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Two Wrongs Do Make a Right:

The International Criminal Tribunal for the Former Yugoslavia was Established Illegally—but it was the Right Thing to do . . . So Who Cares?

By Jeffrey W. Davis*

Introduction

In the early 1990s, the territory of the former Yugoslavia was engrossed in war. It was a region enveloped in unspeakable atrocities and misdeeds of the most inhuman nature. Women and girls were sexually enslaved, men were buried in mass graves, and ethnicities were “cleansed” to the brink of annihilation. Captives imprisoned in concentration camps were forced to drink motor oil, water from polluted puddles, and discharge from fire extinguishers. One man was forced to orally castrate another

* J.D. Emory University School of Law 2002; B.A. Connecticut College 1997. The author is an assistant district attorney and would like to thank Susan for her proofreading, Professor Johan Van der Vyver for his assistance, Professor Nora Demleitner for her comments, and his parents for everything else.

1 Although this article focuses exclusively on the illegal establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the analysis for its unlawful formation is substantially the same for that of the International Criminal Tribunal for Rwanda. The full title of the ICTY is the 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.


man. The need for justice was absolute and the need for action immediate.

In May 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal). The creation of this criminal tribunal was a reaction to the horrific acts perpetrated within the Balkan region. The ICTY, an ad hoc judicial body of limited jurisdiction, was charged with the “prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”

One legal analyst described the creation of the ICTY as a “direct reaction” to a “collective feeling of guilt among the international community, resulting from the double failure to either prevent or stop the massacres” of the Yugoslavian war. Although the precise success level of the ICTY remains a debatable issue, the Tribunal, at the minimum, must be viewed as a “limited” success. It has been responsible for over 100 indictments of some of the war’s most reprehensible criminals and is currently prosecuting Slobodan Milosevic. The question remains, however, whether the achievements of the Tribunal and the dire need for its establishment justify the means by which it was created.

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6 Id.
9 Tiefenbrun, supra note 7, at 554–55 (capitalization altered).
11 In general, the ICTY’s success is beyond the scope of this article. For a brief article describing its successes and advocating the establishment of a permanent international criminal court, see Balkan Precedent, supra note 4, at 19.
The ICTY was created both by powers that far exceeded those of the Security Council and that were contrary to traditional canons of statutory interpretation. The drafters of the United Nations Charter (Charter) never contemplated the establishment of a criminal tribunal and the powers to create such an institution were never conferred upon the Security Council.

Both traditional judicial doctrines and the customary practices for tribunal establishment lead to the clear conclusion that the ICTY was created illegally. This article asserts, however, that faced with either the choice of endorsing the illegal establishment of the ICTY or allowing the crimes of the Yugoslavian war to go unavenged, it was a greater wrong to permit the latter. In other words, for a variety of reasons discussed below, if the Security Council had not created the ICTY, a criminal tribunal to redress the crimes of the war probably would not have been established. Thus, the ICTY’s Appeals Chamber and the Security Council had to choose between illegal creation or no creation. Fortunately and wisely, both chose illegal creation, and as a result, numerous criminals have been brought to justice.

Part I of this article provides a general overview of the war in Yugoslavia with special attention given to the ethnic tensions of the region. Part II examines both the history of international criminal tribunals and the establishment of the ICTY. Part III of this article focuses solely on the illegal establishment of the ICTY through a detailed analysis of Prosecutor v. Dusko Tadic. Finally, Part IV provides some general conclusions and analyses about the ICTY’s establishment and the need of the Security Council and the ICTY to hurdle, or at least sidestep, traditional jurisprudential procedures to respond to the war in Yugoslavia.

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13 See infra notes 68–92 and accompanying text.
16 See infra notes 20–56 and accompanying text.
17 See infra notes 57–92 and accompanying text.
18 Prosecutor v. Dusko Tadic, Defense Motions, ICTY Case No. IT-94-1-T (June 23, 1995); see infra notes 93–169 and accompanying text.
19 See infra notes 170–74 and accompanying text.
I. Overview of the Yugoslavian Conflict

From St. Vitus Day in the year 1389 to the assassination of the Archduke Francis Ferdinand in 1914, the Balkan region has been plagued with over five centuries of conflict, ethnic tensions, and civil strife.20 Greatly oversimplified, the basic genesis of the ethnic disharmony in the region stems from the time of Ottoman rule. Under Ottoman control, the Balkans’ inhabitants were given the option of either converting to Islam or preserving their culture and facing subordination, extreme taxation, and subjugation.21 Serbs often considered this conversion to Islam as a “betrayal of the true faith.”22 This resulted in a tear in the fabric of the Balkan populace that remains to be mended.23

In 1919, the Peace of Paris established the “Land of the South Slavs” or Yugoslavia.24 During the ephemeral and fleeting peace, Serbs, Croats, Slovenes, Macedonians, and other ethnic groups joined together in a most unorthodox and uncomfortable union.25 This congregation of ethnicities could not withstand the strains and assaults of World War II, and it was again divided and fighting by 1941.26 Divisions and fighting led to movements for independence, ethnic cleansing, and general upheaval within the region.27 These perilous conditions ultimately guided Marshall Josip Broz Tito to power.28 To some, Tito, the post World War II leader of Yugoslavia, was considered to be a master statesman for his ability to unite an ethnically diverse nation and successfully challenge Joseph Stalin.29 In actuality, Tito was a brutal leader

20 Griffin, supra note 8, at 422.
22 Id. at 22 (citing ARTHUR L. CLARK, BOSNIA, WHAT EVERY AMERICAN SHOULD KNOW 77 (1996)).
23 Id. (describing the history of the Yugoslav conflict and the sources of lingering ethnic tensions in the Balkans).
24 Id. at 23.
25 Id.
26 Id.
27 Id.
28 Id. at 24.
29 See Josip Broz Tito, Premier of Yugoslavia, CNN Interactive, at
who used ferocious secret police and the fragmentation of Yugoslavia’s ethnic groups to maintain his preeminence. By dividing Yugoslavia’s ethnic groups, Tito replaced nationalism and the ethnic struggle with Communism and the class struggle.

Tito’s method of political success prompted one scholar to remark, his “formula for unity could not survive without his persona and total authority.” This comment proved meritorious. Starting with Tito’s death in 1980 and continuing throughout the decade, severe economic hardship, weak central leadership, and the exploitation of nationalistic sentiments by politicians condemned Yugoslavia to destabilization and destruction.

The ethnic and religious divisions between the six republics and two provinces of Yugoslavia began to widen. Some believe that the Serbs maintained an enduring animosity towards Muslims originating from their conversion to Islam centuries earlier. Whatever the source of the fissure, its expansion was fueled by nationalistic passions carried to fetishistic proportions.

This fervor was stirred and enflamed by orators and politicians who desired power and control. The Serbian ultra-nationalist

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31 See id. at 119–20.
33 Ungar, supra note 5, at 682.
36 SCHARF, supra note 21, at 22 (citing CLARK, supra note 22, at 77).
Slobodan Milosevic perfected this tactic. He purposefully encouraged both ethnically directed violence and ethnic fanaticism. Milosevic reminded Serbs of the Ottoman rule and past cruelties against the Serbs. In a Nazi-like manner, Milosevic used propaganda and rhetoric to incite hatred and racism and called for the creation of a “Greater Serbia.”

Although the precise cause of the war in Yugoslavia remains unsettled, what is beyond debate is that following the collapse of communism, the Yugoslavian democratic elections proved only to test voters’ ethnic loyalties and inevitably confirmed the total disintegration of Yugoslavia. The former Yugoslavia was a nation torn by “ancient ethnic hatreds” and fervent nationalism. These explosive factors led to the outbreak of war in Yugoslavia and the documentation of “widespread use of organized massacres, destruction of towns and villages, [and] systematic and repeated rape [and] torture.” Murders, physical abuse, mass graves, ethnic cleansing, concentration camps, and sexual enslavement became the way of the land.

The United Nations, in general, failed in its efforts to arrest the atrocities in the former Yugoslavia and was unable to halt the

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39 KAUFMAN, supra note 34, at 165.
40 Griffin, supra note 8, at 424 (citation omitted).
41 Ungar, supra note 5, at 682.
42 Kalinauskas, supra note 38, at 387–88.
43 For a brief review of the numerous competing theories explaining the origins of the Yugoslavian wars see Kalinauskas, supra note 38, at 387–88.
44 Id. at 387.
45 Id. at 388.
46 Penny, supra note 35, at 263.
47 Kalinauskas, supra note 38, at 390.
49 Griffin, supra note 8, at 425.
50 Cereste, supra note 4, at 914.
51 Griffin, supra note 8, at 425; Kalinauskas, supra note 38, at 390.
ethnic cleansing.\textsuperscript{52} Arms embargoes, "no fly" zones, safe zones, and peacekeeping forces had little impact on the fighting.\textsuperscript{53} The Yugoslavian war, especially the Bosnian conflict, persisted until NATO employed a strategy of continued and "systematic" air strikes.\textsuperscript{54} These strikes eventually led to the Dayton Peace Accords, the peace agreement that ended the Yugoslavian war.\textsuperscript{55} After failing to a large extent to halt the slaughter and bloodshed of the war, the United Nations Security Council, on May 25, 1993, established the International Criminal Tribunal for the Former Yugoslavia.\textsuperscript{56}

II. The ICTY

\textit{A. The Background of ICTs}

The United Nations Security Council possesses the "primary responsibility for the maintenance of international peace and security."\textsuperscript{57} Charged with this mission, the Security Council formed the ICTY in response to the atrocities that took place in the former Yugoslavia.\textsuperscript{58} The Tribunal’s mandate was to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."\textsuperscript{59} The ICTY was the result of the first endeavor of the Security Council to establish an international criminal tribunal.\textsuperscript{60}

Although far from common occurrences, international

\textsuperscript{52} Griffin, \textit{supra} note 8, at 425.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} Kalinauskas, \textit{supra} note 38, at 391 (citations omitted).


\textsuperscript{56} M. Cherif Bassiouuni \& Peter Manikas, \textit{The Law of the International Criminal Tribunal for the Former Yugoslavia} 199–201 (1996); Griffin, \textit{supra} note 8, at 426.

\textsuperscript{57} U.N. \textit{Charter} art. 24, para. 1.


\textsuperscript{60} Karnavas, \textit{supra} note 48, at 20.
prosecutions are not entirely novel to the global community. Following World War II, the International Military Tribunal at Nuremberg (1945-1946) and the International Military Tribunal at Tokyo (1946-1948) were established to prosecute German and Japanese war criminals respectively. The Nuremberg and Tokyo Tribunals were "neither [pure] criminal nor international" institutions. Rather they were multinational and military in nature. The Nuremberg and Tokyo Tribunals were the victors' spoils—established through treaty by the four major victorious nations of the war to punish the crimes of the defeated. Despite the fact that both the Nuremberg and Tokyo Tribunals and the ICTY prosecuted war criminals, they differed substantially from one another and were formed under inherently different conditions.

The ICTY is neither multinational nor military in character. It is the product of an empowered international community and serves as a mechanism for advancing "reconciliation and restoring true peace." The ICTY is committed to "expand[ing] the jurisprudence of international humanitarian law [and raising] the international community’s level of consciousness regarding the need of states to enforce international norms." In other words, the ICTY is a collectively established international judicial institution created to redress brutal humanitarian violations.

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61 In general, international judicial bodies can be grouped into two classifications: traditional judicial institutions and quasi-judicial dispute settlement or implementation control bodies. Human rights tribunals are usually considered members of the latter. Tiefenbrun, supra note 7, at 560.

62 Karnavas, supra note 48, at 20.

63 Id.

64 Id.

65 Id.

66 Cissé, supra note 10, at 104.

67 Karnavas, supra note 48, at 21 (citations omitted).

B. The Establishment of the ICTY

As mentioned above, the Security Council's principal charge is the preservation of "international peace and security." As such, following the reports of international law violations within Yugoslavia, the Council, through Resolution 780, formed the Commission of Experts for the former Yugoslavia. The Commission, headed by M. Cherif Bassiouni, was established to investigate the validity of these alleged violations. Only three months after its commencement, the Commission verified that severe violations of international humanitarian law were committed within the region of the former Yugoslavia. The Commission recommended the formation of an ad hoc criminal tribunal to remedy the violations.

Heeding the determinations of the Commission, the Security Council through Resolution 808, recognized that the situation in Yugoslavia "constitute[d] a threat to international peace and security." This declaration satisfied the procedural requirements of Article 39 of the U.N. Charter and authorized the Security Council to use its Article 41 and 42 powers. These powers were granted to the Council "as enforcement measures to restore international peace and security."

Article 42 permits military action, while Article 41 provides

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68 U.N. CHARTER art. 24, para. 1.
70 Mr. Bassiouni currently serves as president of DePaul University's International Human Rights Law Institute, the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, and the International Association of Penal Law in Paris, France.
71 Kalinauskas, supra note 38, at 393.
72 Id.
73 STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 166 (1997).
75 U.N. CHARTER art. 39, para. 1.
76 Cissé, supra note 10, at 106.
for the use of non-military measures.\textsuperscript{77} In general, Article 41 sanctions the partial or total stoppage of economic interaction, diplomatic relations, and channels of communication.\textsuperscript{78} The Council decided to act via its Article 41 powers. Accordingly, the Council adopted Resolution 827,\textsuperscript{79} which created the ICTY by powers the Council believed were conferred to it under Chapter VII, Article 41 of the U.N. Charter.\textsuperscript{80}

The specific mandate of the ICTY was to fulfill a fourfold mission: (1) to bring justice to persons allegedly responsible for violations of international humanitarian law; (2) to render justice to the victims; (3) to deter further crimes, and; (4) to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.\textsuperscript{81} Some believed the Security Council did not possess the power to create an ICT.\textsuperscript{82} For instance, one scholar remarked, “the creation of the Tribunal amounted to an unacceptable stretching of the powers conferred to the Security Council by Chapter VII [Art. 41] of the Charter.”\textsuperscript{83}

During the formative process of the ICTY, some nations recommended that a judicial tribunal should be established by treaty.\textsuperscript{84} Even the Secretary-General recognized that the customary manner of creating an international tribunal was by multilateral treaty.\textsuperscript{85} That notwithstanding, the ICTY was established unilaterally through a Security Council resolution—without employing the more “representative and democratic forum of the

\textsuperscript{77} U.N. CHARTER art. 41, para. 1; art. 42, para. 1.
\textsuperscript{78} See id. at art. 41, para. 1.
\textsuperscript{79} Resolution 827 exhibited the Council’s “grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia ... including reports of mass killings, massive, organized and systematic detention and rape of women and the continuance of the practice of ‘ethnic cleansing.’” S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/RES/827 (1993).
\textsuperscript{80} Karnavas, \textit{supra} note 48, at 21.
\textsuperscript{82} Barboza, \textit{supra} note 15, at 128; see Karnavas, \textit{supra} note 48, at 23.
\textsuperscript{83} Barboza, \textit{supra} note 15, at 128.
\textsuperscript{84} Koran, \textit{supra} note 58, at 48. Specifically, the nations that suggested the ICTY be formed by treaty were: China, Brazil, Mexico, Russia, and Yugoslavia. \textit{id.} at 48 n.29.
\textsuperscript{85} Kalinauskas, \textit{supra} note 38, at 394.
General Assembly." The Secretary-General stated that the Tribunal’s creation by the Security Council had two distinct advantages over treaty establishment. The benefits of Council resolution were expediency and the instant binding of all U.N. member nations to the ICTY’s mandate.

An additional advantage to the Council’s resolution as opposed to treaty, as noted by the Secretary-General, was that “there could be no guarantee that [treaty] ratifications w[ould] be received from those States which should be parties to the treaty if it is to be truly effective.” In other words, the Secretary-General worried that the establishment of the ICTY by treaty would not, even after lengthy debate and frequent compromise, gain endorsement by certain key states. It is critical to stress that the creation of the ICTY by treaty would have taken a significant amount of time; it would have been diluted by extensive compromises; and it may never have been ratified by material nations. Thus, the Security Council’s action was inventive and clever, albeit unlawful.

This sly maneuver by the Security Council prompted one

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86 Koran, *supra* note 58, at 48.

87 1 Virginia Morris & Michael Schraf, *An Insider’s Guide to the International Criminal Tribunal of the Former Yugoslavia: A Documentary History and Analysis* 42 (1995). Alternatively, several advantages would have existed had the Tribunal been established by treaty, including:

(1) the participation of all the United Nations member states in the establishment of the tribunal would endow it with greater legitimacy; (2) signatory states to a treaty establishing the Tribunal could not later dispute the legitimacy of the establishment of the Tribunal; and (3) the participation by such a generality of states . . . would provide evidence of the consensus required to create international customary law, which would eventually bind even non-signatory states.

Koran, *supra* note 58, at 48 (citations omitted).

88 The alacrity with which the Tribunal was formed left several notable drafting ambiguities, the most remarkable of these being that both the prosecutor and the accused can appeal the final judgments rendered by the Trial Chamber. Koran, *supra* note 58, at 46. This language seems to allow the prosecution to appeal the acquittal of the accused. Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 Syracuse J. Int’l L. & Com. 1, 26 (1996).

89 Kalinauskas, *supra* note 38, at 394.


91 Koran, *supra* note 58, at 49.
scholar to remark, "[i]t appears that the Security Council usurped General Assembly powers so that states such as . . . the former Yugoslavia . . . would have little or no voice in . . . the setting of parameters for" the ICTY. In other words, the Council may have formed the ICTY through resolution rather than treaty to force nations that otherwise would not have ratified the treaty to be, nonetheless, bound by it. Speculations such as these, along with several other factors discussed above, predestined the ICTY’s establishment to be suspect and its lawfulness questioned.

III. The Illegality of the ICTY’s Establishment

In examining the legitimacy of the ICTY’s creation, the questions of whether an international criminal tribunal should have been formed and whether the acts committed in the former Yugoslavia were severe violations of humanitarian law are wholly distinct from whether the ICTY was formed according to rule. It would be comfortable to focus exclusively on the repugnancy of the offenses and the need for the ICTY and neglect the manner and process by which it was created. Stated differently, "[t]he question of the criminality of the atrocities that occurred in the former Yugoslavia is distinguishable from the question of which courts have jurisdiction to try those accused of these offenses." The jurisdiction to try those accused came under scrutiny in the Tribunal’s first case, Prosecutor v. Dusko Tadic.

A. Prosecutor v. Dusko Tadic

On May 7, 1996, Dusko Tadic became the first accused to go to trial before the ICTY. Prior to the war, Tadic was the proprietor of a pub and an instructor of karate in a primarily Muslim town. As the war progressed, Tadic became a "freelance torturer [and] murderer" and is presumed to have killed his best friend for

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92 Karnavas, supra note 48, at 23.
93 Koran, supra note 58, at 44.
94 Defense Motions, ICTY Case No. IT-94-1-T (June 23, 1995).
95 Dusko Tadic is also known as Dusan Tadic. See e.g. Prosecutor v. Dusko Tadic a.k.a. “Dule” a.k.a. Dusan, Indictment (Amended), ICTY Case No. IT-94-1-T (Sept. 26, 1995).
96 SCHARF, supra note 21, at 8.
97 Id. at 100.
Tadic was charged in a thirty-four count indictment with “grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity.” More specifically, the indictment alleged that Tadic “murdered, raped, and assaulted numerous victims” at a Bosnian Serb detention facility. Ultimately, Tadic was convicted of committing crimes against humanity and violations of the laws of customs of war and sentenced to twenty-five years of incarceration.

Tadic’s first pre-trial motion, Defense Motion on the Jurisdiction of the Tribunal (Motion), claimed several grounds upon which the ICTY lacked jurisdiction as a judicial body. Tadic raised “a series of constitutional issues which all turn[ed] on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action[s] or measures can be taken under [it].” More specifically, Tadic’s Motion asserted a want of jurisdiction on three premises: “(1) the Security Council lacked the power to establish the Tribunal [and] its establishment was unlawful; (2) the primacy jurisdiction conferred upon the Tribunal had no basis in international law; and (3) the Tribunal lacked subject-matter jurisdiction.”

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98 Id. at 96.
103 Prosecutor v. Dusko Tadic, Defense Motion on the Jurisdiction of the Tribunal, ICTY Case No. IT-94-1-T (June 23, 1995).
It is essential to bear in mind that if Tadic were to prevail on any one of his challenges to the ICTY’s legitimacy, there would have been two probable consequences: he would have been acquitted and the notion of the ICTY would have been shattered. The Tribunal’s judges were conscious of both outcomes.

The Trial Chamber dismissed Tadic’s Motion with regards to both primacy and subject-matter jurisdiction, but deemed itself incompetent to decide the legitimacy of the ICTY’s creation. The Trial Chamber considered itself without the authority to assess the legality of the Council’s establishment of the Tribunal and its exercise of jurisdiction over individuals. The Trial Chamber held, generally, that the Security Council’s determination that a threat to the peace existed in Yugoslavia was “a nonjusticiable, political question inappropriate for judicial review.”

Due to the fact that Tadic’s Motion disputed the jurisdiction of the ICTY, Tadic was granted an interlocutory appeal to the ICTY’s Appeals Chamber. This type of direct and immediate appeal is authorized by the Tribunal’s statute only for challenges to the Tribunal’s jurisdiction. Unlike the Trial Chamber, the Appeals Chamber believed that it was “la compétence de la compétence” or that it possessed the jurisdiction to decide its own jurisdiction.

105 Corey, supra note 101, at 148 (citations omitted).
106 Ungar, supra note 5, at 690.
107 Stringer & Amann, supra note 100, at 616.
108 Id. at 617. In making this decision, the Trial Chamber relied, in part, upon the United States Supreme Court’s opinion in Baker v. Carr, 369 U.S. 186, 217 (1962). Id.
109 SCHRAF, supra note 21, at 104.
110 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence 72(B), U.N. Doc. IT/32/Rev.24 (amended July 2002); Koran, supra note 58, at 51.
111 Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY No. IT-94-1-AR72, para. 18 (Oct. 2, 1995). It has been suggested that because explication of the U.N. Charter would have political repercussions, the Appeals Chamber should have followed the Trial Chamber’s lead and deemed an assessment of the Tribunal’s jurisdiction to be a political question. Koran, supra note 58, at 67; see José E. Alvarez, Nuremberg Revisited: The Tadic Case, 7 EUR. J. INT’L L. 245, 254–55 (1996).
Accordingly, the Appeals Chamber held that it could determine the legitimacy of the Council’s establishment of the ICTY.\textsuperscript{112} The Appeals Chamber, in making this determination examined Tadic’s three-pronged attack of the legality of the Security Council’s creation of the ICTY.\textsuperscript{113} Tadic contended:

(a) that the establishment of [the] Tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII... ; (b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ...; and (c) that] the establishment of the International Tribunal... has not been established by law.\textsuperscript{114}

The Appeals Chamber ultimately rejected all of these claims and concluded that the Council had, in fact, acted within the scope of its authority.\textsuperscript{115} This article asserts that Tadic’s first two challenges to the ICTY’s creation were valid and that the ICTY was, in fact, established illegally.

1. ICTY’s Formation Exceeded Security Council Chapter VII Authority

In denying the allegation that the framers of the Charter did not contemplate the creation of the ICTY (or a similar entity), the Appeals Chamber began its analysis by recognizing that the formation of a tribunal is not explicitly delineated as an enforcement option in either Article 41 or 42 of the Charter.\textsuperscript{116} As previously stated, Article 42 involves military peacekeeping enforcement measures, while Article 41 offers non-military

\begin{footnotes}
\footnote{112}{King, \textit{supra} note 15, at 515.}
\footnote{113}{Tadic actually attacked the ICTY’s establishment on four grounds. Prosecutor v. Dusko Tadic, Opinion and Judgment, ICTY No. IT-94-I-T (May 7, 1997). The fourth allegation maintained that the ICTY, a judicial tribunal, was not an effective or sensible method to restore peace to the Yugoslavian region and, thus, was unlawfully established by the Council as a measure to maintain the peace. \textit{Id.} The Chamber promptly and appropriately rejected Tadic’s claim and noted that the Security Council enjoys “wide discretionary powers in this regard” and no legal or valid formula exists to evaluate the Council’s decisions ex post facto. \textit{Id.} This article concurs with the Appeals Chamber that the measures the Council chooses to enforce the peace cannot be retrospectively second-guessed based upon their effectiveness. As such, this unmeritorious assertion of Tadic’s will not be addressed beyond mention in this footnote.}
\footnote{114}{\textit{Tadic}, ICTY No. IT-94-I-T, at para. 32, 40.}
\footnote{115}{King, \textit{supra} note 15, at 515.}
\footnote{116}{\textit{Tadic}, ICTY No. IT-94-I-T, at para. 33.}
\end{footnotes}
Specifically, Article 41 states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.¹¹⁸

Tadic argued that the Article suggests measures such as interruptions to economic, political, and communicative relations, and neither alludes to nor permits the formation of a judicial body.¹¹⁹

The Appeals Chamber’s response to Tadic’s contention focused upon the statutory construction of the Article.¹²⁰ The Chamber noted that it was clear that the “measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve ‘the use of force.’ It is a negative definition.”¹²¹ In other words, the list of possible enforcement measures in Article 41 is not exhaustive, simply illustrative.¹²² Consequently, the Appeals Chamber concluded that the establishment of the ICTY “falls squarely within the powers of the Security Council.”¹²³

The Appeals Chamber’s examination of the Security Council’s Article 41 powers, however, failed to heed a basic canon of statutory interpretation—ejusdem generis.¹²⁴ Ejusdem generis or “of the same genus” is a “canon of construction holding that when a general word or phrase follows an enumeration of specific persons or things, the general word or phrase will be construed as applying only to persons or things of the class within which the

¹¹⁷ U.N. CHARTER art. 41, para. 1; art. 42, para. 1.
¹¹⁸ Id. at art. 41, para. 1.
¹¹⁹ Tadic, ICTY No. IT-94-1-T, at para. 34. Tadic additionally maintained that the actions mentioned in Article 41 are those taken by Member States. This is not the case, however, with the creation of the ICTY. Id.
¹²⁰ Id. at para. 35.
¹²¹ Id.
¹²² Id.
¹²³ Id. at para. 36.
¹²⁴ See BLACK’S LAW DICTIONARY 218 (Pocket ed. 1998).
specific types fall." In other words, when a list of options is referred to by a broad phrase, that broad phrase will be interpreted to include only those options in that same general category or in the same genus as the list of options. For instance, "in the phrase horses, cattle, sheep, pigs, goats, or any other barnyard animal, the general language any other barnyard animal—despite its seeming breadth—would probably be held as applying only to four-legged, hoofed mammals (and thus would exclude chickens)."

In applying this canon of construction to Article 41, it becomes evident that the creation of the Tribunal was beyond the scope of permissible Security Council action. Article 41 lists several acceptable measures that the Council may take under circumstances where a threat to the peace, a breach of the peace, or an act of aggression exists. They all, however, involve a limited or complete stoppage of economic, political, or communicative ties. As such, the general phrase that the Council may choose what non-military means can be used to effectuate the ends of its decisions, while seemingly limitless, should have been construed to include only measures of the same kind as the listed measures (e.g., interruptions to economic, political, or communicative ties).


126 BLACK'S LAW DICTIONARY, supra note 124, at 218.

127 Id.

128 U.N. CHARTER art. 41, para. 1.

129 See id.
In addition, another judicial principle, the Rule of Lenity, further suggests that the Appeals Chamber interpreted Article 41 incorrectly. The Rule of Lenity states “that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient sentence.” Stated differently, the Rule of Lenity requires that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”

In the situation regarding the ICTY, the Security Council was effectively exercising penal powers. Examination and analysis of penal statutes demand restrictive interpretations of those statutes. Accordingly, because the establishment of the ICTY could and eventually did result in the punishment of Tadic, the Appeals Chamber should have resolved all questions or ambiguities in the statute (Article 41) with a narrow interpretation and in Tadic’s favor. The Rule of Lenity required the conclusion that the questionable establishment of the ICTY be resolved in favor of Tadic and, consequently, the establishment was beyond the realm of the Security Council’s authority. Subsequently, the Appeals Chamber misapplied the doctrine of competence de la competence and sanctioned the exertion of jurisdiction by it over individuals.

In summary, had the Appeals Chamber properly observed the judicial doctrines of ejusdem generis and the Rule of Lenity, it would have recognized that the creation of the ICTY, while needed, was nevertheless, beyond the scope of the Council’s Chapter VII powers. As such, the ICTY was created through an

130 BLACK’S LAW DICTIONARY, supra note 124, at 557. Unlike the principle of ejusdem generis, the Rule of Lenity does not garner similar widespread international support.


132 Id.

133 See id.

134 Additionally, it is worth notation that the U.N. was established and Article 41 was drafted close in time to the creation of the Nuremberg and Tokyo Tribunals. WORLD ALMANAC BOOKS, THE WORLD ALMANAC AND BOOK OF FACTS 2000 593 (1999) (these three institutions were established shortly after the end of World War II). As such, the absence of any mention of a Security Council power to establish a criminal tribunal in Article 41, further supports the conclusion that the Charter’s drafters did not intend for the Council to possess such a power.
illegitimate process, and accordingly did not possess the
jurisdiction to try Tadic or anyone else.\textsuperscript{135}

2. \textit{The Security Council is Constitutionally Incapable of
Creating a Judicial Entity}

Tadic’s next challenge asserted, essentially, that because the
Security Council did not possess judicial powers itself, it could not
create a subsidiary organ with judicial powers.\textsuperscript{136} The Appeals
Chamber summarily rejected this contention.\textsuperscript{137} It stated that this
notion of U.N. jurisprudence was “untenable” and “result[ed] from
a fundamental misunderstanding of the constitutional set-up of the
Charter.”\textsuperscript{138}

Generally, Tadic contested the formation of the Tribunal
because the Charter created the Security Council as an executive body.\textsuperscript{139} He maintained that the Council possessed no judicial
powers and, consequently, could not delegate or exercise judicial
functions through a subordinate body.\textsuperscript{140}

The Chamber began its analysis of Tadic’s position by
correctly noting that the Council is clearly neither a judicial body
nor in possession of judicial authority.\textsuperscript{141} Notwithstanding that,
the Chamber recognized that the Council is charged with the duty
to maintain global peace and security.\textsuperscript{142} The Chamber averred
that the creation of the ICTY was merely the Council acting in its
capacity as international peacekeeper.\textsuperscript{143} The Tribunal’s
establishment was the means chosen by the Council to fulfill its
mission of maintaining peace and security.\textsuperscript{144} Precisely, the
Chamber stated the Council could establish a “judicial organ in the
form of an international criminal tribunal as an instrument for the
exercise of its own primary function of maintenance of peace and

\textsuperscript{135} See supra notes 105–24.
\textsuperscript{136} Tadic, ICTY No. IT-94-I-T, at para. 37.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} See id.
\textsuperscript{143} Id. at para. 38.
\textsuperscript{144} Id.
Accordingly, the Appeals Chamber held that the Council’s formation of the ICTY was a permissible action.\(^4\)

The Chamber continued this line of reasoning by stating that the establishment of the Tribunal was neither an improper delegation of power by the Council nor a seizure of judicial power from another U.N. body.\(^4\) Rather, the establishment of the ICTY was an acceptable Council action in light of the Council’s mandate and because no specific organ of the U.N. is expressly charged or empowered with the establishment of secondary organizations.\(^4\)

With specific regard to the creation of secondary organizations, the Appeals Chamber noted that a primary U.N. organ’s creation of a secondary organ did not require particularized powers.\(^4\) By way of example, the Chamber explained that the General Assembly had created such subsidiary bodies as the U.N. Emergency Force in the Middle East and the U.N. Administrative Tribunal.\(^4\) As such, the Appeals Chamber concluded that the Security Council’s creation of the ICTY was constitutionally permissible (1) because it was the measure the Council deemed appropriate to fulfill its mission of maintaining peace and security and (2) because the Tribunal’s formation neither required delineated powers nor usurped authority from another U.N. body.

Although the Chamber’s analysis is convincing at first glance, its reading of the Charter again misconstrues the precise language of the Charter. Article 29 of the Charter states, “[t]he Security Council may establish subsidiary organs as it deems necessary for the performance of its functions.”\(^\text{151}\) Bearing in mind that the function of the Security Council is the maintenance of international peace, the Security Council can create such subsidiary organs to maintain international peace and the Appeals Chamber aptly noted this fact.\(^\text{152}\)

\(^{145}\) Id.

\(^{146}\) Id. at para. 37–38.

\(^{147}\) Id. at para. 38.

\(^{148}\) King, supra note 15, at 561.

\(^{149}\) Id.

\(^{150}\) Tadic, ICTY No. IT-94-I-T, at para. 38.

\(^{151}\) U.N. CHARTER art. 29, para. 1.

\(^{152}\) See Tadic, ICTY No. IT-94-I-T, at para. 38.
The Appeals Chamber neglected, however, to heed the boundaries of this ostensibly limitless interpretation. The boundaries are contained in Chapter VII of the Charter. They delineate the manners by which the Council may perform its function and, consequently, the manners by which a Security Council’s secondary organ can perform its functions. In other words, the Council and its subsidiary organs may act to maintain international peace only in manners permitted by Chapter VII. As this article asserted previously, the Security Council cannot unilaterally create a judicial tribunal and, accordingly, cannot delegate that function to a subsidiary organ.

It is beyond question that the Security Council can establish subsidiary organs to carry out its mission of preserving international peace and security. The manners by which the Council can exercise its powers of maintaining international peace and security, however, must conform to the means permitted in Chapter VII of the Charter. As such, because the creation of a judicial tribunal is not a means by which the Council may maintain the peace, it was improper for the Council to form a subsidiary organ to effectuate that purpose—and a second example of how the ICTY was established unlawfully.

3. The ICTY was not “Established by Law”

Tadic’s third and final challenge alleged that the ICTY was not “established by law” and, therefore, violated Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides, in pertinent part, that “[i]n the determination of any criminal charge against [the accused], or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

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154 Id.
155 Id. at art. 29, para. 1.
157 International Covenant on Civil and Political Rights, Article 14, para. 1 (emphasis added).
Tadic argued that the phrase “established by law” meant “established by a legislature.”\textsuperscript{158} He contended that the formation of ICTY was purely the decision of the executive and was not a decision made with the “democratic control necessary to create a judicial organisation in a democratic society.”\textsuperscript{159} Consequently, because the ICTY was not created by the “legislature,” Tadic alleged that it was not “established by law.”\textsuperscript{160}

The Appeals Chamber acknowledged that Tadic’s interpretation of “established by law” was a reasonable one and that other courts had adopted it.\textsuperscript{161} Ultimately, however, the Chamber rejected Tadic’s interpretation because the United Nations did not “technically” possess a legislative body.\textsuperscript{162} The Chamber stated that the structure of the U.N. did not permit such a “separation of powers analysis” and the duty of being “established by law” was not applicable in the same manner in the international arena.\textsuperscript{163}

The Chamber noted that another interpretation of “established by law” is more discerning and applicable in the international setting.\textsuperscript{164} The Chamber embraced an interpretation of “established by law” meaning that a court or tribunal must be created “in accordance with the rule of law.”\textsuperscript{165} In other words, the ICTY and other international tribunals “must be established in

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\textsuperscript{158} Tadic, ICTY No. IT-94-1-T, at para. 43.  \\
\textsuperscript{159} Id. (citation omitted).  \\
\textsuperscript{160} Id.  \\
\textsuperscript{161} The Court noted that the European Convention on Human Rights had adopted such an interpretation of “established by law.” Id. (citations omitted).  \\
\textsuperscript{162} Id.; Ungar, supra note 5, at 691.  \\
\textsuperscript{163} Tadic, ICTY No. IT-94-1-T, at para. 43; ACKERMAN & O’SULLIVAN, supra note 156, at 7–8.  \\
\textsuperscript{164} Tadic, ICTY No. IT-94-1-T, at para. 45. The Tribunal opined that this alternative interpretation is more applicable in the international setting because it is in “full conformity with internationally recognized human rights instruments.” Id.  \\
\textsuperscript{165} Id. An additional interpretation of “established by law” may be gleaned through an examination of its alternative—“established arbitrarily.” In other words, the ICCPR’s prerequisite that courts be “established by law” may mean that judicial bodies must possess certain protective measures against dictatorial or capricious formation. Although the Chamber did not adopt this interpretation, it garners support with some preeminent international criminal law scholars, such as Professor Johan Van der Vyver. See Johan Van der Vyver, International Criminal Law Lecture at Emory University School of Law (Spring 2002).
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accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments." The Chamber concluded, after an examination of the ICTY’s Rules of Procedure and Evidence, that the Tribunal had been established in conformity with the rule of law and, thus, was “established by law.”

The Chamber’s analysis and eventual rejection of Tadic’s interpretation of “established by law” was a sound jurisprudential decision. The ICCPR’s main concerns with regard to courts or tribunals being “established by law” are due process and fairness concerns. The ICTY’s Rules of Procedure and Evidence secure the highest standards of its judges and “other provisions in the Rules ensure equality of arms and fair trial[s].” Additionally, Article 21 of the ICTY’s Statute “adopted almost verbatim” the “fair trial guarantees” of the ICCPR. In sum, the ICTY ensures that the accused be afforded the protections contemplated under ICCPR Article 14 and, consequently, Tadic’s challenge that the ICTY was not “established by law” is unmeritorious and was appropriately rejected by the Appeals Chamber.

Conclusion

In the post-Cold War era, the Security Council has undergone a power metamorphosis. The Council has experienced unprecedented expansions in both the scope of its involvement and the authority exercised within that scope. For example, during the first four decades of the Council’s existence, it adopted approximately 650 resolutions; in the fifteen or so years since, it has adopted over 1000. Some scholars argue that the Security

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166 Tadic, ICTY No. IT-94-T-T, at para. 45.
167 Id. at para. 46–47.
168 See id. at para. 45.
169 Id. at para. 46; ACKERMAN & O’SULLIVAN, supra note 156, at 8.
170 Tadic, ICTY No. IT-94-I-T, at para. 46.
171 King, supra note 15, at 510.
Council acted, and continues to act, in manners "presumably unanticipated by its framers."173 The establishment of the ICTY was, in all likelihood, one of those manners. The question that persists, however, is whether Council inactivity was worse than its action in one of those "unanticipated manners."

Abraham Lincoln once said, "I would consent to any great evil, to avoid an even greater evil."174 Lincoln’s statement was referring to his acquiescence to the extension of slavery in order to preserve the unity of the United States.175 The international community and, more specifically, the ICTY’s Appeals Chamber were faced with an analogous situation with regard to the creation of the ICTY.

The Appeals Chamber was confronted with the unenviable choice of sanctioning the Security Council’s unlawful establishment of the ICTY or permitting Yugoslavian war criminals to evade responsibility for their ruthless acts. To compound the difficulty and complexity of the ICTY’s choice, the Appeals Chamber was cognizant of the fact that no other international body was capable of trying the Yugoslavian war criminals. Accordingly, the Chamber consented to the “great evil,” the illegal establishment of the ICTY, to avoid an even “greater evil,” the non-punishment of the war’s criminals.

It is essential to bear in mind that whether the ICTY was necessary or beneficial is a distinct question from whether its formation was legal. In other words, the fact that the ICTY was needed and has been effective in its aims does not make its creation lawful, although it may make its creation justifiable. Under traditional canons of judicial interpretation, the ICTY was established illegally. The Security Council exceeded its authority, departed from customary practices and, ultimately, was constitutionally incapable of establishing an international criminal tribunal.

The ICTY’s Appeals Chamber, however, was faced with a unique and compelling situation. It was forced to make a decision

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175 Id.
The Chamber, consequently, used some less than ideal interpretations and explications to, ultimately, provide and administer justice. The Yugoslavian situation called for an innovative and progressive response to an urgent situation. The Security Council acted, and the ICTY sanctioned its illegal actions—because it was the best of the imperfect solutions.

The age-old maxim “two wrongs don’t make a right” has finally faltered. In a situation where one wrong is the commission of heinous and brutal war crimes and the other wrong is the illegal establishment of a tribunal to try those criminals—two wrongs do make a right.

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176 Cf. Jeffrey W. Davis, Accidental Achievements: The Supreme Court has Improved Capital Punishment Jurisprudence—but not because it is Committed to the Principles of Furman v. Georgia, 10 J. S. LEGAL HIST. (forthcoming 2003) (arguing that in extraordinary circumstances failing to follow traditional canons of judicial interpretation and precedent can be both necessary and proper).

177 Id.

178 Id.

179 Id.