
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

FORM OF INDICTMENTS
IN
INTERNATIONAL CRIMINAL LAW

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I. Introduction and Summary of Conclusion

A. ISSUE

This research memorandum provides an analysis of the indictment process and seeks to provide a standard as to:

The rules on the form of criminal indictments that are applicable to an ad hoc international criminal tribunal.¹

B. PROCEDURAL LAW AND AD HOC COURTS

The United Nations Security Council established the Rwanda Tribunal "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda" ² Consequently, the Rwanda Tribunal is not a permanent court but rather an ad hoc creation and, therefore, a court of limited jurisdiction as provided in

¹ See United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topics No. 9, Facsimile dated 26 August 1998. The objective of this paper is to provide information for the question asked in the legal research document received from the prosecutor's office which in part asked for "the rules on the form of indictments in present international criminal law." *Id.* at 3.

² 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 117 (1998). See also 2 Virginia Morris & Michael P. Scharf (1998). S.C. Res. 955, U.N. SCOR, 49 Sess., at 20, U.N. Doc. S/INF/50 (1996).

Article 1 of the International Criminal Tribunal for Rwanda [hereinafter ICTR].³ The ad hoc nature of international criminal courts, past and present, has caused significant challenges as to the proper source of law for such areas as criminal procedure and evidence.⁴

Because there were no permanent codified rules of international criminal procedure⁵, Article 14 of the ICTR delegated authority to the tribunal judges to create a detailed criminal procedure process.⁶ This approach was

³ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 117 (1998). Article 1 of the ICTR provides the courts competence as follows:

The international Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

⁴ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 410-411 (1998).

⁵ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 410 (1998). "In the nearly fifty years since Nuremberg, the international community has taken great strides in the codification . . . of the substantive international criminal law . . . There has been no similar advancement, however, with respect to international criminal procedure and evidence rules." *Id.* at 410.

⁶ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 410 (1998) The problem surrounding the absence of a documented source for international criminal procedural law has been around since the most significant tribunal which was the Nuremberg Tribunal. "The Nuremberg Charter entrusted the four Chief Prosecutors with the task of preparing draft rules of procedure which the judges of the Nuremberg Tribunal were authorized 'to accept, with or without amendments, or to reject.'" *Id.* at 409. Although, the future establishment of ad hoc international criminal tribunals are, hopefully, a rare event, the need of a permanent international criminal tribunal is apparent as evidenced in the hurried approach to formulating criminal

also used by the International Criminal Tribunal for Yugoslavia [hereinafter ICTY].⁷ Although there was not much time to formulate the rules, many factors that guided the process were derived from human rights standards such as fairness and due process.⁸

Since the Rwanda Tribunal was established very shortly after the Yugoslavia Tribunal, the Yugoslavian rules of procedure and evidence were adopted by the Rwanda Tribunal "with such changes as [the Rwandan judges] deem[ed] necessary."⁹ Thus, Article 14,¹⁰ rules of procedure and

procedural rules which has occurred for every tribunal since World War II.

⁷ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 412 (1998). The justification for delegating authority to the judges was much like that of the Yugoslavia Tribunal. Some of the reasons were: "(1) the time constraints . . . in the light of the urgent need to establish the Rwanda Tribunal in order to bring to justice the major offenders . . . ; (2) the absence of any detailed proposals for rules of procedure and evidence by the sponsors . . . ; (3) the highly technical nature of criminal procedure and evidence rules which vary in different legal systems; and (4) the advantage of having the rules . . . drafted by judges who possessed the necessary expertise" *Id.* at 412.

⁸ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). "[T]he unprecedented development of international human rights law . . . include[s] a general standard for fair trial and due process in criminal proceedings . . ." *Id.* at 411. The principles of fairness and due process are important for the following reasons: "(1) to ensure respect for the individual rights of the suspect and the accused, (2) to ensure the legitimacy of the proceedings, and (3) to set an exemplary standard for similar proceedings before national courts or a permanent international criminal court." *Id.* at 411-412. See also U.N.GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948), Universal Declaration of Human Rights.

⁹ Virginia 1 Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 413 (1998). The Yugoslavia rules were adopted because the Yugoslavian tribunal "had completed the task of elaborating the first comprehensive code of international criminal procedure and

evidence, and Article 17,¹¹ investigation and preparation of indictment, establishes the present procedures that the Rwandan prosecutors must follow in conducting the

evidence in the history of international law." *Id.* at 413.

¹⁰ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 7 (1998). Article 14 provides:

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials, and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary. *Id.* at 7.

¹¹ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 8 (1998). Article 17 provides:

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

preliminary investigation as well as the submission of indictments to the trial chamber judges.¹²

C. SUMMARY OF CONCLUSIONS

At present, there are few codified sources of rules for criminal procedure and evidence that can be used by international criminal proceedings such as Rwanda.¹³ Historically, international criminal procedural law has been created on an ad hoc basis.¹⁴ Generally, the form of indictments in the United States must "identify the victim, as well as the time and the place of the incident."¹⁵

The rules governing the current form of indictments for the Rwanda Tribunal were developed on an ad hoc basis by the Yugoslavia Tribunal.¹⁶ Since the rules governing Rwanda procedural issues were adopted from the Yugoslavia Tribunal,

¹² See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). See generally Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997).

¹³ See 1 Virginia Morris & Michael P. Scharf, *International Criminal Tribunal for Rwanda* 410 (1998). See *supra* note 5.

¹⁴ See 1 Virginia Morris & Michael P. Scharf, *International Criminal Tribunal for Rwanda* 410 (1998).

¹⁵ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, *New York University Journal of International Law and Politics* 120, Vol. 30 (Fall 1997-Winter 1998).

¹⁶ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

the current Rwanda Tribunal is allowed to amend the existing rules in order to help facilitate a more efficient indictment process.¹⁷

Based on relevant domestic and international rules and precedent, the form of indictment must adequately "identify the victim . . . describe the place the incident occurred . . . , and . . . provide a sufficiently narrow time frame in which [the offense] is alleged to have occurred" ¹⁸

The following is a discussion of the indictment process using existing human rights standards as a guide to analyze the indictment process. Part II will briefly describe the factual background of the Rwanda Tribunal. Part III will provide a discussion concerning the standards, sources and rules associated with the indictment process. Part III will also discuss finding and enforcing procedural rules.

II. FACTUAL BACKGROUND

In November 1994, the United Nations Security Council, pursuant to Resolution 955, established the International

¹⁷ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

¹⁸ See Michael P. Scharf, Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal, *New York University, Journal of International Law and Politics* 120, Vol. 30 (Fall 1997-Winter 1998). Comparison of U.S. court standards on the form of indictment to issues concerning lack of specificity raised by the defense council in the *Tadic* case. See also *Prosecutor v. Tadic*, No. IT-94-I-T (May 7, 1997) (Opinion and Judgment).

Criminal Tribunal for Rwanda in response to acts of genocide committed in Rwanda from 1 January 1994 to 31 December 1994.¹⁹ The Rwanda Tribunal, an ad hoc creation, has the ultimate authority to investigate, indict, and prosecute all persons responsible for violating international humanitarian law.²⁰

III. LEGAL DISCUSSION

A. OVERVIEW OF INTERNATIONAL CRIMINAL PROCEDURE

First, this section begins by briefly discussing criminal procedure standards as set forth by the Universal Declaration of Human Rights [hereinafter Universal Declaration] which was adopted by the United Nations General Assembly on December 10, 1948.²¹ This section will also

¹⁹ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). "On 8 November 1994, the Security Council adopted Resolution 955 providing for the establishment of the Rwanda Tribunal" *Id.* at 72.

²⁰ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3-12 (1998). Volume 2 provides a complete text of the Statute of the International Tribunal for Rwanda, S/RES/955 (1994), 8 November 1994.

²¹ Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). The General Assembly proclaimed:

[T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and

discuss relevant provisions of the Covenant on Civil and Political Rights.

The Universal Declaration was an innovative document which supplied a preliminary basis for developing criminal procedure in the international criminal law area.²² However, since the creation of the Universal Declaration not much advancement has been made in codifying the procedural area of international criminal law as compared to substantive criminal law.²³

international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

²² See Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). The declaration expressed the concerns of the international community with respect to providing a uniform standard as to the protection of peoples rights who become involved in the criminal justice system. For example, Article 9 prohibits "arbitrary arrest and detention."

²³ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

In the nearly fifty years since Nuremberg, the international community has taken great strides in the codification and progressive development of the substantive international criminal law There has been no similar advancement, however, with respect to international criminal procedure and evidence rules. *Id.* at 410.

See also Keith Highet, Peter H.F. Bekker, Roger P. Alford, *International Courts and Tribunals* (1997). In a discussion concerning the creation of a permanent international criminal court, this article references the ILC Draft Statute concerning procedural rules. "Specific issues were also raised concerning procedural due process and the establishment of rules of criminal procedure, protection of the rights of the accused, rules of evidence, Procedural issues of particular importance included . . . cooperation with national judicial systems regarding indictment[s]" *Id.* at 610. Some delegations were "reluctant to adhere to the approach taken by the ad hoc tribunals in Yugoslavia and Rwanda, in which the judges were left to adopt substantive rules of

Historically, it seems that the international trend, particularly for criminal law procedural matters, has been to develop procedural rules on an ad hoc basis rather than establishing an internationally applicable criminal procedure code which is kept up to date.²⁴

This section will also discuss recent developments with respect to current standards governing international law criminal procedure. Third, this section will review the Yugoslavia Tribunal indictment process which was ultimately adopted by the Rwanda Tribunal. Finally, this section will briefly discuss some of the advantages of a permanent international criminal court.

1. Human Rights Standards

International Human Rights law helps to promote the notion of due process in the international criminal law arena and is a useful international source to analyze procedural standards associated with the criminal justice

procedures and evidence . . ." while others expressed concerns over the need of a substantive and permanent statute. *Id.* at 610.

²⁴ See M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* 28 (1987); Robert A. Freidlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 Case W. Res. J. Int'l L. 13, 17 (1983). International criminal law has evolved on an ad hoc basis and involves "over 300 instruments evolving over the past 175 years." See generally Keith Hight, Peter H.F. Bekker, & Roger P. Alford, *International Courts and Tribunals* (1997).

system.²⁵ International criminal tribunals, such as the Rwanda Tribunal, should always strive to comply with international human rights standards for the following reasons:

There can be no doubt of the importance of ensuring that the proceedings of the Rwanda Tribunal, as an international criminal tribunal, are conducted in accordance with international standards of fair trial and due process for the following reasons: (1) to ensure respect for the individual rights of the suspect and the accused, (2) to ensure the legitimacy of the proceedings, and (3) to set an exemplary standard for similar proceedings before national courts or a permanent international criminal court.²⁶

In 1948, the United Nations in adopting the Universal Declaration recognized the need of a standardized international criminal procedure to protect a person's human rights during pre-trial proceedings.²⁷ Notwithstanding the

²⁵ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). "[T]he unprecedented development of international human rights law . . . include[s] a general standard for fair trial and due process" *Id.* at 411. See also Universal Declaration. The Universal Declaration was adopted by 48 countries which signifies a universal belief that fairness in the international criminal justice system is fundamentally important.

²⁶ 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 411-412 (1998).

²⁷ See generally Malcolm N. Shaw, *International Law* (1997); Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* 894 (1991). "[S]ince international law is generally applicable only to states and does not normally create rights directly enforceable by individuals in national courts, international human rights law can in practice be made effective only if each nation makes these rules part of its own domestic legal system." *Id.* at 893.

fact that the Universal Declaration has no legally binding effect, it nevertheless provides the basic standards applicable to an international criminal justice system.²⁸

For example, provisions such as Article 9 of the Universal Declaration proscribes arbitrary arrest and confinement.²⁹ However, in summary, the Universal Declaration is of limited benefit to the international criminal justice system because it has no binding effect absent an enforcement mechanism such as multilateral treaties.³⁰

The United Nations General Assembly adopted the International Covenant on Civil and Political Rights [hereinafter International Covenant] on December 16, 1966.³¹

²⁸ See Malcolm N. Shaw, *International Law* (1997); See also *supra* note 32; Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997). Timothy L.H. McCormack & Gerry J. Simpson, *The Law of War Crimes* (1997); Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* (1991). There are also many international sources to human rights standards in addition to the Universal Declaration. For example, documents such as the International Covenant on Civil and Political Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms; American Convention on Human Rights; and the African Charter on Human and Peoples' Rights provides standards as to many procedural issues in the criminal justice arena.

²⁹ Universal Declaration of Human Rights. See Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* 352 (1991).

³⁰ See generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 *Vand. J. Transnat'l L.* 151, 155 (1992). For example, many treaties, such as prohibitions against terrorism have existed for years with "little effect because signatory nations have not complied with the terms."

³¹ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171. See Barry E. Carter & Phillip R. Trimble,

The International Covenant recognizes many principles that were contained in the Universal Declaration. For example, Article 14 (3) (a) states that everyone is guaranteed the right "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him" ³² In addition to the International Covenant, there are several regional human rights conventions that provide similar guidelines concerning the indictment process. ³³

2. CURRENT INTERNATIONAL STANDARDS

At present, international criminal law is generally void of any in-depth, codified and binding body of rules that establish permanent guidelines for criminal procedural issues such as investigations and indictment. ³⁴ For

International Law, Selected Documents 357 (1991).

³² International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

³³ See American Convention on Human Rights, November 22, 1969, 9 I.L.M. 673; European Convention For The Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3; African Charter on Human and Peoples' Rights (Banjul Charter) June 27, 1981, 21 I.L.M. 59.

³⁴ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). See generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 Vand. J. Transnat'l L. 151, 155 (1992). Generally, the procedural matters discussed in the Draft Statute for the proposed International Criminal Court were derived from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights; Steven R. Ratner & Jason S. Abrams,

example, the procedural rules used in support of the most recently created United Nations criminal tribunals, the ICTY and ICTR, were created very swiftly on an ad hoc basis.³⁵ The rules governing criminal procedure and evidence developed by the ICTY were subsequently adopted by the ICTR.³⁶

Procedural rules that are made on an ad hoc basis may inevitably lead to procedures that are either too vague or, worse, too comprehensive which may hinder the already complex work of the tribunal prosecutors.³⁷

The United Nations as well as most of the world community recognizes the need of a permanent criminal court that is fully equipped with administrative, logistical, and legal resources.³⁸ An international criminal court could

Accountability for Human Rights Atrocities in International Law (1997).

³⁵ See generally 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

³⁶ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). "[T]he Security Council provided in Article 14 of the Statute of the Rwanda Tribunal that its judges were to adopt the Rules of the Yugoslavia Tribunal" *Id.* at 413.

³⁷ See *supra* note 16. See generally Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997); G.M. Danilenko, *Law-Making in the International Community* (1993).

³⁸ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). "Nearly half a century after Nuremberg, the Security Council's decision to establish the Yugoslavia Tribunal gave rise to the need to formulate an international standard for the procedural and evidentiary aspects of proceedings" *Id.* at 410-411.

provide a timely judicial response to tragic world events such as the recent acts of genocide perpetrated in Yugoslavia and Rwanda.³⁹ The recognition of this need is evidenced by the preliminary work of the International Law Commission [hereinafter ILC] concerning the formation of a permanent international criminal court.⁴⁰

3. THE YUGOSLAVIA STANDARD

The current indictment process used by the Rwandan prosecutors was adopted from the Yugoslavia Tribunal as contained in the Statute of the International Tribunal for the Former Yugoslavia⁴¹ and the Yugoslavian Rules of

³⁹ See generally 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997); M. Cherif Bassiouni, *A Treatise on International Criminal Law*; McCormack & Simpson, *The Law of War Crimes* (1997). "An International [criminal] Court possessing criminal jurisdiction over individuals would mark a significant progression for international law" *Id.* at 230. There is also growing support in the United States Congress. For example, Senator Arlen Specter pushed a bill before Congress declaring "the United States should explore the need for the establishment of an international criminal court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions" Act of Nov. 5, 1990, Pub. L. No. 101-513, Section 599E, 1990 U.S.C.C.A.N. (104 Stat.) 1979, 2066.

⁴⁰ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). See generally Timothy L.H. McCormack & Gerry J. Simpson, *The Law of War Crimes* (1997).

⁴¹ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). See also Michael P. Scharf, *Balkan Justice* (1997). Article 18 provides critical guidelines concerning the preparation of the indictment. Article 18 requires that the accused be provided with "a concise statement of the facts of the case and of the

Procedure and Evidence.⁴² The relevant provisions concerning the indictment process are set out in Rule 47 of the Statute which specifies:

- (a) If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable

crime" *Id.* at 108. Indictments that lack specificity may pose problems. For example, in the Yugoslavia Tribunal's *Tadic* trial, the defense council "challenged the form of the indictment" by arguing that it lacked specificity. *Id.* at 107. The "trial chamber agreed that one incident . . . was excessively vague." *Id.* at 108. See generally Christine Van Den Wyngaert & Guy Stessens, *International Criminal Law (1996)*. Article 18, Investigation and preparation of indictment provides:

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payments by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

⁴² See International Criminal Tribunal for Yugoslavia, Rules of Procedure and Evidence, U.N.Doc. ITR/3/REV.1 (1995).

grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Register an indictment for confirmation by a Judge, together with supporting material.

- (b) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.
- (c) The Registrar shall forward the indictment and accompanying material to one of the Judges currently assigned under Rule 28, who will inform the Prosecutor of the date fixed for review of the indictment.
- (d) On reviewing the indictment, the Judge shall hear the Prosecutor, who may present additional material in support of any count. The Judge may confirm or dismiss each count or may adjourn the review.
- (e) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.⁴³

Rules 48-53 address several administrative issues related to the indictment process.⁴⁴ Generally, Rules 48 and 49, provide for options for joinder of the accused and

⁴³ Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also Christine Van Den Wyngaert & Guy Stessens, *International Criminal Law* (1996).

⁴⁴ See Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

provide for joinder of crimes.⁴⁵ Under Rule 50, the prosecutor may amend the indictment "without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, with leave of the Trial Chamber" ⁴⁶

Rule 51 makes available the withdrawal of indictments "without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, only with leave of the Trial Chamber" ⁴⁷

Pursuant to Rule 52, the indictment "shall be made public" and Rule 53 requires non-disclosure of the indictment until the accused are served.⁴⁸

The decision to adopt the Yugoslavian rules by the Rwanda Tribunal was probably the only practical and viable option for the following reasons: (1) both tribunals were established by the Security Council on an ad hoc basis and no other useful source of procedural rules was available,⁴⁹

⁴⁵ See Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

⁴⁶ Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

⁴⁷ Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

⁴⁸ Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. See also 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

⁴⁹ See John R.W.D. Jones, *The Practice of the International Criminal*

(2) the Tribunal for Rwanda needed to be established quickly so as to facilitate "the process of national reconciliation"⁵⁰ and, (3) the sharing of rules was "aimed at promoting consistency in the law and practice of the two tribunals, as well as efficiency."⁵¹

Current international human rights law provides useful guidelines as to the indictment process. A viable course of action would be to task the ILC to study the current indictment system and make recommendations for a system that is expeditious, efficient, and one that meets all due process requirements.⁵² In sum, the form of the indictment generally requires specificity with respect to the time, manner, and place of the offense.

4. Analysis of Rulings on Defense Challenges to Indictments

Tribunals for the Former Yugoslavia and Rwanda (1998). (discussing the *Rules of Procedure and Evidence for the International Criminal Tribunal for Yugoslavia*). See also 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

⁵⁰ Security Council resolution 955 of 8 November 1994. See also 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998); John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998).

⁵¹ Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 175 (1997).

⁵² See Michael P. Scharf, *Balkan Justice* (1997). "The International Law Commission was established by the General Assembly in 1947 pursuant to its obligation to encourage the codification and progressive development of international law The ILC consists of thirty-four members who are persons of recognized competence" *Id.* at 14.

This section provides analysis of United States case law, as well as Yugoslavia and Rwanda Tribunal rulings on defense challenges to the form of indictments.

In general, an indictment prepared in the United States which fails to adequately describe the time and place of a criminal act may render the indictment "fatally defective."⁵³ For example, in Ball v. United States, an indictment was prepared that generally stated that the defendant assaulted the victim.⁵⁴ The indictment did not disclose the time or place of the offense.⁵⁵ The Court held that under common law, "both time and place were required to be alleged".⁵⁶ Thus, it is extremely important to specificity in the indictment the time and place of the offense. Sufficient specificity will help prevent successful defense challenges as to the form of the indictment.

In the Tadic trial, "prior to trial, the defense protested the lack of specificity of Count 1 of the indictment."⁵⁷ Count 1 of the indictment provided:

⁵³ See Ball v. United States, 140 U.S. 118 (1891).

⁵⁴ See Ball v. United States, 140 U.S. 118 (1891).

⁵⁵ See Ball v. United States, 140 U.S. 118 (1891).

⁵⁶ Ball v. United States, 140 U.S. 118, 133 (1891).

⁵⁷ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 119, Vol. 30 (Fall 1997-Winter 1998).

Between the dates of 24 to 27 May 1992, Serb forces attacked the village of Kozarac and other villages and hamlets in the surrounding area. Dusko Tadic was actively involved in the attack. His participation included firing flares to illuminate the village at night for the artillery and tank guns as the village was being shelled, and physically assisting in the seizure, collection, segregation, and forced transfer to detention centres of the majority of the non-Serb population of the area during those first days. Dusko Tadic also took part in the killing and beating of a number of the seized persons, including: the killing of an elderly man and woman near the cemetery in the area of "old" Kozarac . . . the beatings of at least two former policemen from Kozarac at a road junction in the village of Kozarac, and the beating of a number of Muslim males who had been seized and detained at the Prijedor military barracks.⁵⁸

Tadic was acquitted of all murder offenses contained in indictment but was "found guilty of stabbing and cutting the throats of two Muslim policemen" ⁵⁹ However, as stated above, Count 1 did not specifically "refer to the stabbing and throat-slitting of two Muslim policemen in front of the Serbian Orthodox Church." ⁶⁰ As a result, the

⁵⁸ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 118, Vol. 30 (Fall 1997-Winter 1998).

⁵⁹ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 117, Vol. 30 (Fall 1997-Winter 1998).

⁶⁰ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University

defense council argued that the indictment lacked specificity.⁶¹

The Trial Chamber found that the above provision of the indictment was "excessively vague."⁶² The Trial Chamber required that the provision either be dropped or amended by "provid[ing] the necessary degree of specificity."⁶³ Subsequently "the Prosecution amended the indictment . . . [but] never inserted a specific reference to the stabbing and throat-slitting incident of which Tadic was eventually convicted."⁶⁴

Thus, the defense raised a motion "which challenged the form of the indictment."⁶⁵ The prosecutor had argued that "the indictment provid[ed] the accused with sufficient notice of the nature of the crimes with which he is charged

Journal of International Law and Politics 119, Vol. 30 (Fall 1997-Winter 1998).

⁶¹ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 119, Vol. 30 (Fall 1997-Winter 1998).

⁶² Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 119, Vol. 30 (Fall 1997-Winter 1998).

⁶³ Michael P. Scharf, *Balkan Justice* 108 (1997).

⁶⁴ Michale P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 119, Vol. 30 (Fall 1997-Winter 1998).

⁶⁵ Michael P. Scharf, *Balkan Justice* 107 (1997).

and the facts which support those charges."⁶⁶ The Trial Chamber found that the incident involving the policemen was "relevant because of the use of the word 'including' . . . which was contained in the indictment."⁶⁷

The approach used by the Trial Chamber to determine whether the indictment met specificity standards is similar to the rules contained in the United States Rules of Criminal Procedure.⁶⁸ In the United States, courts determine whether the indictment is sufficient enough by "examin[ing] whether the indictment provides protection against twice being put in jeopardy and whether it provides fair notice to the defendant to enable him to adequately prepare a defense."⁶⁹

In general, the form of the indictment should be very specific as to the identity of an assault or murder victim.⁷⁰ Additionally, the time, place, and manner of the

⁶⁶ Michael P. Scharf, *Balkan Justice* 107 (1997).

⁶⁷ Michael P. Scharf, *Trial and Error: An assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, *New York University Journal of International Law and Politics* 120, Vol. 30 (Fall 1997 - Winter 1998).

⁶⁸ See Michael P. Scharf, *Trial and Error: An assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, *New York University Journal of International Law and Politics* 120, Vol. 30 (Fall 1997 - Winter 1998).

⁶⁹ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, *New York University Journal of International Law and Politics* 120, Vol. 30 (Fall 1997 - Winter 1998).

⁷⁰ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crime Tribunal*, *New York University*

offense should be very precise.⁷¹ The *Tadic* indictment did not provide very specific information concerning the stabbing and throat-slitting incident.⁷² Therefore, applying United States standards to Count 1 of the *Tadic* indictment, the indictment "might be found defective."⁷³

Moreover, another issue concerning "impermissible variance" was raised.⁷⁴ The *Tadic* indictment stated that the defendant beat the policemen "[r]ather than stating that the defendant stabbed and cut the throats of the two Muslim policemen"⁷⁵ Therefore, there might be a variance "between the proof offered at trial and the allegations in

Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁷¹ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁷² See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁷³ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁷⁴ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics Vol. 30 (Fall 1997 - Winter 1998).

⁷⁵ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics Vol. 30 (Fall 1997 - Winter 1998).

the indictment."⁷⁶ In the United States, "a conviction cannot stand if based on an offense that is different from that alleged in the . . . indictment."⁷⁷

In general, the United States standard "for judging the scope of permissible variance" was discussed in Berger v. United States.⁷⁸ The Court said in Berger:

The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirement (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at trial; and (2) that he may be protected against another prosecution for the offense.⁷⁹

⁷⁶ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 121, Vol. 30 (Fall 1997 - Winter 1998).

⁷⁷ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 121, Vol. 30 (Fall 1997 - Winter 1998) (quoting United States v. Miller, 471 U.S. 130, 142 (1985)).

⁷⁸ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 121, Vol. 30 (Fall 1997 - Winter 1998) (quoting Berger v. United States, 295 U.S. 78, 82 (1935)).

⁷⁹ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 121, Vol. 30 (Fall 1997 - Winter 1998) (quoting Berger v. United States, 295 U.S. 78, 82 (1935)).

Thus, in accordance with the Berger standards, the *Tadic* indictment would be lacking in specificity as to the charges concerning the policemen.⁸⁰ As a result, the defense counsel likely did not properly investigate this charge.⁸¹ However, in *Tadic*, the Trial Chamber "emphasiz[ed] that the Court adjourned the proceedings for three weeks . . . in order to allow the defense additional time for the preparation of its case."⁸²

Article 18 of the Tribunal's statute coupled with precedence from the United States and the *Tadic* trial suggests that the form of the indictment must contain "a concise [and specific] statement of the facts of the case and of the crime with which the suspect is charged."⁸³ However, there can be problems associated with the

⁸⁰ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁸¹ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998).

⁸² Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics 121-122, Vol. 30 (Fall 1997 - Winter 1998).

⁸³ Michael P. Scharf, *Balkan Justice* 108 (1997). See also Michael P. Scharf, *Trial and Error: An assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, New York University Journal of International Law and Politics, Vol. 30 (Fall 1997 - Winter 1998); 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

specificity requirement. Indictments that are too specific may raise evidence problems for the prosecution. For example, in the recent Jean-Paul Akayesu decision, the facts contained in paragraph 13 of the indictment were specific but not sufficiently established.⁸⁴ In essence, the allegation was that Akayesu failed to take necessary action to arrest a man who killed a teacher.⁸⁵ Paragraph 13 provided:

On or about 19 April 1994, before dawn, in Gishyeshye sector, Taba commune, a group of men, one of whom was named Francois Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwandan Patriotic Front ("RPF") and plotting to kill Hutu. Even though at least one of the perpetrators was turned over to Jean-Paul Akayesu, he failed to take measures to have him arrested.⁸⁶

The above allegation provides reasonable specifics as to the time and place of the crime, and the identity of the victim.⁸⁷ In fact, the Prosecutor proved that the victim

⁸⁴ See United Nations International Criminal Tribunal for Rwanda Judgment on the *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁸⁵ See United Nations International Criminal Tribunal for Rwanda Judgment on the *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁸⁶ United Nations International Criminal Tribunal for Rwanda Judgment on the *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁸⁷ See United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

was killed at the time and place alledged in the indictment.⁸⁸ However, the Prosecutor did not sufficiently prove the allegations concerning the "number and identity of the perpetrators of the killing of [the victim] as well as the reasons for this murder."⁸⁹ The Trial Chamber found that "the Prosecutor has not established beyond reasonable doubt that at least one of the perpetrators . . . was turned over alive to Akayesu, and that he failed to take any measures to have him arrested."⁹⁰

Paragraph 13 of the Akayesu indictment provided specific information concerning the facts of the crime.⁹¹ As a consequence, the prosecution was unable to present sufficient evidence to sustain the charge.⁹² The accused should be entitled to a consise and specific indictment. However, for crimes such as genocide, the complexity and magnitude of the crimes usually create investigative problems for the prosecution.⁹³ Therefore, in genocide

⁸⁸ See United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁸⁹ United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁹⁰ United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁹¹ See United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case. No. ICTR-96-4-T.

⁹² See United Nations International Criminal Tribunal for Rwanda Judgment on *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

⁹³ See generally Michael P. Scharf, *Balkan Justice* (1997). Professor

cases, the indictment should be as specific as practically possible.

B. FINDING AND ENFORCING PROCEDURAL LAW

Given the complexity and geo-political nature of the international legal process, it is understandably difficult to obtain a consensus as to the nature and scope of procedural rules that should be adopted by an internationally created criminal tribunal.⁹⁴ There are, however, many sources available to help formulate an up-to-date criminal procedural framework.⁹⁵ However, the issue of enforcing the rules within the international community is problematic.⁹⁶

Scharf provides a discussion on the Yugoslavia "Tribunal's funding difficulties". *Id.* at 79-84.

⁹⁴ See Malcolm N. Shaw, *International Law* (1997). "It is clear that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognized." *Id.* at 10; Timothy L.H. McCormack & Gerry J. Simpson, *The Law of War Crimes* (1997). "Institution-building in international law is an architecture of compromise. The United Nations, in attempting to establish a permanent international criminal court, again finds itself caught between the impulse towards a hopeful universalism and the hesitancies of deeply ingrained statism." *Id.* at 230.

⁹⁵ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal For Rwanda* (1998); Malcolm N. Shaw, *International Law* (1997); G.M. Danilenko, *Law-Making in the International Community* (1993).

⁹⁶ See Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997). See also *supra* note 35.

Just as other international courts have been established by treaty, so should the procedural rules that govern them.⁹⁷ In sum, the establishment of a permanent codified system would help achieve mutual international goals, such as consistency in the criminal law and the protection of human rights in the international criminal justice system.⁹⁸

1. ENFORCEMENT

The creation of a codified international criminal procedure law would be a valuable time-saving asset for future international criminal trials.⁹⁹ However, the codified rules must be binding to have any effect.¹⁰⁰

As noted above, shortly after the International Military Tribunal at Nuremberg, the General Assembly of the United Nations voted for the creation of the Universal

⁹⁷ See Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals* 499 (1997).

⁹⁸ See John Dugard & Christine Van Den Wyngaert, *International Criminal Law and Procedure* (1996) (quoting M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order* 151 (1992)).

⁹⁹ See generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1992).

¹⁰⁰ See generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1992).

Declaration.¹⁰¹ The Declaration provides many procedural rights that relate to the criminal justice system, e.g. "equal protection of the law," and the right to a "fair trial."¹⁰²

Although the Universal Declaration can be cited as evidence of customary international law, it is not a treaty and cannot be considered binding.¹⁰³ Many of the existing sources of international criminal procedural law lack the binding nature associated with treaties.¹⁰⁴

It is likely that much of the existing Rwanda and Yugoslavia rules of procedure were extracted from customary international law.¹⁰⁵ Customary international law is developed by "a general practice [in the international arena

¹⁰¹ See Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). See also Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* (1991). See generally Malcolm N. Shaw, *International Law* 196 (1997).

¹⁰² Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). See Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* (1991). See generally Malcolm N. Shaw, *International Law* (1997).

¹⁰³ See Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). See Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* (1991); Malcolm N. Shaw, *International Law* (1997). "[the Universal Declaration is] clearly not a legally enforceable instrument as such" *Id.* at 207.

¹⁰⁴ See Malcolm N. Shaw, *International Law* (1997). *Id.* at 196-202. See generally Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948). See Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* (1991).

¹⁰⁵ See generally G.M. Danilenko, *Law-Making in the International Community* (1993); Timothy L.H. McCormack & Gerry J. Simpson, *The Law of War Crimes* (1997).

which is] accepted as law."¹⁰⁶ Treaties can ultimately incorporate the rules that are derived from customary law into a binding source for use in subsequent tribunals.¹⁰⁷

While substantive criminal law has evolved considerably since the Nuremberg Tribunal, there has been very little procedural law codification.¹⁰⁸ The lack of progress is linked to "the failed efforts to establish an international criminal court which would have required consideration of the procedural and evidentiary rules governing its proceedings."¹⁰⁹ However, current ad hoc tribunals give "rise to the need to formulate an international standard for the procedural and evidentiary aspects of proceedings before an international criminal tribunal." ¹¹⁰

To accelerate and simplify the indictment process, domestic procedural rules of various nations should be considered as a model for use in international criminal

¹⁰⁶ Jordon J. Paust, *International Law as Law of the United States* 45 (1997).

¹⁰⁷ See Steven R. Ratner & Jason S. Abrams, *Accountability For Human Rights Atrocities in International Law* (1997).

¹⁰⁸ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998); Keith Highet, Peter H.F. Bekker, & Roger P. Alford, *International Courts and Tribunals* (1997).

¹⁰⁹ 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 410 (1998). "[T]he development of international criminal procedure and evidence rules lagg[s] far behind the development of substantive international criminal law." *Id.* at 410.

¹¹⁰ 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 410-411 (1998).

tribunals.¹¹¹ In doing so, however, the protection of essential human rights should not be sacrificed.¹¹² Consequently, there will inevitably be conflicts between the desire to simplify the indictment process and the need to guarantee due process rights.¹¹³

2. SOURCES

There are various sources to find international procedural law.¹¹⁴ For example, one possible source is to

¹¹¹ See G. M. Danilenko, *Law-Making in the International Community* (1993).

One of the most important political-legal factors affecting the development of international law in the second half of this century is the progressing organization and institutionalization of the World Community through international organizations and specialized organs which offer universal forums for interaction and exchange of views between all states." *Id.* at xiii.

Keith Highet, Peter H.F. Bekker, & Roger P. Alford, *International Courts and Tribunals* (1997). See generally Malcolm N. Shaw, *International Law* (1997).

¹¹² See Malcolm N. Shaw, *International Law* (1997). "The cornerstone of UN activity has been without doubt the Universal Declaration of Human Rights . . . a common standard of achievement for all peoples and nations." *Id.* at 206-207. See generally Keith Highet, Peter H.F. Bekker, & Roger P. Alford, *International Courts and Tribunals* (1997).

¹¹³ See Malcolm N. Shaw, *International Law* (1997). "While there is widespread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law. The question of what is meant by a 'right' is itself controversial and the subject of intense jurisprudential debate." *Id.* at 196. See generally Keith Highet, Peter H.F. Bekker, & Roger P. Alford, *International Courts and Tribunals* (1997).

¹¹⁴ See 1 Virginia Morris & Michael P. Scharf, *The International*

use "national jurisprudence and scholarly works" as a basis to create international law.¹¹⁵ However, when discussing domestic law as possible sources to international procedural law, the first issue that is likely to arise is a political question: which nation's law should be considered and adopted?¹¹⁶ The consideration of all mature legal systems would be helpful in formulating a permanent and codified set of procedural rules.¹¹⁷ Albeit a seemingly piecemeal and political process, it would nevertheless provide a good source to find procedures applicable to future international criminal trials.¹¹⁸

Criminal Tribunal for Rwanda (1998). International tribunals could use several sources of international law to create rules such as "(1) international conventions, (2) customary law, and (3) general principals of law. Such a tribunal could also consider national jurisprudence and scholarly works as a subsidiary means for determining the relevant rules of international law." *Id.* at 122.

¹¹⁵ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998). See also Malcolm N. Shaw, *International Law* (1997). Article 38(1) of the Statute of the International Court of Justice discusses the various sources of international law. For example: "(a) international conventions . . . ; (b) international custom . . . ; (c) the general principles of law . . . ; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations" *Id.* at 55.

¹¹⁶ See Malcolm N. Shaw, *International Law* (1997). "Politics is much closer to the heart of the [international law] system than is perceived The interplay of law and politics in world affairs is much more complex and difficult to unravel Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence." *Id.* at 11.

¹¹⁷ See generally Malcolm N. Shaw, *International Law* (1997); G. M. Danilenko, *Law-Making in the International Community* (1993); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1997).

¹¹⁸ See G.M. Danilenko, *Law-Making in the International Community*

The process of developing a permanent codified international procedural rule system covering such issues as the indictment process, requires that the rules be consistent with generally recognized principles governing the law of criminal procedure.¹¹⁹ For example, it is generally recognized that international criminal law should not violate the principle *nullum crimen sine lege* (no crime without law).¹²⁰

In the United States, for example, Rule 7 of the Federal Criminal Code and Rules, provides the general guidelines for preparing an indictment.¹²¹ However, unique to the American federal judicial system is the use of the grand jury.¹²² The decision to return an indictment is

(1993). See generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1997).

¹¹⁹ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998); G.M. Danienko, *Law-Making in the International Community* (1993).

¹²⁰ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998); G.M. Danienko, *Law-Making in the International Community* (1993). See generally Jordan J. Paust, *International Criminal Law* (1997).

¹²¹ See Federal Rules of Criminal Procedure, West Group (1998), Rule 7.

¹²² See Federal Rules of Criminal Procedure, West Group (1998), Rule 6. Under the U.S. Const. amend. VI, at the federal level, a prosecutor must receive a grand jury affirmation before charging in felony cases. Pursuant to *Hurtado v. Cal.*, 110 U.S. 516 (1884), this requirement is not imposed upon states. States may use a preliminary hearing as a screening alternative to grand juries. In *Lem Woon v. Ore.*, 229 U.S. 586 (1913), the Court held that a state may eliminate all screening procedures. The *Lem Woon* Court allows the prosecutor to file charges directly with only a prosecutorial oath that the charge is in good faith. These decisions have been generally upheld in recent cases. See

generally within the authority of the grand jury.¹²³ In the United States, the Constitution provides many procedural protections for the accused such as the prohibition of arbitrary arrest and detention.¹²⁴ However, the United States is not immune from attack by human rights organizations.¹²⁵

Every element of the American indictment process probably will not be applicable to an international criminal court.¹²⁶ However, selected American procedures coupled with procedures from other nations would likely help facilitate the formulation of an up-to-date codified system complete with procedural due process safeguards.¹²⁷

In summary, regardless of the source of law used to codify a workable international procedural system, multilateral treaties would likely be necessary to ensure enforceability.¹²⁸

Gerstein v. Pugh, 420 U.S. 103 (1975).

¹²³ See Federal Rules of Criminal Procedure, West Group, Rule 6 (1998).

¹²⁴ See U.S. Const. amend. V, VI, & VIII.

¹²⁵ For example, the death penalty is available in the United States for certain crimes involving aggravating circumstances. See Gregg v. Georgia, 428 U.S. 153 (1976). However, many international human rights organizations generally disapprove of the death penalty.

¹²⁶ The American grand jury system, for example, would be contrary to the existing procedures used by the Yugoslavian and Rwandan tribunals.

¹²⁷ See generally G. M. Danilenko, *Law-Making in the International Community* (1993).

¹²⁸ See G. M. Danilenko, *Law-Making in the International Community* (1993).