “right of an accused to be present at his trial is traceable to the earliest days of Anglo Saxon law”). One scholar of the policies that undergird this legal tradition’s aversion to trials in absentia has questioned whether the ban on them still makes sense:

When the right arose in Anglo-Saxon times, it is true that presence was a requirement, not a privilege. Jurisdiction was as dependent on presence in criminal trials as in civil, for originally both were in the nature of a private action brought by one individual against another for redress of private wrong. Also, the early mode of trial, by ordeal or by battle, and the
put of domestic judicial tribunals around the world lends further support to the argument that the use of such proceedings by a multilateral legal structure comports with emergent trends in the international legal system. Particularly outside the United States, the presumption against trials in absentia either never existed or seems to be waning.

48. The United States

American case law has recognized an increasing number of exceptions to the common law's outright ban on trials in absentia. In Diaz v. United States, the U.S. Supreme Court declared that the U.S. Constitution permits trials to proceed if those who stand accused have voluntarily absented themselves from them. Similarly, Illinois v. Allen stands for the proposition of rendering judgment immediately upon return of verdict, both argued for presence. Lastly, since defendants could not have counsel in ancient times, maintenance of any pretense to an adversary system necessitated presence. But the evolution of criminal procedure has undermined these justifications and the privilege of presence is now retained primarily for the defendant's benefit and for the indirect societal interest in providing for his protection.


148. We discuss the approach to the trial in absentia issue taken by American, French, English, Australian, and former Yugoslav domestic law. Several considerations explain this selection. First, much of the law at the domestic level around the world traces its origins to either the common law, which was born and bred in England, or civil law legal tradition, whose evolution was shaped by developments in France. Australia and the United States are common law countries. The former Yugoslavia fell into the civil law camp. With the exception of the former Yugoslavia, nationals from each jurisdiction currently function as judges at the ICTY. Our decision to examine the law of the former Yugoslavia should be obvious. When actors in this region engaged in criminal conduct, they presumably knew that prosecutions against them could be initiated, which, depending on their permissibility, might incorporate trials in absentia. Thus the Tribunal's utilization of this device would seem to be justified if persons in the former Yugoslavia expected to be subject to trials in their absence.

149. 223 U.S. 442 (1912).

150. In many respects, the language of article 14 of the Covenant tracks that of the U.S. Constitution's Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. Because all of the Sixth Amendment's guarantees except the right to a jury trial are contained in article 14 of the ICCPR, the Amendment's interpretation, while not authoritative, might inform the construction given to the ICCPR.

151. Citing the U.S. Court of Appeals for the District of Columbia Circuit, the Court stated that it was not "consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial commenced." Diaz, 223 U.S. at 457.

152. 397 U.S. 337 (1970). For commentary on this case, see The Supreme Court, 1969 Term, supra note 147, at 90-100. When the Netherlands acceded to the ICCPR, it reserved "the statutory option of removing a person charged with criminal offence from the courtroom in the interests of the proper conduct of the proceedings." NOWAK, supra note 134, at 764. That the Dutch government felt compelled to make such a reservation is one of the few pieces of evidence that support the proposition that article 14(3)(d) contains an absolute prohibition on trials in absentia. As noted previously, the Tribunal has established that trials in absentia are permissible when the behavior of the defendant would otherwise prevent the trial from going forward. See Current ICTY Rules, supra note 3, Rule 80.
sition that a disruptive defendant waives his or her constitutional right to be present during his trial. In *Crosby v. United States,* the Court did hold that the U.S. Federal Rules of Criminal Procedure barred the initiation of criminal proceedings in the absence of the defendant. Yet a U.S. Court of Appeals in *Kirk v. Dutton* recently held that criminal proceedings in Tennessee, which are not regulated by the Federal Rules of Criminal Procedure, may proceed without the defendant’s presence as long as he or she knows that a criminal prosecution has begun. Finally, in *Brewer v. Raines,* the constitutionality of sentencing a defendant in absentia was upheld.

The outcomes in *Diaz, Allen, Crosby, Kirk, and Brewer* demonstrate a willingness on the part of U.S. courts to push the trial-in-absentia envelope. Indeed, at some point judges may need to determine whether defendants need to be present at any juncture during the criminal prosecution process. It currently seems conceivable, especially in state proceedings, that the defendant would not have to be in custody during the indictment, at the beginning of

153. See *Allen,* 397 U.S. at 345-47.
155. See Fed. R. Crim. P. 43(a) (requiring that defendant be present for most trial stages, with certain limited exceptions).
156. See *Crosby,* 506 U.S. at 258-61. *Crosby,* perhaps, is more significant for the question that was not decided: Because the Court found Rule 43 “dispositive,” it did not reach the petitioner’s claim that “his trial in absentia was also prohibited by the Constitution.” 506 U.S. at 262.
158. As the Sixth Circuit noted, its determination represented only the latest in a series of holdings that state criminal trials can begin if the defendant is not present. To defend its decision, the Tennessee trial court noted that the absent defendant was being tried along with six other codefendants who were in state custody. Since joinder was necessary, delaying the proceedings until the defendant had been apprehended would have amounted to a denial of the other defendants’ Sixth Amendment right to a speedy trial. See 1994 WL 561146, at *2-5. Given that article 21(1)(c) of the Tribunal’s Statute mandates that those accused of violating international humanitarian law “be tried without undue delay,” *ICTY Statute,* supra note 9, at 1198, it seems possible that the Tribunal might face the same situation confronted by the trial court. Rule 82(B) of the Tribunal’s Rules of Procedure and Evidence provides for separate trials when a communal indictment has issued. See *Current ICTY Rules,* supra note 3, Rule 82(B). To avoid holding a trial in absentia for a portion of the defendants, this provision would have to be invoked. It would allow the Tribunal to sever the trial of an accused already in custody from proceedings for those who had yet to be transferred to The Hague. Such persons, fully aware of the Tribunal’s wariness of trials in absentia, might argue that they be tried jointly with those who stand accused, but were still absent. At the same time, delaying the proceedings until the accused was taken into the Tribunal’s custody, which might take years or never transpire, would violate the Statute’s guarantee of a speedy trial to those already detained. See *Current ICTY Rules,* supra note 3. Thus, the Tribunal’s prohibition on trials in absentia may diminish its overall ability to administer justice when it is important that defendants be tried in groups. Moreover, severance might, in the end, only complicate the work of the Tribunal. The Second Circuit, another complex judicial structure, has commented on the strains that ordering separate trials can impose on courts. See United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir. 1972) (stating that, in exceptional circumstances, trial in absentia is justified when public interest outweighs the voluntarily absent defendant’s interests).
159. 670 F.2d 117 (9th Cir. 1982).
160. See id. at 119. But see *Kirby v. Illinois,* 406 U.S. 682, 689-90 (1972) (stressing centrality of formal arraignments with the defendant present in “whole system of adversary criminal justice”). In response to this decision, one might argue that as long as the accused is apprised of the charge that has been brought against him, it is unnecessary that he be formally arraigned. Indeed, one American court’s statement that there are no “talismanic properties which differentiate the commencement of a trial from later stages” would seem to apply to the entire criminal prosecution process. Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975).
and during his or her trial (especially if he or she is disruptive), and for sentencing. On the other hand, arraignments, which usually require the presence of the accused, continue to play a vital role in criminal proceedings.\(^{161}\)

b. France

During the negotiations that served as the basis for the establishment of the Tribunal, France argued for allowing trials in absentia.\(^{162}\) This stance dovetailed nicely with the permissibility of such proceedings in the French judicial system.\(^{163}\)

c. United Kingdom

The stance against trials in absentia taken by British courts has hardly been absolutist. In *Lawrence v. The King*,\(^{164}\) The Privy Council held that

> there has to be considered the alteration and recording of the sentence in the absence of the accused. It is an essential principle of our criminal law that the trial for an indictable offense has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority, for saying that in cases of misdemeanor there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid.\(^{165}\)  

Similarly, the Court of Appeal in *Regina v. Jones (R E W)*,\(^{166}\) which was decided almost forty years later, adopted language from *Regina v. Abrahams*,\(^{167}\) an 1895 decision, where it was held that while

> as a matter of law trial for misdemeanor may proceed in the absence of the defendant, it must not be understood that such a course would in these days meet with ap-


\(^{162}\) See French Proposal, supra note 11, at 346–47. In the end, this stance lost out to the Italian government's views on the establishment of the Tribunal. According to articles 11(1)(a) and 11(1)(d) of the statute proposed by Rome, "[e]very person who is charged with a crime . . . has the right . . . [t]o be judged within a reasonable period of time at a public hearing appearing personally and being represented by a counsel . . . ." Italian Proposal, supra note 11, at 378–79.

\(^{163}\) France, a party to the ICCPR, does not appear to regard its use of trials in absentia as contrary to its article 14(3)(d) obligations. In acceding to this instrument, it did enter a reservation "concerning articles 9 and 14 to the effect that these articles cannot impede enforcement of the rules pertaining to the disciplinary régime in the armies." NOWAK, supra note 134, at 754. France also has signed the ICCPR's Optional Protocol, which allows the United Nations's Human Rights Committee to receive and review communications from individuals within its jurisdiction who have alleged violations of this treaty. The French legal system's continued use of trials in absentia has not been challenged before the Human Rights Committee. Thus, the French position with regard to the Tribunal's Statute, that it "does not explicitly exclude the possibility of judgment in the defendant's absence, but does not actually provide for it" appears consistent with the view that its domestic use of trials in absentia comports with its ICCPR commitments. French Proposal, supra note 11, at 347.


\(^{165}\) *Id.* at 708.


\(^{167}\) [1895] 21 V.L.R. 343 (U.K.).
I think that not only has an accused person a right to be present during the hearing of any proceeding against him, but as a rule, which should never be departed from except under special circumstances, he is also bound to be there. . . . All that we are here deciding, in my opinion, is that the presiding judge may in misdemeanors proceed without the presence of the prisoner where the absence is voluntary. He has in law a discretion, but that discretion should be exercised with great reluctance, and with a view rather to the due administration of justice than to the convenience or comfort of anyone.  

**d. Australia**

Like their English counterparts, Australian courts have identified situations in which trials in absentia do not offend Anglo-Saxon conceptions of the procedural protections it is just to extend to individuals accused of criminal offenses. In *R. v. McHardie and Danielson* for example, the Court of Criminal Appeal for New South Wales, after reviewing English and New South Wales practice regarding the conduct of criminal proceedings in the defendant’s absence, concluded

> notwithstanding the general principle that at an indictable offense trial before a judge and jury the accused’s presence is normally a prerequisite to a fair trial, his failure to appear after the trial has started, through his escape from lawful custody, can correctly be described and found to be a waiver of his right to be present at his trial; that the trial judge has a discretion as to whether he should continue his trial, or discharge the jury; that in New South Wales this principle applies to a trial whether it be one for a category known as a felony, or for a category known as a misdemeanor; and that in any event, the distinction formerly applied for different considerations in cases of felony, as opposed to misdemeanor, are no longer of any legal significance in the present context.

**e. The Former Yugoslavia**

The judicial system of the former Yugoslavia likewise permitted trials in absentia in a limited set of circumstances. It did so as a signatory without reservation to the ICCPR. Moreover, since gaining their independence

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168. *Id.* at 353.
169. (1983) 2 N.S.W.L.R. 733 (Austl.).
170. *Id.* at 745.
171. Under article 275 of the Yugoslav Code of Criminal Procedure, an accused could be tried in his absence “only if [the accused] has fled or is otherwise not amenable to justice.” YUGOSLAV CODE OF CRIM. PROC. art. 275 (n.d.). Of course, proposals supporting an inclusion of Yugoslav domestic law in the subject matter jurisdiction of the ICTY ultimately were rejected. *See ICTY Statute,* supra note 9, ¶ 36. It is clear, however, that the Prosecutor tends to be sensitive to approaches taken by Yugoslav law to various issues. In addition, article 24 of the Tribunal’s Statute does explicitly refer to national law in the guidelines for establishing appropriate penalties. *See id.* art. 24. When the need for a sentence to be handed down arises (which has already occurred), the Prosecutor will be called upon to make a recommendation regarding its duration.
172. Yugoslavia signed the ICCPR on June 2, 1971. It seems evident that Belgrade took its obligations and duties under this instrument seriously. For example, on April 17, 1989, it invoked the ICCPR’s article 40(1). This provision empowers states to derogate from its commitments under this agreement in times of exceptional public emergency. The Yugoslav government forwarded to the Secretary General’s “Derogation from Articles 12 and 21 in the Covenant in the Autonomous Province of Kosovo as from 28 March 1989. The measure became necessary because of disorders which led to the loss of human lives and which had threatened the established social system.” Reservations, Declarations, Notifications and Objections Relating to the CCPR and the Optional Protocols Thereof, reprinted in NOWAK, supra note
in 1991 and 1992 respectively, Croatia and Bosnia-Herzegovina have both retained trials in absentia.

5. **The Legacy of Misconstruing the Tribunal’s Statute**

The above survey suggests that states, including signatories of the ICCPR, have allowed trials in absentia in some situations. The same liberties that national authorities have granted themselves have not worked their way up to international judicial bodies like the ICTY. This court must exist, however, in a context where an absolutist reading of the prohibition on criminal proceedings in the absence of the accused reigns supreme. Given the relatively vast reservoir of coercive power into which states can tap, it would seem that national judicial authorities could abuse trials in absentia more readily than could their counterparts at the supranational level. On the international level, the practical result of a trial in absentia is likely to be limited to a criminal conviction being entered against the defendant and a reaffirmation of the need for his or her arrest. Meanwhile, a conviction returned in the defendant’s absence by a domestic prosecuting authority might serve as the basis for depriving this person of a bundle of rights, including the rights to vote or to own property. Additionally, the conviction in absentia could entitle the victims of the accused to civil damages from the defendant’s estate. Ultimately, the presence of states eager to preserve their sovereignty at all costs in the process that created the ICTY may explain why such an expansive ban on trials in absentia was read into its Statute. Indeed, allowing the Tribunal to preside over trials in absentia might have served as a precedent for the procedures used by the International Criminal Court which, in theory, will be able to try individuals of any nationality.173

By vesting defendants with the protections that multilateral human rights conventions grant those who are accused of criminal wrongdoing, the United Nations has enhanced the prestige of the guarantees that individuals can rely upon to facilitate their defense. The ICTY’s commitment to ensuring fair trials has also bolstered the legitimacy of legal instruments like the ICCPR. Theodor Meron, for example, has asserted that “[t]he incorporation of the norms under Article 14 of the Covenant in the statute of the first international criminal court since the post-World War II tribunals stands as a significant precedent that enhances the importance of these norms per se and

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134. at 813. The following spring, a similar derogation was announced due to further conflict in Kosovo. On both occasions, a cessation of the crisis underlying the state of emergency brought an end to Yugoslavia’s derogation from its ICCPR duties. See *Intifada in the Balkans*, ECONOMIST, Apr. 1, 1989, at 40-41 (describing factual background of derogations).

173. *See* Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT’L L. & POL’LY 419, 436 (1995) (emphasizing that “A.B.A. Task Force and the 1953 U.N. Commission proposal both agree on personal jurisdiction. This proposal stated that both the state where the crime was committed and the state of nationality of the accused must consent to jurisdiction of the international criminal court in order for the court to obtain personal jurisdiction over the individual”).
in the context of international criminal tribunals.” By construing without justification key human rights provisions in a way that represents a notable departure from the manner in which they have been traditionally interpreted both by international bodies and national judiciaries, the Secretary General hardly enhances the stature of this regime.

This malfunctioning of the international lawmaking process justifies a search for lessons so that it does not happen in the future. The nature of the process that produced the Tribunal’s Statute may explain why article 14 was interpreted to impose an outright ban on the conduct of criminal proceedings outside the defendant’s presence. Relatively few actors played key roles in this drama. Although views on the establishment of a tribunal for the former Yugoslavia were submitted by a variety of players, including member states and NGOs, the Secretary General drove the drafting of the Tribunal’s Statute, which was approved without modification by the Security Council.

This gloss regarding trials in absentia may also be linked to the fact that the ICTY was created very quickly. Only three months separated the entries into force of Security Council Resolutions 808 and 827. In addition, besides being engaged in the effort to set up the Tribunal, the United Nations was working to address a number of other issues, including the military and political dimensions of its involvement in the former Yugoslavia as well as an overly ambitious attempt to pacify and reconstruct a deteriorating Somalia. It was also presiding over complicated peace operations in Cambodia, Mozambique, and El Salvador that continually required attention. Furthermore, the Security Council issued no less than eighteen resolutions between the time that the Tribunal was formally proposed and its establishment. These dealt with such complex contexts as Angola, Rwanda, Liberia, the Western Sahara, and Armenia-Azerbaijan. Given the presence of all of these pressing items on its agenda, it is not surprising that article 14 was misconstrued.

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In contrast, the fuller reading of the trial in absentia issue by the actors framing the Statute for the proposed International Criminal Court may be due to the fact that the process producing it was more deliberative and marked by the active involvement of a relatively large cast of characters. It has also unfolded at a slower rate.\textsuperscript{176}

C. Rule 61 and the Achievement of Justice in the Former Yugoslavia

Too many inquiries into whether the Tribunal will be able to obtain a just settlement\textsuperscript{177} in the former Yugoslavia see this process as driven solely by the ICTY.\textsuperscript{178} Rather, whether the Tribunal is ultimately successful will depend on many factors—some already determined\textsuperscript{179}—in addition to the number, timing, and substance of its rulings. For example, the lay of the land in the post-conflict Yugoslav order will shape the Tribunal’s ability to make a concrete contribution to the cause of transitional justice. The difference it might make would be diminished if the regimes that emerge proved to be undemocratic, predisposed to mistreat discrete minorities, and uncooperative with the Tribunal and the other dimensions of the international community’s presence in the former Yugoslavia. Whether the entities in this region decide to pursue this agenda, in turn, will be shaped by millions of individual decisions, taken at the grassroots level, in corridors of power, and

\textsuperscript{176} The nature of the process that led to the Tribunal’s creation has had important consequences for its ability to function effectively. For example, the Security Council’s decision to spearhead the creation of the Tribunal is widely thought to have offended the General Assembly, even though many members of this body, especially Muslim countries, had been very supportive of the project. Even though it favored a tribunal, the General Assembly attempted to highlight its relevance and register its disapproval of the way in which the Tribunal was founded by delaying the ICTY’s funding for several months. As the preceding discussion suggests, this appears to be what happened in the case of the Security Council’s efforts to integrate article 14 of the Covenant into the procedures of the Tribunal. See Iain Guest, \textit{Will U.N. Smother Its Conscience? War Crimes Tribunal May Not Receive Adequate Funding}, \textit{Des Moines Reg.}, Dec. 20, 1994, at 11 (“Now, at a time of shrinking U.N. budgets, the General Assembly is considering a request from the Secretariat for $28.4 million to cover the Tribunal’s work in 1995. Last Wednesday, the panel that advises the General Assembly on budgetary matters decided to postpone a decision until spring.”).

\textsuperscript{177} By “just settlement,” we do not mean the achievement of the kind of Bosnia-Herzegovina that is expressed in various Security Council resolutions. Rather, this concept pertains to the project’s consistency with the imperatives of justice in situations undergoing basic political shifts.

\textsuperscript{178} W. Michael Reisman has argued that undergirding the creation of mechanisms such as the ICTY is a faith in judicial romanticism, the belief that if a court could only be established, it would bring law and order to the most unruly political situation . . . . It assigns almost magical, alchemical qualities to what a court can do, if it is only established and only given the chance to issue its judgments.


\textsuperscript{179} The fact that the ICTY is a creation of the international community will shape its capacity to bring peace and justice to the Balkans.
by actors on the world political stage as they interact with the protagonists in the drama unfolding there.

Although the Tribunal is certainly not the only unknown quantity in the transitional justice equation, neither is it a passive spectator. Rather, what ultimately emerges will depend, in part, on the decisions it makes and the strategies it employs to implement them. The desirability of efforts made by judicial entities to achieve justice in transitional contexts can be evaluated with a number of yardsticks. One is a given project’s consistency with the rule of law. The degree to which members of the community undergoing the transition are induced to participate in the search for justice and the sophistication of the strategy the undertaking is allowed to pursue are also relevant factors to consider in judging the propriety of a particular initiative.

Some of these inquiries are likely to unfold with relative ease. Others are more difficult to execute successfully. Moreover, the fact that the Tribunal is composed of many constituent parts—including judges, a large prosecutorial staff, an extraordinarily powerful Registry with a set of interests that do not necessarily mesh with those of the other components of the Tribunal, and procedural rules—counsels against making hasty generalizations about its overall capability to make a lasting contribution to a just transition in the former Yugoslavia. Rather, this determination will emerge from individual examinations of the varied aspects of this structure’s operation. These are likely to proliferate with the passage of time and as the Tribunal begins to leave a more substantial jurisprudence in its wake. Toward that end, what follows is intended as a preliminary attempt to gauge the extent to which one feature of the ICTY—its utilization of Rule 61 proceedings—dovetails with the demands of transitional justice. This determination will be driven, in part, by the function of Rule 61, an issue that we have discussed in considerable detail. If, for example, Rule 61 acts primarily to perpetuate the Tribunal’s existence, it is difficult to see how it has any relation to the achievement of a just settlement in the former Yugoslavia.

1. The Rule of Law

The Tribunal’s overall operation seems to conform readily to the principle of the rule of law, which can be conceptualized as a fidelity to existing rules. Indeed, various aspects of the process associated with the Tribunal—including the Security Council’s deliberations on the Statute and the Tadic jurisdictional ruling—have been characterized by an extreme sensitivity to the notion that the acts the Tribunal is competent to prosecute be explicitly proscribed by international humanitarian law at the time that they were al-

180. If common ground on a conception of the rule of law exists—a big “if”—assessing a given project’s consistency with the rule of law emerges as a relatively straightforward task.
181. If this were indeed the case, the only way to see Rule 61 as furthering the transitional justice agenda would be if a just settlement could not be achieved immediately.
182. See Tadic Appeal, supra note 4.
leveled committed. This stands in marked contrast to other attempts to settle accounts in transitional contexts, including a German court’s invocation of natural law to justify its decision to convict former East German military personnel accused of murdering individuals attempting to escape to West Berlin. Ironically, the Tribunal’s reliance on Rule 61 hearings may be something of an exception to its overall faithfulness to the rule of law. As already noted, this procedural device has never been used in an international context. That this is the case may simply be a reflection of the poverty of the procedural regime for criminal prosecutions undertaken at the international level. More troubling is the fact that nothing analogous to the Rule 61 reconfirmation proceeding forms part of the criminal procedure regimes utilized at the national level.

2. **Participatory Aspect of Rule 61**

A number of commentators have stressed the desirability of efforts to attain justice that involve the participation of broad swaths of the polity in which the transition is occurring. Participation may function as a means to

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183. See ICTY Statute, supra note 9, ¶ 34 (stressing importance of no crime without law principle).
184. Germany: Trial of Border Guards (Berlin State Court, Docket No. (523) 2 Js 48/90 (9/91)), reprinted in 3 TRANSITIONAL JUSTICE, supra note 77, at 576.
185. It seems overly simplistic to argue that the rule of law only implies an adherence to substantive legal provisions. This view assumes that meaningful distinctions between substance and procedure can be made. See William H. Simon, The Ideology of Advocacy, in THE STRUCTURE OF PROCEDURE 48, 54-55 (Robert M. Cover & Owen M. Fiss eds., 1979) (arguing that procedural rules, in fact, play more fundamental role than substantive rules once legal process is set in motion).
186. See Goldstone, supra note 110, at 9.
187. This, of course, assumes that the Rule 61 mechanism is not a trial in absentia, a position that the Tribunal has unwaveringly endorsed. If, on the other hand, this device can be equated with a trial in absentia, there is, as we have argued, precedent for its use by the Tribunal.
188. Efforts to confront the legacy of a given old order exist along a continuum. At one end are efforts spearheaded by actors hailing from the locale in transition; at the other are efforts undertaken by the international community. Transitional efforts staffed by a combination of international and indigenous actors, or only indigenous actors benefiting from technical assistance provided by intergovernmental arrangements and nongovernmental entities, inhabit a twilight zone in the middle. Both Bosnian and non-Bosnian judges currently sit on that country’s constitutional court. See Gary A. Hengstler, Out of the Rubble, A.B.A. J., Mar. 1996, at 52 (discussing this structure). See generally Neil J. Kritz, The Dilemmas of Transitional Justice, in 1 TRANSITIONAL JUSTICE, supra note 77, at xxviii (discussing how management of transitions has come to be handled on international level).

There are a variety of consequences of keeping transitional efforts centered at the international level. They may be viewed as less partisan than if they were initiated by the political force that reigns supreme in the post-transition era. At the same time, because the Tribunal was established by the Security Council, which has generally been seen as anti-Serb in the Bosnian conflict, it is unclear whether the Tribunal’s ability to be perceived as impartial has been permanently compromised. As the creation of an international entity, the Tribunal could begin to operate before the emergence of the new order. At the same time, its operation must conform to international legal principles. Moreover, it is susceptible to shifting political winds at the international level, which can be quite sudden and severe. For example, a breakdown in cooperation between members of the Security Council or among different components of the U.N. system—even in an area far removed from the international community’s response to the situation in the Balkans—could effectively gut the work of the Tribunal.
According to Judith Shklar, for example, the post–World War II judicial proceedings at Nuremberg,

by forcing the defense lawyers to concentrate on the legality of both the entire Trial and its specific charges, induced the German legal profession to rediscover and publicly proclaim anew the value of the principle of legality in criminal law, which for so many years had been forgotten and openly disdained.\(^9\)

Or, as noted previously, participation may function as an end in itself. For example, it may have a purging effect on those involved in the effort to reckon with the prior regime. In transitions from totalitarian systems, where almost all members of the community played some role in perpetuating the old order, many citizens might publicly need to break their ties to the previous regime.\(^9\) As an entity established by the United Nations, located in The Hague, and staffed by individuals from the four corners of the globe, the Tribunal does not provide many opportunities for individuals from the former Yugoslavia to become involved in the efforts to achieve a more just post-conflict order in the region.\(^9\) Indeed, there is only one notable exception to this general rule, short of a full-blown trial. Rule 61 hearings, by providing witnesses and victims with the chance to testify, institutionalize a small degree of participation by Yugoslav actors into the Tribunal’s overall efforts to achieve justice in this region.\(^9\)

3. **Sophistication of the Overall Strategy Pursued to Achieve Justice**

In evaluating the desirability of Rule 61 proceedings, attention ought to be paid to their relationship to the overall objectives of the Tribunal. One of these was gaining leverage over the disputants by exposing and punishing criminal wrongdoing. Since its establishment, though, there has been a considerable amount of “mission creep” in the activities undertaken by the

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\(^{189}\) See Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus: Three Factors in Search of a Theory of Value*, in *The Structure of Procedure*, supra note 185, at 18, 22 (asserting that “a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable”); Simon, * supra* note 185, at 64 (noting that “procedures required by such [U.S. Supreme Court] decisions were justified by their service as expressions of fundamental moral value, such as individual dignity, trust, equality and fraternity”).


\(^{192}\) See, e.g., Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, in *1 Transitional Justice*, supra note 77, at 340 (noting that “[a]bolishing the monuments of the past [the statues of the Lenins and the Stalins] is one way to cleanse a society”). Such undertakings have the added advantage of requiring the participation of thousands of individuals.

\(^{193}\) Besides marginalizing the role that actors could conceivably play in the search for justice in the Balkans, the Tribunal’s physical and institutional separation from this region, as well as the political processes unfolding in it, may cause it to lose touch with what is possible to achieve.

\(^{194}\) Of course, the question then becomes whether these hearings promote enough participation. One of the most disheartening aspects of the Rule 61 mechanism as applied to Karadzic and Mladic was the extent to which the proceedings marginalized victims and their families while giving academics and military officers center stage. See Dutch Official Defends Acts of U.N. Troops, Muslims Not Shielded From Bosnian Slaughter, *News & Observer*, July 5, 1996, at A14 (illustrating high-profile role of military commander Ton Karremans before U.N. war crimes tribunal).
ICTY.\textsuperscript{195} For example, the Dayton Peace Agreement, which forbids individuals indicted by the Tribunal to participate in future electoral processes in the region,\textsuperscript{196} effectively pushed the Tribunal into the business of dispensing administrative justice.\textsuperscript{197} Similarly, Rule 61 hearings, which retain a pronounced truth commission quality, may allow the ICTY to harness the benefits of this approach to create a more just post-conflict order although, as discussed previously, plenty of evidence suggests it will not. Of course, even though it is routinely vilified in the press, "mission creep" is not always problematic. In the case of the Tribunal, it may enable this entity to pursue a more dynamic strategy to apportion justice in the former Yugoslavia. Where the Tribunal is unlikely to obtain a criminal conviction due to a lack of cooperation on the part of the relevant authorities, justice may demand that the potential defendant be sanctioned in some other manner. Indicting the individual and subjecting him or her to a Rule 61 hearing allows this goal to be achieved, albeit in a watered-down form.

IV. CONCLUSION

This Article has contended that Rule 61 amounts to an innovative attempt by the Tribunal to fulfill its overall mandate: apprehending and trying individuals who stand accused of violating international humanitarian law in the former Yugoslavia. A variety of obstacles thwarted the realization of this goal. First, the Tribunal needed a way to pressure parties in the region and at the international level that were unwilling participants in its search for justice in the Balkans. Second, the Tribunal had to ensure the legality of its solution, including the ban on trials in absentia that formed part of its Statute. Ultimately, Rule 61 represents an attempt to remain cognizant of both of these imperatives simultaneously. The fact that the Tribunal has turned to other strategies, including the use of sealed indictments, to bring those it had accused into custody points to shortcomings in Rule 61. However, this does not mean that this procedural device should be regarded as a failure. Rather, planners of other international attempts to prosecute criminal wrongdoing in politically fluid contexts would do well to appreciate what can be realized with a procedure similar to Rule 61.

\textsuperscript{195} "Mission creep" is a term that has been coined in the context of multilateral peace operations. It refers to situations in which a military force that has intervened for one reason, such as the delivery of humanitarian relief supplies, but begins pursuing other goals, such as attempting to track down and capture a recalcitrant disputant.

\textsuperscript{196} Annex 4 of the Dayton Agreement provides:
No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.

\textsuperscript{197} For one attempt to dispense administrative justice at the national level, see Czech and Slovak Federal Republic: Screening ("Lustration") Law, Act No. 451/1991 (Oct. 4, 1991), \textit{reprinted in 3 Transitional Justice, supra note 77, at 312.}