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Rachel Kerr

The International Criminal Tribunal for the Former Yugoslavia

An Exercise in Law, Politics, and Diplomacy

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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What follows is a systematic examination of the ICTY, what it is, why it was established, how it functions, and what its significance is as a judicial institution operating for a political function. It is not a study of the effectiveness of the Tribunal as a deterrent, or as a mechanism for transitional justice—while these questions are undoubtedly of critical importance, to have addressed them here would have required me to write a different book entirely, and one twice as long. The basis for this study is a fascination with the subject and a desire to explore it in more depth, as well as to reveal more about the realities of international criminal prosecution and, it is hoped, provide lessons for the future. According to Weber, value positions arise in the choice of research topic and the relevance of research findings. The value position informing this study is a normative desire to see effective mechanisms for enforcement of international humanitarian law in order that deterrence is successful. The relevance of the research derives from the fact that, in practical and rhetorical terms, international criminal justice has been placed firmly on the agenda of international politics—it is to be hoped that it is there to stay.

Rachel Kerr

April 2003

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Abbreviations

FRY	Federal Republic of Yugoslavia
GFA	General Framework Agreement
ICTR	International Criminal Tribunal for Rwanda
ICCPR	International Covenant on Civil and Political Rights
IFOR	Implementation Force
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Former Yugoslavia
ICJ	International Court of Justice
ILC	International Law Commission
IPTF	International Police Task Force
JNA	Yugoslav People's Army
KLA	Kosovo Liberation Army
NAC	North Atlantic Council
NGO	Non-governmental Organization
NATO	North Atlantic Treaty Organization
OPCW	Organization for the Prohibition of Chemical Weapons
OTP	Office of the Prosecutor
OSCE	Organization for Security and Cooperation in Europe
PIFWC	Persons indicted for war crimes
RPE	Rules of Procedure and Evidence
SACEUR	Supreme Allied Commander for Europe
SFRY	Socialist Federative Republic of Yugoslavia
SDA	Serbian Democratic Action
SDS	Serbian Democratic Party
SRS	Serbian Radical Party
UNPROFOR	United Nations Protection Force
UNMIK	United Nations Mission in Kosovo

1 Introduction

On 25 May 1993, the UN Security Council took the extraordinary and unprecedented step of deciding to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a mechanism for the restoration and maintenance of international peace and security. Resolution 827 was an extremely significant innovation in the use of mandatory enforcement powers by the Security Council, and the manifestation of an explicit link between peace and justice, politics and law.

Just over eight years later, on 28 June 2001, Slobodan Milošević, the former president of Serbia and the Federal Republic of Yugoslavia, was transferred to the custody of the Tribunal on charges of war crimes and crimes against humanity. His trial commenced on 12 February 2002. At his initial appearance before the Tribunal, on 3 July 2001, Milošević refused to recognize the legitimacy of the court: 'I declare this a false tribunal and the indictment a false indictment. […] This trial's aim is to produce false justification for war crimes committed by NATO in Yugoslavia.'[1] This was not new. Milošević merely repeated the substance of his statements over the previous eight years that the Tribunal was a political not a judicial institution, and he was not alone in holding this view.[2] For example, in November 2000, the Russian representative on the Security Council accused the Tribunal of being a political institution, of being less than diligent in its examination of NATO, of improperly issuing sealed indictments, of being anti-Serb, and of creating anarchy in the international legal system by making new legal interpretations.[3] Others alleged, at different times, that the Tribunal was a 'politicized' institution.[4]

1 Does the defendant want to hear 32 pages of charges? "That's your problem", *The Guardian,* 4 July 2001.

2 See, for example, Interview with Serbian President Slobodan Milošević in *Der Spiegel,* tr. in *Transition,* 12 July 1996, 70.

3 Cited in *Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, to the UN Security Council,* JL/PIS/542-E, The Hague, 24 November 2000.

4 Hazel Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', *International and Comparative Law Quarterly,* 46 (1997), 434–42.

The question of politicization is not a straightforward one. The decision to establish the Tribunal was political, and it was established for a political purpose, but its internal mandate was to deliver justice. Thus, while politics permeated every aspect of the Tribunal's operation, including its establishment, proceedings had to be conducted in an apolitical vacuum. On a conceptual level, while this form of international criminal justice is inherently political, the judicial process is not necessarily 'politicized'. On a practical level, the interaction of politics and law was central to the Tribunal's ability to perform the judicial function, it did so independently of politics, which was crucial for its success as a tool for the restoration and maintenance of international peace and security.

There is a burgeoning literature focusing on the Tribunal as one of a number of mechanisms for the administration of international criminal justice. In this context, the article by David Scheffer, former US Ambassador at Large for War Crimes Issues, published in *Foreign Policy* in 1996 is extremely important. Scheffer welcomed the establishment of the Tribunal as a form of 'international judicial intervention' that could prove to be the 'shiny new hammer' in the 'civilized world's box of foreign policy tools'.[5] Is the Tribunal, as Scheffer argues, the 'shiny new hammer'? Or, does the dependency of the Tribunal on external bodies to obtain custody of accused, and the close linkage between the mandate of the Tribunal and the political process for the restoration of peace, amount to 'politicization' by undermining its judicial status, as Hazel Fox argues, thereby rendering it useless?[6]

Whether the politicization of the function of the Tribunal undermines its impartial status is the key question addressed here. In large part, the understanding of 'politicization' conditions the approach taken and the eventual answer to the question posed. The main drawback of ad hoc tribunals is that they are inherently political and selective by virtue of their method of establishment, even if in themselves they are legitimate judicial bodies. Richard Goldstone: '[I]t is clearly inappropriate for a political organ to be given authority to decide that in some countries of the world international humanitarian law should be enforced and not in others. Justice should never be undertaken on an ad hoc or political basis.'[7]

Furthermore, the Tribunal cannot operate in isolation from the political arena since it is dependent on the political will of states in order to be able

5 Scheffer, D. J., 'International Judicial Intervention', *Foreign Policy,* (1996), 51.

6 Fox, 'The Objections to Transfer of Criminal Jurisdiction', 434–42.

7 Justice Richard Goldstone, 'Conference Luncheon Address at Symposium: Prosecuting War Crimes: An Inside View', *Transnational Law and Contemporary Problems,* 7/1 (1997), 3.

to conduct investigations and obtain custody of accused and, therefore, to function as a judicial body. But this does not amount to 'politicization'. 'Politicization' is the manipulation of the judicial process by politics, not the manipulation of politics to serve the judicial process, or the apolitical administration of justice to serve a political goal. As this study of the Tribunal will show, in order to be successful, the Tribunal must perform a delicate balancing act at the interface of law and politics, so that it is able to manipulate the political environment in order to serve the judicial function, without the judicial process becoming politicized. Whilst they are intertwined, law and politics are not merged: The boundary exists at the doorway to the courtroom.

The establishment of the ICTY was the result of a political decision to activate the legal power and authority of the Security Council to enforce another set of international laws—those regulating the use of force—by creating a judicial institution with a political mandate. The mandate was the restoration and maintenance of international peace and security and was to be achieved through the prosecution of individuals for serious violations of international humanitarian law. The Tribunal was a product of existing rules, and the Statute based on rules of international law considered to be beyond doubt. At the same time, it was established as a mechanism for the maintenance of international peace and security, not just on a political level, but also as a means of strengthening and further developing international humanitarian law—a normative objective. In this case, law informed the political decision to establish and politics determined the application of legal norms for a political purpose—international peace and security. This interaction can only be properly understood in the context of an integrated study of law and politics in the maintenance of international peace and security.

In 1993, Anne-Marie Slaughter called for the development of a new academic discipline combining the study of law with the study of international politics: 'Just as constitutional lawyers study political theory, and political theorists enquire into the nature and substance of constitutions, so too should two disciplines that study state behaviour seek to learn from one another.'[8] Slaughter echoed the views expressed by several International Law scholars over the past few years.[9] In a subsequent article

[8] Anne-Marie Slaughter, 'International Law and International Relations Theory: a Dual Agenda', *American Journal of International Law,* 87 (1993), 205. In this discussion, 'International Relations' and 'International Law' are capitalized when they denote scholarly disciplines; the terms are not capitalized when they denote phenomena. The terms international politics and international relations are used interchangeably.

[9] See, Beck, R. J., Arend, A. C., and Vander Lugt, R. D., *International Rules: Approaches From International Law and International Relations* (Oxford: Oxford University Press, 1996); Ratner, S. R. and Slaughter, A. M. (eds.), 'Symposium on Method in International Law', *American Journal of International Law,* 93/2 (1999), 291–423.

in 1995, she stated that together, international law and international politics 'comprise the rules and reality of the international system [so that] it makes little sense to study one without the other'.[10] This was not new for international lawyers. Brierly wrote in 1963 that 'the character of the law of nations is necessarily determined by that of the society within which it operates, and neither can be understood without the other';[11] and Louis Henkin lamented in *How Nations Behave* (1968), 'the student of law and the student of politics … purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other'.[12]

Formerly, the disciplines of International Relations and International Law were polarized in response to the 'realist challenge'. Post-1945, scholars such as E. H. Carr and Hans Morgenthau, himself a lawyer, sought to distance so-called *Realpolitik* from the utopian idealism of 1919–39 on the basis that the failure of the League of Nations and the rise of fascism were clear demonstrations of the ineffectiveness and irrelevance of international law and institutions. Realism sought to describe the 'reality' of international relations instead of striving for a normative framework. The 'reality' described was an anarchic international system, in which the state was the primary actor and its interaction with other states was in the context of a competitive war of all against all motivated by national self-interest and a thirst for power. Realists like Morgenthau stated boldly that international law had little relevance in a world characterized by the struggle for power.[13] International lawyers rose to this challenge by attempting to establish a relationship between law and politics;[14] and by reconceptualizing the nature of international law as process rather than a set of rules, and its function as communicative rather than coercive.[15]

[10] Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law,* 6/4 (1995), 503–38. See also Slaughter, A. M., Tulumello, A. S., and Wood, S., 'International Law and International Relations Theory: a New Generation of Interdisciplinary Scholarship', *American Journal of International Law,* 92 (1998), 367–97.

[11] Cited in Harris, D. J., *Cases and Materials on International Law* (London: Sweet and Maxwell, 1991), 1.

[12] Henkin, L., *How Nations Behave: Law and Foreign Policy* (New York: Praeger, 1968), 6.

[13] Morgenthau, H., *Politics Among Nations,* 6th edn. (New York: McGraw-Hill, 1985), 290–1.

[14] Abram Chayes and Louis Henkin, for example, sought to review the actual impact of international legal rules on the behaviour of states. Slaughter, 'International Law in a World of Liberal States', 503.

[15] See, for example, McDougal, M., and Lasswell, H. D., 'The Identification and Appraisal of Diverse Systems of Public Order', *AJIL,* 53 (1959), 1–29; see also, Higgins, R., *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994).

More recently, Slaughter set out a case for building bridges between international law and Institutionalism or Regime Theory on the one hand, and Liberalism on the other. She argued that Institutionalism provided opportunities for interdisciplinary dialogue because, like international law, its unit of analysis is the state; and that the Liberal agenda provides fertile ground for a 'dual agenda' because it takes into account the nature and condition of a state and provides a theoretical framework for conceptualizing transnational law.[16] There is also considerable scope for collaboration in the context of the 'English School' of International Relations. The starting point for this is Hedley Bull's *The Anarchical Society.* Stanley Hoffman described Bull's work as 'too Grotian for the Machiavellians and the Hobbesians, too statist for the Kantians and the cosmopolitans'.[17] According to Bull, international politics is a complex set of relations between states in a *society,* rather than a states *system.* The society is anarchic because there is no overall sovereign authority, but a 'society' presupposes a web of relationships and interactions, whereas 'system' denotes independent entities knocking against one another. The goal of international society is the maintenance of order through the institutions of international law, diplomacy, balance of power, and war. Whilst traditional realist assumptions of state interest may not appear to be directly threatened, there is a shared understanding of minimum standards of behaviour within as well as among states that is important in the context of international politics even in an anarchical order.

The events of the 1990s demonstrated that international society had evolved to an extent that the value of order was well enough established that the maintenance of international peace and security relied not just on the prohibition of the use of force between states, but on the management of intra-state violence and other manifestations of disorder within states such as massive and widespread abuses of human rights and violations of international humanitarian law.[18] This was manifested in the response of the international community to events that presented complex practical, ethical, legal, and political challenges: intervention to protect the Kurds in

[16] Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 226–36. This approach is closely tied to the theory of democratic peace and invites normative additional criteria for statehood, most forcefully that of democratic governance. For a critique, see Susan Marks, 'The End of History? Reflections on Some International Legal Theses', *EJIL* 3 1997, 449–77.

[17] Stanley Hoffman, 'Foreword: Revisiting "The Anarchical Society" ', in Hedley Bull (ed.), *The Anarchical Society: A Study of Order in World Politics,* 2nd edn. (London: Macmillan, 1995), p. viii

[18] James Gow, 'Stratified Stability: Interpreting International Order', *Brassey's Defence Yearbook,* (1998), 349–65.

northern Iraq, the conflict in the former Yugoslavia, intervention in Somalia, Rwanda, Liberia, Haiti, and in a different but critical context, action against Libya for the failure to hand over the two suspected of the bombing of a Pan-Am flight over Lockerbie in 1988.[19] Crucially, the political will existed to activate the legal powers and authority of the Security Council in the area of international peace and security to address non-military and non-international issues, including enforcement of international humanitarian law. Manifest in this was recognition of an express linkage between law and politics in the maintenance of international order.

At the level of the state, law is a set of binding rules regulating the relationship between the state and its subjects and the conduct of subjects toward one another, and is made by the legislature or other designated authority. Politics is the art and science of government—that is, the acquisition of power and authority to allocate resources; the exercise of that power and authority in the allocation of resources; and the study of the exercise of power and authority.[20] Politics is manifested in a series of manoeuvres in pursuit of a given interest or policy. Both law and politics operate in the context of an organized political community—the state, with a prescribed sovereign authority—the Executive—and a designated Legislature and Judiciary. The key organizing feature is recognition of a designated authority to exercise power and to make and enforce the law. Without that level of ordered society, law and politics are nonsense, because rules are not binding and politics is not conducted with recognized power and authority. Law and politics, far from being mutually incompatible or irrelevant to one another, are mutually reinforcing.

Whilst this model describes domestic political communities, when it is transposed to the international community it presents difficulties. In the international community there is no overall sovereign authority with the power to make and enforce international law. For realists, as stated above,

[19] See, for example, Nigel Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (London: Brassey's, 1992); Micheal Brown (ed.), *Ethnic Conflict and International Security* (Princeton: Princeton University Press, 1993); Lori Fisler Damrosch, *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993); Charles King, *Ending Civil Wars,* Adelphi Paper 308 (London: IISS, 1997); Lawrence Freedman (ed.), *Military Intervention in European Conflicts* (Oxford: Blackwell, 1994); James Mayall, *The New Interventionism 1991–1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (Cambridge: CUP, 1996); Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflicts* (Cambridge: Polity Press, 1996).

[20] This definition of law and politics emerged from a seminar discussion on International Peace and Security. The other participants were James Gow, Eirin Mobekk, and Vesselin Popovski. King's College, London, 19 July 2001.

the consequence is that international law is irrelevant. For some lawyers, the absence of a sovereign authority means that international law is not 'law', properly so called. The positivist view, propounded by John Austin in the nineteenth century, is that law is a 'sovereign command made effective by the threat of sanction', and in the international system there is no sovereign authority to threaten sanction, so international law is not law as such, but rather a form of positive morality.[21] This tradition has its origins in Hobbes' state of nature, where, since there is no common power, 'there is no law', and that, therefore, life is 'solitary, poor, nasty, brutish and short'.[22]

Other proponents of legal positivism, in a slightly modified form, are Hans Kelsen and H. L. A. Hart. Kelsen accepted the basic Austinian characterization of the law as a coercive order, as distinguished from other forms of social order (moral or religious): 'A rule of law, … is a hypothetical judgement according to which a coercive act, … is attached as a consequence to certain conduct of that subject.'[23] Where Kelsen departs from Austin is in the medium of coercion: in the international arena, law rests on decentralized sanctions, applied by individual states; and law is formulated by those states, not by sovereign command. Hart put forward an alternative conception of the nature of obligation, arguing that law does not only rest on the threat of coercion, but works on the basis of duty. He refuted the allegation that international law is not law because it is not a system of orders backed by threats by drawing a crucial distinction between duty—'having an obligation' or 'being bound'—and coercion—'likely to suffer the sanction or punishment threatened by disobedience'.[24] International law imposes obligations and operates on the basis of voluntary compliance, rather than the threat of coercion.[25]

At the opposite end of the spectrum, Natural Law doctrine was formulated on the basis that law is rooted in a set of fundamental principles of right and wrong recognized by all societies, such as the right to life, liberty, and property. Natural Law scholars argued that the law is based on human reason—it is law because it is rational that it should be so—and is, therefore, eternally and universally valid;[26] and pointed to its development across cultures as testament to the universality of these principles. Natural law doctrine formed the basis of early Christian legal scholarship,

[21] Beck, *International Rules,* 57.

[22] Cited in Ramsbotham and Woodhouse, *Humanitarian Intervention,* p. iii.

[23] Hans Kelsen, 'The Nature of International Law', in Beck (ed.), *International Rules,* 61.

[24] Hart, H. L. A., *The Concept of Law* (Oxford: Clarendon Press, 1961), 216.

[25] This is important in relation to the ICTY, as discussed in Chapter 6.

[26] Beck, *International Rules,* 34.

through Francisco de Vitoria (1483–1546), Francisco Suarez (1548–1617), and Hugo Grotius (1583–1642), the 'Father of International Law'. Grotius recognized the independent role of states in formulating international law, but considered natural law to constitute the greater part of any law because, 'outside of the sphere of the law of nature, which is also commonly called the law of nations, there is hardly any law common to all nations'.[27] He drew a distinction between the law of nations, based on the mutual consent of states, and the law of nature, which proceeds from humanity. The former is created by treaty and the latter by custom.

The alternative view is the New Haven, or 'law as process' school, pioneered by Myres McDougal and Harold Lasswell in the 1950s, which rejected the conception of international law as a body of rules and reconceptualized it as a process of effective and authoritative decision-making. Rather than reject law as irrelevant to politics, as Realists had done, they sought to include factors in legal analysis that had previously been viewed as irrelevant to the law in order to formulate a so-called 'policy-oriented jurisprudence'.[28] The New Haven approach focused on the moral, social, and political process by which decisions are reached rather than on the content of static rules.[29] The law as process school did not deny that international law is 'law'; but that it is a body of static rules. MacDonald: 'International law should be viewed not as a citadel of ideals, against attacks of barbarians outside the gates, but as a process of authoritative adjustments to needs of society.'[30] Even if political and social factors are part of the law-making process, the process is law-making and not politics because it is a legal process, made by those with requisite authority.[31]

According to Higgins, the difference between domestic law and international law lies in the fact that domestic law operates in a vertical legal order, while international law operates in a horizontal legal order. Law is made by sovereign states, rather than by one overall sovereign. Thus, the fact that there is no overall sovereign authority does not detract from the

[27] Hugo Grotius, *De Jure Belli ac Pacis* (trans. Francis W. Kelsey, 1925), cited in Beck, *International Rules,* 36.

[28] Beck, *International Rules,* 110.

[29] Bull, *The Anarchical Society,* 123.

[30] MacDonald, R. St. J., and Johnston, D., *The Structure and Processes of International Law* (The Hague: Martinus Nijhoff, 1983), 204–5.

[31] The main criticisms of the 'law as process' school are that, if international law is regarded as more than rules, it becomes confused with other phenomena, such as power or social or humanitarian factors; and second, that it is felt that only by insisting on the impartial application of international law as rules will it be possible to avoid the manifestation of legal argument for political ends. Higgins refutes these criticisms, on the basis that first, it is not possible to a separate law from other phenomenon; and second, even if law is process and not a set of static rules, legal scrutiny is no less rigorous. Higgins, *Problems and Process,* 3–7.

status of international law as law. In the area of international peace and security, however, States agreed to devolve sovereignty to the Security Council to make and enforce law. The relationship between States and the Security Council acting under Chapter VII is, therefore, vertical not horizontal.[32] Consequently, the definitions of law and politics in a domestic political community are applicable.

The UN Charter is a legal instrument, which sets out the powers and responsibilities of the Security Council. The power and authority of the Security Council and the criteria for application of that power and authority is international law. The acquisition and actual exercise of power and authority is international politics. The organization of the Security Council reflected the distribution of power at the time at which the Charter was formulated, in 1945, and as such was a product of politics—the acquisition of power and authority to make decisions by the Permanent Five. The decision to activate those powers is also political, notwithstanding the fact that it is based on legal criteria. The effect of the exercise of power and authority is international law, through the creation of binding obligations. The Security Council is not a law enforcement body, however, it is a peace enforcement body. Law enforcement falls within its remit only where the enforcement of law and the maintenance of international peace and security coincide. The critical change in the 1990s was the recognition of an explicit linkage between the two.

As stated above, the Tribunal was established as a tool of politics but, in the administration of justice, it had to be apolitical. Conceptually, this is possible. The interaction of law and politics does not inevitably lead to politicization of the law or, indeed, legalization of politics. Instead, the two should be finely balanced. The question is how the balance between political and diplomatic interactions and the fulfilment of the judicial function should be struck in practice. This dissertation is an empirical examination of the consequence of the Tribunal's political status for the performance of its judicial function in order to determine how the Tribunal managed this balancing act, and with what degree of success. Given that the ICTY has to operate in a political environment, and has to solicit the support of states for its continued existence and activities, to what extent has it succeeded in establishing itself as an independent court, able to conduct its investigations, indictments, and judicial processes fairly and impartially?

[32] In respect of the Tribunal, for example, the relationship between States and the Tribunal is a vertical one, whereas the relationship between the ICC and States is horizontal. See Chapter 6.

Chapter 2 sets the establishment of the ICTY in May 1993 in the context of the combination of converging trends and unique circumstances which led to its establishment. The circumstances were the end of the cold war and the crisis in former Yugoslavia. The trends were the process of development of international humanitarian law and the reinterpretation of the meaning of the term 'threat to international peace and security' by the UN Security Council in 1992. At the heart of this was the interaction of legal and political mechanisms, rules, norms, and factors. The creation of the Tribunal was evidence of an explicit link between international criminal justice and international peace and security—between law and politics.

Chapter 3 examines the process of establishing an international tribunal. When the Security Council adopted resolution 827, they established the bare bones. It is possible that most of the members of the Security Council had little understanding of the nature and extent of the commitment they were entering into. The fact that it got anywhere is a an astounding achievement, and thanks to the efforts of the few. Crucially, whatever the motives behind the creation of the Tribunal, in establishing judicial body the Security Council created an independent entity with a momentum all of its own. This chapter charts the process of setting up the Tribunal, and examines the particular difficulties involved in setting up an international criminal court—difficulties imposed by being part of UN system, and part of international system.

Chapters 4 and 5 discuss the establishment of jurisdiction and the application of rules of procedure in cases before the Tribunal. At every stage of its development, the Tribunal has struggled with its status as a political tool. Internally, it is a judicial institution—the Statute and the Rules of Procedure and Evidence (RPE) reflect well-grounded principles of law. Ultimately, however, it operates in a political environment. The political circumstances have an impact on the purely legal considerations relating to jurisdiction and procedure, in terms of conflicting imperatives, albeit in a judicial environment. Equally, these legal aspects reflect back to impact the political environment.

Chapters 6 and 7 examine state cooperation and judicial assistance, without which the Tribunal cannot fulfil its judicial function. Chapter 6 sets out the legal framework for cooperation and discusses a variety of mechanisms for cooperation on political–diplomatic, financial, and logistic levels. The legal framework and methods for obtaining custody of accused is examined in Chapter 7. Significantly, both the prosecutor and the president have to play a wider role than they would in equivalent positions in national jurisdictions in order to secure the political support and practical assistance of States. This has meant engagement in politics

and diplomacy, in order to enable the judicial function to proceed, but without allowing political interference in the judicial process.

The exercise of prosecutorial discretion is critical. Chapter 8 discusses the relative styles of the three incumbents of the post of Chief Prosecutor, Richard Goldstone, Louise Arbour, and Carla Del Ponte, and their interpretation of the function of the Office in terms of law and politics. The twin meanings of discretion are important: On the one hand, prosecutorial discretion is the authority to decide independently who, when, and how to investigate and prosecute; on the other hand, discretion is the most important virtue for a prosecutor of an international tribunal. It is the prosecutor who must interact with States at every level—operational to executive, particularly with regard to sensitive matters such as obtaining custody of accused or securing the handover of intelligence material. This close interaction must be conducted whilst safeguarding the independence of the Office. This requires the prosecutor to have a well-developed political and diplomatic acumen, as well as a strong sense of integrity. This is the key to averting politicization, while at the same time ensuring the effectiveness of the Tribunal.

On a conceptual level, there is no reason why the political function of the Tribunal should undermine its judicial status. On a practical level, the judicial function is a prerequisite for the fulfilment of the political mandate, but in order to fulfil the judicial function the Tribunal must operate in a highly politicized context. As will be argued, the success of the Tribunal depended on the manipulation of politics to serve the judicial function, without the manipulation of the judicial function by politics, in order that the judicial function should serve the political purpose for which it was invoked—not politicized proceedings, but the maintenance of international peace and security.

2 International Peace and Security, International Criminal Justice, and the Yugoslav War

The creation of the Tribunal in 1993 was the result of a unique convergence of legal, political, and diplomatic circumstances. At the political–legal level, it was the manifestation of the convergence of two distinct and related trends: the reinterpretation by the Security Council of that which constitutes a threat to international peace and security, to include intra- as well as interstate conflict and violations of basic human rights; and the development of international humanitarian law and international criminal law. This was combined with a unique set of circumstances at the political–diplomatic level, stemming from systemic changes in international relations following the end of the cold war, which both required and allowed for a high level of activity on the part of the Security Council.

This chapter sets the decision to establish the Tribunal in the context of those changes at the political–legal and political–diplomatic levels. There are three parts to the equation: the UN Security Council's powers and responsibilities in the area of international peace and security; the development of international criminal justice; and the response of the international community, through the auspices of various international organizations, to the war that broke out in Yugoslavia in 1991, particularly the widespread and systematic violations of international humanitarian law committed as an integral part of the strategy of ethnic cleansing.

THE UN SECURITY COUNCIL AND INTERNATIONAL PEACE AND SECURITY

The establishment of the International Criminal Tribunal for Former Yugoslavia (ICTY) was the result of a political decision to invoke the legal power and authority of the Security Council to enforce another set of international laws—those regulating the use of force—by creating a judicial

institution with a political mandate. The mandate was the restoration and maintenance of international peace and security and was to be achieved through the prosecution of individuals for serious violations of international humanitarian law. Law informed the political decision to establish, and politics determined the application of legal norms for a political purpose—international peace and security.

There was no change in the legal framework. The change was in the interpretation of the powers and responsibilities of the Security Council under the Charter, and was a product of political will. The radical change in the international system with the end of the cold war and the reactivation of the UN Security Council, coupled with the reinterpretation of the meaning of 'threat to international peace and security', paved the way for the invocation of Chapter VII in situations that, prior to the early 1990s, would have been considered outside the remit of the Security Council, such as the protection of human rights within the borders of a single state.[33] In December 1998, on the fiftieth anniversary of the Universal Declaration of Human Rights Mary Robinson, the UN Human Rights Commissioner, lamented the 'failure of implementation on a scale that shames us all'.[34] In contrast, the early 1990s saw the invocation of Chapter VII in situations where massive and widespread violations of international humanitarian law were occurring, even within the borders of a single state.

Article 24 of the UN Charter confers on the Security Council 'primary responsibility for the maintenance of international peace and security'. In Article 25 the Members of the UN 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' Furthermore, action taken under Chapter VII 'trumps' sovereignty, in that it provides an exception to the doctrine of non-intervention in the internal affairs of States enshrined in Article 2(4) of the UN Charter.[35] Not only does it have 'primary responsibility'; action taken by the Security Council under Chapter VII overrides sovereignty and is binding on all states.

Article 39 determines the application of Chapter VII, but it does not offer guidance on criteria for the determination of a breach of the peace, act of aggression, or threat to the peace. The UN Charter provides the framework, but the actual use of those powers is subject to a political determination as to the interpretation of Article 39, and the choice of appropriate

[33] There are two possible exceptions to this: Southern Rhodesia in 1966 and South Africa in 1977. See p. 16.

[34] Cited in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 1999) 32.

[35] The other exception, enshrined in Article 51 of the Charter, is self-defence.

measures to counter such a threat. The Security Council has the legal authority to make such a determination, the determination itself is political, but the effect is legal, since Chapter VII resolutions create binding obligations on all States.

Since 1945, the Security Council determined that a 'breach of the peace' had occurred on only four occasions. Significantly, on every one of these occasions it has been accompanied by action. The first concerned the conflict in Korea in 1950.[36] The second occasion was the war between the United Kingdom and Argentina over the Falklands Islands in 1982.[37] The third occasion was on 20 June 1987, with regard to the Iran–Iraq war, which had been ongoing for seven years previously.[38] The fourth and last occasion was in response to the Iraqi invasion of Kuwait in August 1990.[39] In the last case, breach of the peace was used instead of the more inflammatory 'act of aggression', since it was hoped that Iraq could be persuaded to withdraw voluntarily.[40]

An 'act of aggression' was determined in situations where the Security Council intended to condemn, without necessarily taking action. In fact, White makes the point that while there is no substantive difference between a breach of the peace and an act of aggression, since both describe the resort to armed force by one state against another, there is a difference in the message portrayed. Breach of the peace is a neutral definition, which, when it was invoked, was accompanied by action, while 'act of aggression' is condemnatory, and was invoked where the Security Council was prepared to do no more than condemn.[41] Thus, there is a political element to the determination. Meanwhile, there were countless

[36] The UN intervention in Korea was a 'fluke of history', made possible by the unique accident of the Russian boycott. Max Hastings, *The Korean War* (London: Pan Books Ltd., 1988), 51. The Soviet Union had been absent since 30 January 1950 in protest against the failure to install the Government of the People's Republic of China in the permanent seat instead of the Nationalist Government in Taiwan.

[37] Resolution 502 was proposed by the United Kingdom, and referred to a 'breach of the peace' rather than an act of aggression on the part of Argentina in order not to incur the veto of the Soviet Union. N. D. White, *Keeping the Peace: The United Nations and International Peace and Security* (Manchester: Manchester University Press, 1993), 49.

[38] S/RES/598 (1987), 20 June 1987. In this case, the finding of a 'breach to the peace' was clearly a mechanism to invoke Chapter VII enforcement measures, rather than any substantive change in circumstances.

[39] Resolution 660 stated that 'there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait'. S/RES/660 (1990), 2 August 1990.

[40] White, *Keeping the Peace,* 49.

[41] Resolutions were passed condemning the incursion of South African forces into Angola (1976), Zambia (1980), and Botswana (1985), and the bombing by Israel of the PLO Headquarters in Tunis (1985) and the assassination of Abu Jihad (1988). White, *Keeping the Peace,* 50.

occasions when, in reality, a breach of the peace or act of aggression has occurred but has not been defined as such by the Security Council, because of the lack of political will to act, or even to condemn such acts.[42] Furthermore, the General Assembly Resolution on the Definition of Aggression (1974), while it gives a clear description, explicitly recognizes in Article 2 the primary role of the Security Council in the determination of whether an actual act of aggression may have been committed, so that the political aspect of the determination is not compromised by the legal definition of aggression.[43] Thus, the determination of an act of aggression under Article 39 of the Charter by the Security Council will not necessarily conform to the definition as set out by the General Assembly.

The last trigger for Security Council action is 'threat to the peace'. The finding of a 'threat to international peace and security' invokes Chapter VII, whereas if a situation is deemed 'likely to endanger international peace and security', it activates mechanisms for the peaceful settlement of disputes under Chapter VI. There may be no substantive difference in situation, but there is a significant difference in terms of legal impact. It has been argued that a threat to the peace in the sense of Article 39 of the Charter is 'a situation which the organ, competent to impose sanctions, declares to be an actual threat to the peace.'[44] Whilst this is correct, it is tautological and misleading. Although the determination of a threat to international peace and security is political, it is made according to legal criteria. There are limits to the powers of the Security Council, even if it does have very wide discretion.[45] Judicial review might be a way of establishing the legality

[42] For example: Ethiopia and Somalia (1977); Tanzania and Uganda (1978–79); India and Pakistan (1947–49, 1965, and 1971); Vietnam and Cambodia (1978); China and the Soviet Union (1969 and 1971); India and China (1962); the Arab–Israeli wars (1948–49, 1956, 1967, and 1973); the Israeli invasions of Lebanon (1978 and 1982); Soviet armed intervention in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979); US incursions into Guatemala (1954), the Dominican Republic (1965), Grenada (1983), and Panama (1989). White, *Keeping the Peace,* 49.

[43] Article 1: 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition'. Resolution on the Definition of Aggression 1974 G. A. Resolution. 3314 (XXIX), 14 December 1974.

[44] J. Combacau, *Le Pouvoir de sanction de l'ONU* (Paris, 1974), 100: 'une menace pour le paix au sens de l'article 39 est une situation dont l'organe compétent pour déclare qu'elle menace effectivement la paix'. Cited in Peter H. Kooijmans, 'The Enlargement of the Concept of "Threat to the Peace"' in *Colloque Dupuy,* Receuil de Cours, Academie de Droit International, 1992.

[45] For discussion, see Alvarez, J. E., 'Judging the Security Council', *American Journal of International Law,* 90 (1996), 1–39; Franck, T. M., 'The "Powers of Appreciation"—Who Is the Ultimate Guardian of UN Legality?', *American Journal of International Law,* 86 (1992), 519–523; Gill, T. D., 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter', *Netherlands Yearbook of International Law,* XXVI (1995), 33–138; Reisman, W. M., 'The Constitutional Crisis in the United Nations', *American Journal of International Law,* 87 (1993), 83–99. In the Tadić case, the Appeals Chamber declined to rule on the legality of the finding of threat to the peace on the basis that it was a political determination. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 29.

of political decisions. However, whilst international law may be able to legitimize a political decision, it cannot justify it. The legal position is that the Security Council has primary responsibility for international peace and security and it is for the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression. Thus, it is for the Security Council to make the political determination—even if that decision is made with reference to international law. The shift that occurred in the 1990s was in the political determination that there was no longer any need to construct a nexus with interstate conflict in order to invoke Chapter VII, which meant that the legal parameters of Chapter VII action were widened, not that there are no legal parameters.

Until the 1990s, a threat to the peace was found in only a handful cases, and of these only two related to situations where human rights were being seriously threatened within the borders of a single state. Even in these two cases, the invocation of Chapter VII was linked to external ramifications. For example, the Council found that the situation in Southern Rhodesia was a threat to international peace and security in 1968,[46] but it was not made explicit what exactly the threat was—whether it was the denial of the right to self-determination or the spillover effect. In 1977 the Security Council imposed a mandatory arms embargo on South Africa, but the basis for the invocation of Chapter VII cited in Resolution 418 was not the policy of apartheid per se, but the acquisition by South Africa of arms and related material.[47] In both these instances the Security Council resolutions had a nexus with a military threat to international peace and security outside the borders of the state, which warranted the invocation of Chapter VII. Without this nexus, it would seem that the protection of human rights was outside the scope of the Security Council, at least in practice, until the 1990s.

What had changed by 1993 is that the political will existed to invoke Chapter VII, at least on the part of the majority of the Permanent Members

[46] A non-mandatory arms, oil, and petroleum embargo was imposed on Southern Rhodesia following Ian Smith's unilateral declaration of independence in 1965. In 1966, selective mandatory sanctions were imposed under Chapter VII and in 1968, this was extended to more comprehensive sanctions. S/RES/232 (1966) 16 December 1966; S/RES/253 (1968) 29 May 1968. See Nkala, J. C., *The United Nations, International Law and the Rhodesian Independence Crisis* (Oxford: Clarendon Press, 1985), esp. chapter XI.

[47] S/RES/418 (1977), 4 November 1977.

of the Security Council, and among those who were less certain, there was not enough uncertainty to justify a veto when cooperation was more beneficial in the wider international context.[48] This change is attributed to two separate developments: the end of the cold war and the opening up of the political environment to allow the Security Council to take action;[49] and the influence of growing concern for human rights among domestic public opinion in the United States and Western Europe in the face of widespread and vigorous media coverage from areas where those rights are being violently abused.[50] One author asserts that in the late 1980s and early 1990s a 'paradigm of international relations began to form in which the international community, not in the context of victors and vanquished, could make a decision on intervening in such a sensitive and traditionally exclusive area of state competence as criminal jurisdiction'.[51] The creation of the Tribunal was part of what Robertson labelled a 'seismic shift from diplomacy to legality in the conduct of world affairs.'[52]

The first manifestation of this shift occurred in the context of the Gulf War. The war itself was fought in response to a blatant and clear-cut act of international aggression, not only a violation of the fundamental norms governing international politics—the use of force—but also threatening vital national interests—oil, and the development by Iraq of chemical, biological, and nuclear warfare.[53] What was innovative, however, was the action taken to protect the Iraqi civilian population from repression. On 5 April 1991, in Resolution 688, the Security Council found the persecution of Kurd and Shi'a minorities in northern and southern Iraq to be a threat to international peace and security. The Council 'condemned the repression

[48] White suggests that in the early 1990s, China's acquiescence was the product of Western economic pressure and their desire for political rehabilitation after the Tiananman Square massacre in 1989. White, *Keeping the Peace,* 43. Russia, meanwhile was dependent on Western goodwill for the continuance of economic aid, so neither was prepared to rock the boat. This situation did not last long, and in 1999 NATO chose to bypass the Security Council in relation to the Kosovo intervention.

[49] Anthony Parsons dates the loosening of constraints on Security Council action to 1987, when President Gorbachev came to power. Anthony Parsons, 'The UN and the National Interests of States', in Roberts, A. and Kingsbury, B. (eds.), *United Nations, Divided World: The UN's Role in International Relations,* 2nd edn. (Oxford: Clarendon Press, 1993), 115–6.

[50] On the role of the media see Morris and Scharf, *An Insider's Guide,* 17; Dusan Cotic, 'Introduction' in Roger S. Clark and Madeleine Sann (eds.), *A Critical Study of the International Tribunal for the Former Yugoslavia, Criminal Law Forum* 5/2–3 (1994), 230–1; and, Mark Thompson, *Forging War: The Media in Serbia, Croatia, and Bosnia* (London: Article 19, 1994).

[51] Roman A. Kolodkin, 'An *Ad hoc* International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia' in Clark and Sann (eds.), *A Critical Study,* 384.

[52] Robertson, *Crimes Against Humanity,* 194.

[53] Lawrence Freedman, 'Security and the Diffusion of Power', in *Brassey's Defence Yearbook 1997* (London: Brassey's, 1997), 15.

of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threatened international peace and security in the region.[54] This resolution did not explicitly authorize action, but the armed forces of some of the members of the coalition that had fought the Gulf War took it upon themselves to set up safe havens for Kurdish refugees in Iraq and enforce no-fly zones. They obtained the agreement of the Iraqi Government.

Following this, tentative measures were taken in response to the outbreak of violent conflict in Yugoslavia in 1991, and in Somalia in 1992,[55] and, crucially in this context, in response to the failure by Libya to hand over the two men suspected of the Lockerbie bombing.[56] In March 1992, Chapter VII was invoked to impose sanctions on Libya for their failure to comply with French, British, and American requests to surrender the persons suspected of the destruction of Pan-Am flight 103 over Lockerbie in 1988. This was the first time that Chapter VII was invoked in respect of individual criminal responsibility. The 'seismic shift', however, was the formal reinterpretation by the Security Council of what constituted a threat to international peace and security within the terms of Article 39 of the UN Charter in January 1992. On 31 January 1992, a meeting of the Heads of Government of Current Security Council Members in New York issued the following statement: '[T]he absence of war and military conflicts among states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.'[57]

[54] S/RES/688 (1991), 5 April 1991. See Ramsbotham and Woodhouse, *Humanitarian Intervention,* 80–5; and Paul Fifoot, 'Functions and Powers and Interventions: UN Action in Respect of Human rights and Humanitarian Intervention' in Rodley (ed.), *To Loose the Bands of Wickedness,* 133–64.

[55] S/RES/733 (1992), 23 January 1992. The situation in Somalia was deemed to be a threat to international peace and security in January 1992. This determination, motivated by humanitarian concerns, also made reference to the consequences for peace and stability in the region and imposed an arms embargo, which indicates a strong nexus with the use of armed force and international peace—requirements according to past practice for the finding of a threat to international peace and security. See Inger Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the United Nations Charter* (Uppsala: Iustus Forlag, 1998), 55.

[56] See Bailey, *The UN Security Council and Human Rights* (London: St. Martin's Press, 1994), 110–1.

[57] S/23500, 31 January 1992. See Bailey, *The UN Security Council and Human Rights,* 125, and Ramsbotham and Woodhouse, *Humanitarian Intervention,* 84–5. This led to further consideration of the future role of UN Peacekeeping forces and elaboration of the concept of non-military sources of instability. Boutros Boutros-Ghali, 'An Agenda For Peace', Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, S/24111, 17 June 1992.

This set the tone for future UN responses and represented a watershed in the determination of a threat to international peace and security within the terms of Article 39 of the UN Charter. [58] It directly opened the way for the establishment of a Tribunal, since it meant that violations of international humanitarian law could be formally determined a threat to international peace and security. Coupled with the reinterpretation of the meaning of threat to international peace and security was the decision to employ a wholly new tool in relation to the former Yugoslavia—an ad hoc international criminal tribunal. This was an explicit recognition of the link between peace and justice as mutually reinforcing objectives.[59]

In the first case before the Tribunal, that of Dusko Tadić, the Defence objected to the method of establishment, arguing that the Security Council was acting outside its powers in taking measures beyond those expressly provided for in Articles 41 and 42 of the Charter. Obviously, the establishment of a tribunal is not a measure under Article 42, which provides for military action, but the Defence argued that it cannot be justified under Article 41 either because 'it is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures'.[60] However, Article 41 is not an exhaustive list, but contains merely illustrative examples. On this basis, the Appeals Chamber found that the establishment of the Tribunal falls squarely within the powers of the Security Council under Article 41.[61]

According to a previous ruling in the International Court of Justice (ICJ), the only limitation is that the exercise of powers must be in accordance with the purposes and principles of the United Nations. Article 24 of the Charter

[58] 'The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. UN Charter, Article 39.

[59] The relationship between peace and justice is the subject of several articles arguing the case for the establishment of the ICTY. See, for example, Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia' *Foreign Affairs* 72/3 (1993), 122–35; Hampson, F. J., *Violations of Fundamental Human Rights in the Former Yugoslavia Part Two: The Case for a War Crimes Tribunal* (London: David Davies Memorial Institute Occasional Paper, 1993). Hampson outlines five ways in which war crimes trials contribute to peace at an international and a local level: upholding and strengthening the international legal order; promoting reconciliation; responding to the needs of the victims for reckoning; providing a confessional for perpetrators; and attaching individual rather than collective guilt.

[60] Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, *Prosecutor* v. *Tadic,* IT-94-1-T, 23 June 1995, at 3.2.1.

[61] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadic,* IT-94-1, 2 October 1995, at 35–6.

imposes conditionality on the Security Council's powers and responsibilities for the maintenance of international peace and security, which is that 'in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. According to this interpretation, as long as the act is in furtherance of the objectives of the organization and is not expressly forbidden by the UN Charter, it is legal.[62]

Provided that the establishment of an international criminal tribunal was justified as a measure for the restoration and maintenance of peace, its establishment was a lawful exercise of Security Council powers. The question of whether it could be justified on this basis, however, is a political not a legal determination. The Appeals Chamber in the Tadić case recognized this: 'It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends'.[63] The Appeals Chamber decided that the Tribunal met the requirements of having been 'established by law'.

The establishment of the Tribunal was the result of a political decision to exercise legal powers by the Security Council—deriving from the UN Charter—in order to enforce another set of legal rules—international humanitarian law. Three elements feed into understanding how the Security Council came to do this. The first was that the violations of international humanitarian law occurring on a daily basis in the former Yugoslavia were deemed to be a threat to international peace and security, as discussed in the final section of this chapter. The second was that, in establishing a Tribunal, the Security Council was relying on the body of law already in existence, the practical application of which constitutes international criminal justice—as discussed below. As such, the Tribunal was the product of the convergence of political and security concerns of the UN Security Council, its legal powers, and existing international humanitarian law. This constitutes the third element—the interaction of international politics and international law, at the heart of international peace and security. This is the subject of the following section.

INTERNATIONAL CRIMINAL JUSTICE

Part of the reason that a tribunal was deemed an appropriate response to the massive and widespread violations of international humanitarian law

[62] *Certain Expenses of the United Nations,* 1962, ICJ Rep. 151, at 168.

[63] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadic,* IT-94-1, 2 October 1995, at 39.

occurring in the former Yugoslavia was because there existed a well-developed and codified body of law to be applied, and a widely held recognition that the acts in question were not only morally reprehensible but also carried criminal responsibility. The process of development and codification of international humanitarian law, international criminal law, and human rights law accompanied the increasing frequency with which these hitherto academic areas of interest were appearing on the political agenda.

The regulation of warfare has its origins in Just War Theory. The *jus ad bellum* developed from the just war doctrine to the general prohibition on the use of force embodied in Article 2(4) of the UN Charter. The *jus in bello* also expanded and developed. In the context of this discussion of the regulation of armed conflict, the *jus ad bellum* is of less concern. It should be emphasized that the rightfulness or otherwise of the cause does not have any impact on the applicability of the *jus in bello,* the regulation of the conflict itself. Whether or not the reason for the war is just, conduct in war must be so.

The fundamental principle of the regulation of warfare is that the right to inflict harm on the enemy is not unlimited. There is an important distinction to be made, however, between conduct that is regarded as morally wrong and that which carries criminal responsibility. Paskins and Dockrill make a clear distinction between moral rules, which are addressed to the better part of humanity within the self, and legal rules, with sanctions attached for offenders.[64] Michael Howard also makes explicit the difference between traditional constraints, the 'cultural regulation of violence', and formal laws, which may or may not coincide.[65] Acts subject to prosecution must be recognized as such at the time of commission: *nullem crimen sine lege, nulla poena sine lege* (no act is criminal unless it is laid down in law and no act can be punished unless punishment is prescribed by law).

The modern laws of war, grouped together under the heading International Humanitarian Law, were extensively codified and developed through the latter half of the nineteenth century and the first half of the twentieth century, beginning with the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The impetus for the creation of the modern laws of war can be traced to the impact of William Howard Russell reporting from the Crimea, and

[64] B. A. Paskins and Michael Dockrill, *The Ethics of War* (London: Duckworth, 1979), 303–4.

[65] Michael Howard, 'Constraints on Warfare', in Michael Howard, George J. Andreopoulos, and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World* (New Haven: Yale University Press, 1994), 1.

Roger Fenton and colleagues in the American Civil War, which 'brought the realities of mass military slaughter to the attention of a generation that hoped and believed that mankind was emancipating itself from such barbarities'.[66] This is not to say that there had been no previous attempts to put limits on the conduct of armed forces. Armies have formulated their own rules of conduct as part of military doctrine from the earliest times. The most often cited modern example is US Army General Order No. 100, *Instructions for the Government of Armies of the United States in the Field,* known after its author Dr Francis Lieber. It is only in the nineteenth century, however, that these limits were codified in international conventions, thereby attaining the status of international law.

The process of codification accelerated at the turn of the century with the First Hague Peace Conference in 1899 and the Second Hague Peace Conference in 1907. The conventions concluded as a result of these two conferences were concerned with the means and methods of warfare.[67] This did not preclude the continuing applicability of customary international law governing the rules of armed conflict, however. The 'Martens Clause' in the 1899 Hague Convention expressly provides that

> In cases not included in the Regulations adopted, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usage established between civilised nations, from the laws of humanity and the requirements of the public conscience.

In spite of these developments, there were very few examples of international prosecution for war crimes.[68] Initiatives to prosecute individuals responsible for the commission of war crimes committed during the course of the First World War came to nought.[69] This was partly because the Allies themselves were divided as to their objectives for war crimes trials.[70] The 1918 Preliminary Peace Conference decided to create a fifteen

[66] Howard, 'Constraints on Warfare', 5–6.

[67] For the text of these conventions see Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War,* 2nd edn. (Oxford: Clarendon Press, 1994).

[68] The earliest recorded trial in an international court for war crimes was the case of Peter von Hagenbach, who was prosecuted for violations of the laws of God and humanity in 1494. M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (London: Martinus Nijhoff Publishers, 1987), 2.

[69] The prosecution of war crimes was also included as a condition in the peace settlements with Germany's allies: Austria, Bulgaria, and Turkey. The Treaty of Sèvres, 10 August 1920, made provisions to prosecute those responsible for the massacre of over a million Armenians in Articles 226–230. However, this was never acted upon and amnesty was granted in the Treaty of Lausanne on 24 July 1923. Morris and Scharf, *An Insider's Guide,* vol. I, 2.

[70] According to Telford Taylor, the United States viewed trials as a political necessity, the French viewed them as a means to secure reparations, and Britain sought trials as a necessary corollary to the construction of a democratic government in Germany and a means to a moderate peace. Telford Taylor, *The Anatomy of the Nuremberg Trials* (London: Bloomsbury, 1993), 15.

member *Commission of Inquiry into Responsibility of the Authors of the War and Means of Punishment*. The Commission proposed that higher German officials should be tried by a High Tribunal, but the United States was opposed in principle to the establishment of an international tribunal. A compromise was reached in Articles 227–9 of the Versailles Treaty, which provided for the prosecution of individuals, including the Kaiser, for violations of the laws and customs of war in German courts or their extradition to national courts of the Allied nations.[71] The Kaiser was to be tried for 'supreme offences against international morality and the sanctity of treaties'. This never came to fruition, the Kaiser was granted asylum in the Netherlands, and Germany pre-empted the allies by holding trials in Leipzig.[72] Out of a total of 896 names submitted by the War Crimes Commission, only twelve were tried and of those, six were acquitted.[73]

The situation at the end of the Second World War was significantly different. The Allies had achieved a total victory and were in occupation of Germany and Japan, and the German government had collapsed. In addition to creating a new regime in Germany, the Allies were also embarking on the creation of a new world order, based on the United Nations, as the guarantor of international peace and security. The trial and punishment of German and Japanese war criminals was an important element of this.[74] The basis for jurisdiction was the Charter of the Nuremberg Tribunal, annexed to the London Agreement, which specified the arrangements for the composition of the Tribunal and the charges to be brought against the defendants. Article 6 provided that the accused would be tried for the following offences: crimes against peace; war crimes; and crimes against humanity.[75] The Nuremberg trial opened on 20 November 1945 and lasted until 31 August 1946. Judgement was handed down on 30 September and 1 October 1946. Twenty-two German 'major war criminals', which included the military and political leaders, were put on trial at Nuremberg. Of these, twelve were condemned to death,

[71] Morris and Scharf, *An Insider's Guide,* vol. I, 2.

[72] Lyal S. Sunga, *Individual Responsibility in International Law* (London: Martinus Nijhoff, 1992), 23.

[73] Morris and Scharf, *An Insider's Guide,* vol. I, 2.

[74] It was by no means a foregone conclusion, however. The British view, expressed by the Lord Chancellor, Simon, was that the question of the fate of the Nazi leaders was 'a political, not a judicial question'. The Foreign Secretary, Anthony Eden, felt that 'the guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process'. Taylor, *Anatomy,* 53–4.

[75] The trial of German major war criminals: by the International Military Tribunal sitting at Nuremberg (London: HMSO, 1946).

three were sentenced to life imprisonment, two received sentences of twenty years, one received a sentence of fifteen years, and three were acquitted.

Nuremberg was intended to be 'the last act of the war, and the first act of the peace': as the last act of the war it was intended to publicize Nazi atrocities and provide vindication of the Allied victory in the name of justice; as the first act of the peace it was the first manifestation of a new world order.[76] Robert Jackson, in his final report to President Truman in October 1950, said that the endeavour should not be measured in terms of the personal fate of the defendants.[77] According to Telford Taylor, the primary purpose of the Nuremberg Tribunal was 'to bring the weight of law and criminal sanctions to bear in support of the peaceful and humanitarian principles that the UN was to promote'.[78]

The major criticism of both the Nuremberg and Tokyo Tribunals was that it was no more than an exercise in 'victor's justice'.[79] It was 'victor's justice' in as far as the vanquished were being put on trial by the victors, and there was strong criticism of the applicable law and procedure.[80] However, it is wrong to assert that it was no more than that. Several key contributions were made. First, Nuremberg and Tokyo demonstrated that there were acts that are not only morally reprehensible; they were criminal, and incurred individual criminal responsibility: 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[81] Second, Nuremberg documented the atrocities committed by the Nazi regime 'with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people'.[82] The main contribution, however, was that the Nuremberg and Tokyo Tribunals

[76] Paskins and Dockrill, *The Ethics of War,* 266.

[77] Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Macmillan, 1983), 487.

[78] Taylor, *Anatomy,* 42.

[79] The most damning overall critique of the Tokyo Tribunal is mounted by Richard Minear in his book *Victor's Justice,* which by the author's own admission adopts a polemical tone. Minear, R. H., *Victor's Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971).

[80] The most contentious of the charges was that of crimes against peace. The charge was broken down into two counts of conspiracy and waging aggressive war. There was also criticism of the prosecution of a new set of crimes against humanity. War crimes had a much firmer basis in international law, and the Judgement of the Tribunal was that it was 'too well settled to admit of argument'; and further that the weight of evidence on this count was 'overwhelming in its volume and its details'. Judgement of the International Military Tribunal for the Trial of German Major War Criminals (London: HMSO, 1946).

[81] Sunga, *Individual Responsibility,* 38.

[82] Department of State Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (US Department of State, 1945). Cited in Morris and Scharf, *An Insider's Guide,* 8. The Nuremberg Judgement has succeeded in providing an historical record, but it has not been wholly undisputed.

demonstrated that international resolve can, on occasion, be sufficiently compelling to result in the prosecution and punishment of individuals.[83] It firmly established that there are certain crimes of international concern and provided a starting point for a permanent international criminal court.

The legacy of Nuremberg was the further development and codification of international humanitarian law. On 11 December 1946, the UN General Assembly unanimously adopted Resolution 95(I), affirming the 'principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal'.[84] The principle of individual responsibility in international law for war crimes and crimes against humanity was, therefore, verified. This was followed in December 1948 with the adoption of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

The Nuremberg definition of war crimes was codified and further developed in the 1949 Geneva Conventions and the 1977 Additional Protocols thereto. The Geneva Conventions are based on three main purposes. First and foremost, the Conventions are a code of conduct for armed forces in order to prevent breaches. Second, the Conventions include provisions for scrutiny by impartial observers to ensure compliance; and third, in the event of failure of the first two, the Conventions provide a basis for prosecution and punishment.

The International Law Commission began work on a Draft Code of Offences against the Peace and Security of Mankind, which was approved by the General Assembly in 1954. Further progress was stalled by the need to agree on a Definition of Aggression, which was completed in 1974. However, work on a Draft Statute for an international criminal court suffered from lack of political will to push it forward until the 1990s.[85] With the end of the cold war, and on the initiative of a coalition of sixteen Caribbean and Latin American countries led by Trinidad and Tobago, the United Nations renewed efforts to create a permanent court. The impetus to put the issue back on the agenda of the United Nations was that it was viewed as an effective means of dealing with the problems associated with the prosecution or extradition of drug offenders. It was also motivated by the evidence of atrocities being committed in the former Yugoslavia.[86] The General Assembly again requested the International

[83] Sunga, *Individual Responsibility,* 48.

[84] A/RES/95(I) (1946), 11 Dec. 1946.

[85] Bassiouni, *A Draft International Criminal Code,* 5–10.

[86] James Crawford, 'The ILC's Draft Statue for an International Criminal Court', *American Journal of International Law,* 88 (1994), 141.

Law Commission (ILC) to consider the issue and a special working group was established in 1992, mandated by the General Assembly to produce a Draft Statute, which it did in 1994. The process was accelerated by the example of the ICTY and the Statute of the International Criminal Court was adopted in Rome on 17 July 1998.[87]

THE YUGOSLAV WAR, ETHNIC CLEANSING, AND THE RESPONSE OF THE INTERNATIONAL COMMUNITY

The decision to establish the Tribunal cannot be understood in isolation from the political, diplomatic, and military context in which it was taken.[88] The crisis in former Yugoslavia was a testing ground for European political cooperation; as Jacques Poos declared famously: 'The Hour of Europe has Dawned'.[89] It proved to be a false dawn. The muddled response of the international community, through the auspices of the European Commission (EC), the European Union (EU), the Organization for Security and Co-operation in Europe (OSCE), the North Atlantic Treaty Organization (NATO), and the United Nations (UN) to the outbreak of violent conflict in former Yugoslavia was vilified at the time and has been harshly criticized since. Gow notes that this was the product of a combination of bad timing, bad judgement, an absence of unity, and the lack of political will, particularly with regard to the use of force.[90]

The Yugoslav War was not 'merely the second act of a tragedy that opened in 1941', as some have alleged, nor was it the inevitable reignition

[87] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[88] In such a short space, the following discussion is not a comprehensive history of the Yugoslav state and its dissolution; this has been done admirably elsewhere. See, for example, Ivo Banac, *The National Question in Yugoslavia: Origins, History, Politics* (London: Cornell UP, 1984); Bennett, C., *Yugoslavia's Bloody Collapse: Causes, Course and Consequences* (London: Hurst & Co., 1995); Stephen Clissold (ed.), *A Short History of Yugoslavia* (Cambridge: Cambridge UP, 1966); Cohen, L. J., *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition* (Boulder: Westview, 1995); James Gow, *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (London: Hurst & Co., 1997); Noel Malcolm, *Bosnia: A Short History,* 2nd edn. (London: Macmillan, 1996); O'Ballance, E., *Civil War in Yugoslavia* (Bromley: Gallago, 1993); Stevan K. Pavlowitch, *Yugoslavia* (London: Ernest Benn, 1971); Silber, L. and Little, A., *The Death of Yugoslavia* (London: Penguin, 1995); Fred Singleton, *A Short History of the Yugoslav People* (Cambridge: Cambridge UP, 1985); Thompson, M., *A Paper House: The Ending of Yugoslavia* (London: Vintage, 1992).

[89] Silber and Little, *Death of Yugoslavia,* 175.

[90] Gow, *Triumph of the Lack of Will,* 2.

of the Balkan powder keg.[91] It was a war fought for control of the entities that made up the Socialist Federative Republic of Yugoslavia (SFRY).[92] The SFRY was made up of six Republics: Slovenia, Croatia, Bosnia and Hercegovina, Serbia, Montenegro, and Macedonia; and within Serbia, two autonomous regions: Kosovo and Vojvodina.[93] The status of these two provinces was different to that of the Republics in that the Hungarian and Albanian populations did not have a right to self-determination in the formal structure of the SFRY, whereas the Slovenes, Croatians, Bosnians, Serbians, Montenegrins, and Macedonians did. After Tito died, in 1981, the threads holding the state together wore increasingly thin and the SFRY slid into a spiral of crisis and dissolution.[94]

By the end of 1990 a combination of factors made the break-up of the SFRY inevitable. The fact that the dissolution of the SFRY was accompanied by violent conflict and widespread atrocities was, however, not inevitable. It was both tragic and avoidable. The responsibility for the transformation from crisis to war, and the commission of egregious violations of international humanitarian law, lies with individuals. The trend toward dissolution and attendant disaster was accelerated by the growth of extreme nationalism in Serbia and in Croatia.[95] The increase in Serb intolerance toward other ethnic groups both led to and was a direct consequence of the coming to power of Slobodan Milošević. His espousal of the cause of Serbs in Kosovo in Spring 1987, when he told them, famously, 'No one shall dare beat you', was the beginning of his rise to power. Milošević was sent by the Serbian president, Ivan Stambolić, to talks with local leaders in Kosovo on 24 April 1987. A demonstration was orchestrated outside the House of Culture in Kosovo Polje, while talks were taking place. Although it appeared to be no more than a fortunate coincidence for

[91] Andrew Bell-Fialkoff, 'A Brief History of Ethnic Cleansing', *Foreign Affairs,* 72 (1993), 116.

[92] Gow asserts that the war was about statehood, sovereignty, self-determination, and the meaning of 'nation'. Gow, *Triumph of the Lack of Will,* 67–8. Also see James Gow, 'Serbian Nationalism and the Hissssing Ssssnake in the International Order: Whose Sovereignty? Which Nation?', *Slavonic and East European Review,* 72 (1994), 456–76.

[93] The Federal People's Republic of Yugoslavia, which was formed in 1945, became the Socialist Federative Republic of Yugoslavia with the introduction of a new constitution in 1974. The change is subtle, but important, since it reflected the reduced relevance of the authority of the federation in relation to its member states. For discussion of constitutional issues, see Fritz Hondius, *The Yugoslav Community of Nations* (The Hague: Mouton, 1968); and Gow, *Hissssing Ssssnake.*

[94] Gow, *Triumph of the Lack of Will,* 13.

[95] The 1986 Memorandum of the Serbian Academy of Arts and Sciences was a focal point for the kinds of arguments made on behalf of the Serbs. The document, written by a group of Serbian academics and not intended for publication, was a 'political bombshell' when excerpts from it were published in the Belgrade press in September 1986. Silber and Little, *Death of Yugoslavia,* 29.

Milošević, which he capitalized on, he had actually been to Kosovo four days earlier, and spoke with Serb activists, who accused him of not listening to his grievances. He agreed to return at 5 p.m. on 24 April. In the interim, preparations were made to ensure a good turnout and the Belgrade media and TV were put on stand-by to come and cover the event.[96] This event enshrined Milošević as protector of the Serbs, and he played on that image to secure his own hold on political power in 1987 and stoke the fires of nationalism among the Serbs in other parts of the SFRY.

In 1990, multiparty elections were held which resulted in victory for parties founded along nationalist lines, whether they were communist parties as in Serbia and Montenegro or centre–right parties as in the other Republics. In Bosnia, three parties formed, and drew support from the Republic's three main ethnic groups: the Serbian Democratic Party (SDS), the Croatian Democratic Community (HDZ), and the Party of Democratic Action (SDA). In Croatia, the Croatian Democratic Union (HDZ) won decisively under the leadership of Franjo Tudjman. Tudjman was a former JNA Officer who had previously been sidelined in Croatian politics for his nationalist beliefs. His pronouncements, notably denying the scale of the Second World War atrocities committed by Croatian Milošević, and his desire to secure for the Croatian people a nation state of their own, struck fear into the hearts of Serbs living in Croatia and increased support for the SDS. Following the elections, ethnic Serbs in Croatia began to react to the possibility that they would find themselves discriminated against in an independent Croatia, run by 'Ustaše inspired politicians', and began to form paramilitary units to effectively cut off predominantly Serb populated areas of Croatia, in the Krajina and in Eastern Slavonia, with the moral support and political guidance of the Belgrade regime.[97]

Violence had broken out in earnest by May 1991, and in the political arena was mirrored by the blocking of what should have been an automatic rotation of the Presidency to Stipe Mesić.[98] The series of meetings held by the leaders of the Republics had degenerated into no more than, according to Tudjman, 'conversations of the deaf'.[99] The SFRY had by now ceased to function. On 25 June 1991, Slovenia and Croatia made declarations of independence. In response, the JNA carried out what was initially

[96] Silber and Little, *Death of Yugoslavia,* 36–8.

[97] Silber and Little, *Death of Yugoslavia,* 110.

[98] Transcript [Testimony of Expert Witness, Dr James Gow in the Rule 61 hearing in the Nikolić case], *Prosecutor v. Nikolić,* IT-94-2-R61, 9 October 1995, 67.

[99] Silber and Little, *Death of Yugoslavia,* 161.

conceived as a limited police action in Slovenia, sanctioned by a Presidential Order of 21 June, to restore Federal control of the boundaries and border posts. The war in Slovenia lasted only ten days. On 7 July, an EC-brokered ceasefire provided for the withdrawal of the JNA from Slovenia, the succession of Mesić to the Presidency, and a three month moratorium on the question of independence.

The situation in Croatia was more complex. The JNA joined with Serb paramilitary groups, who had been fighting in areas of Croatia since 1990. By mid-August it was clear that there was no prospect of preserving the SFRY so the aim was no longer to forestall independence, but to create a new common state for all Serbs. This meant carving out strategically important areas of territory, and clearing them of non-Serbs, in order to attach to the successor state to the SFRY.[100] The attack on Dubrovnik and the siege of Vukovar, in November 1991, were the most brutal early examples of the strategy of ethnic cleansing.[101]

The outbreak of war in Bosnia was blamed on the granting of recognition by the EU in April 1992, although this was, in reality, unavoidable.[102] As the findings of the Badinter Commission show, every Republic had equal right to independence, so each had to be recognized on the same criteria. The tragedy was that the road to independence would necessarily be more complex and difficult in Croatia than Slovenia, and even more so in Bosnia.[103] In any case, the declaration of four autonomous regions

[100] Gow, *Triumph of the Lack of Will,* 33.

[101] Vukovar was the subject of more that one indictment relating to the mass killing and deportation of the population. The first indictment charged individuals responsible for the mass killing at Ovčara, near Vukovar, of approximately 200 Croatian and other non-Serb persons who had been removed from Vukovar Hospital on 20 November 1991. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin, and Slavko Dokmanović, "Vukovar" (IT-95–13a), 7 November 1995. A second indictment was confirmed against Željko Ražnjatović, also known as Arkan, and he has been indicted for crimes committed in and around Vukovar, although the details remain confidential as the indictment was sealed. Decision to Vacate in Part an Order for Non-Disclosure, *Prosecutor* v. *Željko Ražnjatović "Arkan",* IT-97-31, March 1999.

[102] Lord David Owen argued that the critical mistake made by the European Union and the United States was to continue down the path towards recognizing Bosnia after recognizing Croatia and Slovenia. He notes that there was a significant difference between the recognition of Croatia and Bosnia, in that when the former was recognized there was a formal ceasefire in place, whereas the recognition of Bosnia was like 'pouring petrol on a smouldering fire'. The consequence of recognition was different, therefore, but Owen is mistaken in thinking that it was unavoidable. David Owen, *Balkan Odyssey* (London: Indigo, 1995), 48. See Gow, *Hisssing Ssssnake* ; and Weller, M., 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law,* 86 (1992), 569–607.

[103] See Gow, *Hisssing Ssssnake* ; and Weller, M., 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law;* 86 (1992), 569–607.

(SAOs) by the Bosnian Serbs in September 1991 and their withdrawal from the Bosnian Assembly in 1991 to form their own 'Assembly of the Serb People of Bosnia and Hercegovina' sounded the death knell for Bosnia months before EU recognition of the Republic.[104] Izetbegović was shocked by Karadžić's words on the night of 14–15 October: 'At that moment I had the feeling that the gates to hell had opened and we were all burned by the flames of the inferno'.

In December 1991, Germany stated unilaterally that it was ready to recognize Slovenia and Croatia, and the European Union granted recognition in January 1992, subject to certain conditions. Bosnia was recognized as an independent state by the European Union on 6 April 1992 and by the United States a day later, following a referendum on independence held in March and boycotted by the Serbs. Radovan Karadžić, leader of the Bosnian Serbs, threatened that if Bosnia was recognized as an independent state it would be stillborn and not last a single day.[105] His threat was carried out. Although sporadic fighting had begun before recognition, the war in Bosnia broke out in earnest at the beginning of April 1992. By August 1992, the Bosnian Serb Army and the JNA were in control of 70 per cent of the territory of the republic.

Ethnic cleansing was an explicit part of Serb strategy in Croatia and in Bosnia.[106] The aim was to clear areas of non-Serb population through mass killing, terror, and deportation. Throughout 1992 and 1993, international observers, under the auspices of the UN Human Rights Committee, the European Community, the Conference on Security and Co-operation in Europe, the International Committee of the Red Cross (ICRC), and Non-Governmental Organizations (NGOS), such as Helsinki Watch and Amnesty International, documented the widespread violations of international law occurring in Bosnia primarily, but also in other regions of the territory of the former Yugoslavia.[107] In its first 'special session', the UN

[104] Silber and Little, *Death of Yugoslavia,* 237.

[105] Ibid., 226.

[106] Zoran Pajić, *Violations of Fundamental Human Rights in the Former Yugoslavia. Part 1: The conflict in Bosnia and Hercegovina* (London: David Davies Memorial Institute, 1992), 5; also see Norman Cigar, *Genocide in Bosnia: The Policy of Ethnic Cleansing* (Texas: A&M University Press, 1996); and Gow, 'The Role of the Military in the Yugoslav War of Dissolution', and *Triumph of the Lack of Will,* 41–3.

[107] For example, *Report on the Situation of Human Rights in the Territory of Former Yugoslavia Submitted by Mr. Tadaeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights Pursuant to Paragraph 14 of Commission Resolution 1992/S-1/1,* S/24516 (1992), 14 August 1992; Human Rights Questions: Human Rights Situation and Report of Special Rapporteurs and Representatives, *The Situation of Human Rights in the Territory of the Former Yugoslavia,* S/24516, 3 September 1992; *Situation of Human Rights in the Territory of the Former Yugoslavia: Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia. Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights Pursuant to Paragraph 32 of Commission Resolution 1993/7, of 23 February 1993,* S/26725, 20 November 1993; *European Community Investigative Mission Into the Treatment of Muslim Women in the Former Yugoslavia: Report to European community Foreign Ministers* S/25240 (1993), 3 February 1993; *Report of CSCE Mission to Inspect Places of Detention in Bosnia and Hercegovina,* 29 August to 4 September 1992; *Report Under the Moscow Human Dimension Mechanism to Croatia,* CSCE, October 1992; Amnesty International, *Further Reports of Torture and Deliberate and Arbitrary Killings in War Zones* (1992); Amnesty International, *Bosnia and Hercegovina: Gross Abuses of Basic Human Rights* (1992); Helsinki Watch, *Human Rights Abuses in Croatia* (1992); Helsinki Watch, *Yugoslavia: Human Rights Abuses in Kosovo* (1992); Helsinki Watch, *Abuses Continue in the Former Yugoslavia: Serbia, Montenegro and Bosnia and Hercegovina* (1993).

Commission on Human Rights, convened at the request of the US government on 13–14 August 1992, requested its chairman to appoint a special rapporteur with a mandate to gather and compile information on possible violations of human rights in the territory of the former Yugoslavia.[108] The Chairman appointed Tadeusz Mazowiecki, former Prime Minister of Poland. The Secretary-General, on the basis of reports from his own Special Envoy, concluded that the Bosnian Serbs and the Yugoslav People's Army were 'making a concerted effort … to create ethnically pure regions in the Republic'.[109] The acts which constituted 'ethnic cleansing' included mass forced population transfers, Serb-run detention centres where tens of thousands were being killed and tortured, organized massacres, physical destruction of whole towns including major historical, cultural, and religious monuments, and the systematic and repeated rape of women.[110]

Far from being the unfortunate fallout of a war fought on ethnic lines, or a random set of occurrences which—however brutal—were part of the 'fog of war', ethnic cleansing was an orchestrated and systematic campaign to rid areas of non-Serb populations. The same strategy was carried out by Bosnian Croat forces against Bosnian Muslims in the Lašva River Valley area of central Bosnia in 1992–94 and in Ahmići in 1993.[111] There were also sporadic incidents of atrocities carried out by Bosnian Muslims against Bosnian Serbs.[112] This was recognized by Mazowiecki, who issued

[108] See Payam Akhavan, 'Punishing War Crimes in the Former Yugoslavia—A Critical Juncture for the New World Order', *Human Rights Quarterly,* 15 (1993), 265–8.

[109] *Further Report of the Secretary General Pursuant to Security Council Resolution 749,* S/13900 (1992), at 5.

[110] Bell-Fialkoff, 'A Brief History of Ethnic Cleansing', 110.

[111] Tihomir Blaškić 'Lašva Valley', IT-95-14, 10 November 1995; Zlatko Aleksovski 'Lašva Valley', IT-95-14/1, 10 November 1995; Dario Kordić and Mario Čerkez 'Lašva Valley', IT-95-14/2, 10 November 1995; Zoran Marinić 'Lašva Valley', IT-95-15, 10 November 1995; Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić 'Ahmici', IT-95-16, 10 November 1995; Anto Furundžija 'Lašva Valley', IT-95-17/1, 10 November 1995.

[112] Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo "Čelebići Camp", IT-96-21, 21 March 1996.

a statement in May 1993 condemning crimes committed by Muslims against Serbs; and the European Parliament condemned Serb and Croat attacks.[113]

THE SECURITY COUNCIL AND VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN YUGOSLAVIA

It has been suggested that the establishment of an international tribunal for Yugoslavia was 'only a matter of time once the situation in the area was put on the agenda of the UN Security Council'.[114] However, the situation in Iraq in which violations of international humanitarian law were taking place had, only a couple of years earlier, been brought to the attention of the Security Council, but an international tribunal was not established, nor were any other measures taken to ensure that those responsible were brought to justice.[115] Meron considers the failure of the Security Council to even issue a warning to responsible Iraqis that they would be subject to arrest and prosecution for war crimes to mean that an 'historic opportunity' had been missed to assert the principle of individual criminal responsibility.[116] As he points out, there was an obvious tension in 1991 between negotiating a ceasefire and demanding the arrest, trial, and punishment of Saddam Hussein, particularly given that the war aims of the UN coalition had been limited to the removal of Iraqi armed forces from Kuwait, so there was no prospect of forceful action to obtain custody of Iraqi leaders in order to conduct a trial. Another 'historic opportunity' presented itself with regard to former Yugoslavia in 1993 and this time it was acted upon.

The decision was not taken in isolation. It was the culmination of a series of incremental measures taken by the Security Council. As discussed above, the Council, meeting in September 1991, concluded that the situation in Yugoslavia constituted a threat to international peace and security even though it was still generally regarded as an internal conflict.[117] Resolution 713, imposing an arms embargo on Yugoslavia, referred

[113] Cotic, 'Introduction' in Clark and Sann (eds.), *A Critical Study,* 232.

[114] Juan José Quintana, 'Violations of International Humanitarian Law and Measures Of Repression: the International Tribunal for the Former Yugoslavia' *International Review of the Red Cross,* 300 (1994), 224.

[115] See *The Path to The Hague: Selected Documents on the Origins of the ICTY* (The Hague: ICTY, 1996); and Meron, 'The Case for War Crimes Trials', 124.

[116] Meron, 'The Case for War Crimes Trials', 124.

[117] Slovenia and Croatia declared their independence on 25 June 1991 but they were not recognized as independent states until January 1992. Bosnia was recognized by the European Union on 6 April 1992, following a referendum on independence. See Chapter 4.

to the consequences of the fighting in Yugoslavia for the countries of the region, in particular the border areas of neighbouring countries; it also referred to the heavy loss of life and material damage caused by the fighting and determined that the continuation of the situation constituted a threat to international peace and security.[118] Subsequent enforcement measures included sending peacekeeping forces to Croatia with the consent of the parties to the conflict and later authorizing 'all measures necessary' to facilitate the delivery of humanitarian assistance in Bosnia (UNPROFOR),[119] the imposition of sanctions against Serbia and Montenegro, incrementally strengthened during 1992–3, the imposition of a no-fly zone to curb attacks on civilian targets from Bosnian Serb air bases in Banja Luka,[120] and the creation of 'safe areas' in Srebrenica, Sarajevo, Tuzla, Žepa, Goražde, and Bihać.[121]

On 13 July 1992, the Security Council reaffirmed that all parties are under obligations to respect international humanitarian law, in particular the 1949 Geneva Conventions, and that persons who commit or order the commission of grave breaches are individually responsible.[122] The message was reiterated on a number of separate occasions. On 4 August 1992, the Security Council expressed its deep concern at reports of 'widespread violations of international humanitarian law and in particular reports of the imprisonment and abuse of civilians in these camps', calling on all parties, States, international organizations, and NGOs to submit any information they might have regarding these camps.[123] Later that month, following the transmission on 6 August 1992 of ITN footage from the Omarska camp in the Prijedor region of north-western Bosnia, showing conditions in the camp reminiscent of Auschwitz and Belsen fifty years previously, the Security Council adopted Resolution 771.[124] In this Resolution, the Council, acting under Chapter VII, demanded that all parties and others concerned in the Former Yugoslavia and all military forces in Bosnia and Hercegovina comply with the provisions of Resolution 771, including the immediate cessation of all breaches of international humanitarian law, including those involved in the practice of 'ethnic cleansing', and unimpeded access for relevant international humanitarian organizations to camps, prisons, and detention centres, and warned the parties that failure

[118] S/RES/713 (1991), 25 September 1991.[87] S/RES/770 (1992), 13 August 1992.

[119] S/RES/770 (1992), 13 August 1992.

[120] S/RES/781 (1992), 9 October 1992. No authorization was given to enforce this until March 1993, S/RES/816 (1993), 31 March 1993; and no action was taken until February 1994.

[121] S/RES/819 (1993), 16 April 1993, and S/RES/824 (1993), 6 May 1993.

[122] S/RES/764 (1992), 13 July 1992.

[123] Statement by the President of the Security Council, S/24378 (1992), 4 August 1992.

[124] S/RES/771 (1992), 13 August 1992.

to comply would result in further measures being taken. The Resolution also called upon states and international humanitarian organizations to collate 'substantiated information' relating to violations, to be made available to the Security Council. On 6 October 1992, the Security Council requested that the Secretary-General establish a Commission of Experts to examine evidence of international humanitarian law violations, including information collected by States and international organizations.[125]

The five member Commission of Experts was mandated to 'examine and analyse, *inter alia,* information submitted pursuant to Security Council Resolutions 771 (1992) of 13 August 1992 and 780 (1992) of 6 October 1992, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia'.[126] In spite of financial and practical difficulties, the Commission managed in just sixteen months to compile over 65,000 pages of documents, 300 hours of videotape, and 3,300 pages of analysis.[127] The Final Report set out the findings of the Commission regarding the law applicable to the situation in former Yugoslavia; and made substantive findings based on general studies of the military structure of the parties to the conflict and on a number of separate investigations carried out in 1993 and 1994.[128] It concluded that the practices of ethnic cleansing, sexual assault, and rape were carried out so systematically that they strongly appeared to be the product of a policy; and further that the type, range, and duration of the violations described strongly implied command responsibility.[129] In its first interim report on 9 February 1993, the Commission stated that the establishment of an ad hoc international criminal tribunal would be 'consistent with the direction of its work'.[130]

The first proposal for an international tribunal for Yugoslavia was made by a Yugoslav reporter, Mirko Klarin, in an article published in Belgrade

[125] S/RES/780 (1992), 6 October 1992.

[126] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, 27 May 1992, at 1. See M. Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' in Clark and Sann, *A Critical Study,* 279–340.

[127] M. Cherif Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers, 1996), 204.

[128] Between July 1993 and March 1994 the Commission carried out thirty-two field missions and seven major investigations, concentrating on: the excavation of a mass grave in Vukovar/Ovčara; grave exhumation in UNPA Sector West; rape and sexual assault; radiological investigation in UNPA Sector West; the destruction of property; the Medak Pocket in UNPA Sector South; and ethnic cleansing in Prijedor, in north-western Bosnia.

[129] Final Report of the Commission of Experts, 27 May 1994, at 313, 318.

[130] Interim Report of the Commission of Experts, 10 February 1993, at 74.

entitled 'Nuremberg Now!' in May 1991.[131] It was not until the following Spring that the idea was taken up by Robert Badinter, former French Justice Minister and President of the Arbitration Commission for the Former Yugoslavia; and it was still another year before the Tribunal was finally established.[132] The German Foreign Minister, Klaus Kinkel, proposed the establishment of a tribunal at the London Conference on Former Yugoslavia on 26 August 1992: 'Those responsible for all crimes and violations of human rights, both inside and outside the camps, must be brought to account. An international court of criminal justice has to be created.'[133] Kinkel raised the idea again before General Assembly in September 1992, and in December 1992 Lawrence Eagleburger made what has become known as his 'naming names speech' in which he announced that the United States had identified ten suspected war criminals who should be prosecuted, including Milošević and the Bosnian Serb political and military leaders, Radovan Karadžić and Ratko Mladić.[134]

There followed a 'flurry of activity' to turn the idea into a reality.[135] The first draft was submitted on 9 February 1993 by three CSCE Rapporteurs, and was prepared at the request of the British government, who at the time held the Presidency of the EU.[136] On 6 January 1993, Roland Dumas appointed a Commission of Jurists, chaired by the French chief prosecutor, with the mandate to prepare a draft statute for an ad hoc international

[131] Mirko Klarin, 'Nuremberg Now!', *Borba,* 16 May 1991. Translation from Serbo-Croatian reproduced in Antonio Cassese (ed.), *The Path to The Hague: Selected Documents on the Origins of the ICTY* (The Hague: ICTY, 1996), 35–7.

[132] Letter of Robert Badinter to Antonio Cassese, 24 May 1996. Translation from French reproduced in Cassese (ed.), *The Path to The Hague,* 71.

[133] Statement delivered by Dr Klaus Kinkel, German Foreign Minister, at the London Conference on the Former Yugoslavia, 26 August 1992. Translation from German reproduced in Cassese (ed.), *The Path to The Hague,* 39–41.

[134] Statement delivered by Lawrence Eagleburger, US Secretary of State, at the International Conference on the Former Yugoslavia, Geneva, December 16 1992. Official text reproduced in Cassese (ed.), *The Path to The Hague,* 55–7. The others on the list of suspects were Drago Prcać; Adem [Hazim] Delić, who was found guilty on thirteen counts and sentenced to twenty years imprisonment on 16 November 1998; Željko Ražnjatović (Arkan), who was killed in a café in Belgrade in August 1998; Vojislav Šešelj; Borislav Herak; and 'Adil' and 'Arif', members of a Croatian paramilitary force. Eagleburger said later that he had been prompted to make this speech after a conversation with Elie Wiesel, and with the explicit approval of the US government. Letter of Mr Lawrence Eagleburger to Mr Antonio Cassese, original text reproduced in Cassese (ed.), *The Path to The Hague,* 73. See also Michael P. Scharf, *Balkan Justice,* 44.

[135] Cassese (ed.), *The Path to The Hague,* 13.

[136] CSCE *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* by Rapporteurs (Corell–Turk–Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Hercegovina, 9 February 1993. The Rapporteurs, Ambassador Corell, Ambassador Turk, and Mrs Gro Hillestad Thune, were given the following mandate: 'To investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such acts'. Cassese (ed.), *The Path to The Hague,* 61.

tribunal.[137] Meanwhile, the US government, keen to take the initiative on this issue, requested the UN Human Rights Committee to form an expert working group to draft a statute for an international tribunal.[138]

On 22 February 1993 the Security Council, expressing alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, decided in principle on the establishment of an international tribunal, and requested that the Secretary-General prepare a report, including specific proposals for the 'effective and expeditious implementation of this decision' taking into account suggestions put forward by Member States.[139] A number of suggestions were subsequently put forward by States, international organizations, and NGOs, which supplemented the initiatives outlined above.[140] Aside from the CSCE proposal, the majority of the proposals put forward by States and NGOs for the establishment of the tribunal recommended

[137] Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, S/25266 (1993), 10 February 1993. The Italian government also submitted a proposal. Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, S/25300, 16 February 1993.

[138] Scharf notes, somewhat petulantly, 'Little did we know that France was about to pull the rug out from under us and steal our thunder'. Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (North Carolina: Carolina Academic Press, 1997), 52.

[139] S/RES/808 (1993), 22 February 1993.

[140] Note Verbale dated 12 March 1993 from the Permanent Mission of Mexico to the United Nations addressed to the Secretary-General, S/25417, 16 March 1993; *Some Preliminary Remarks by the International Committee of the Red Cross on the setting-up of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia (United Nations Security Council Resolution 808 (1993) Adopted on 22 February 1993),* DDM/JUR/422b, 25 March 1993; The National Alliance of Women's Organizations, 31 March 1993; Letter dated 31 March 1993 form the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey to the United Nations addressed to the Secretary-General, S/25512, 5 April 1993, (Organization of the Islamic Conference); Amnesty International, *Memorandum to the Untied Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia,* Distr: SC/CO/PG/PO, AI Index: Eur 48/02/93, April 1993; Letter dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/25537, 6 April 1993; Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/25575, 12 April 1993; Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General, S/25594, 14 April 1993; Lawyers Committee for Human Rights, 19 April 1993; Letter dated 20 April 1993 from the Permanent Representative of Slovenia to the United Nations addressed to the Secretary-General, S/25652, 22 April 1993; Note Verbale dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General, S/25716, 4 May 1993. All of the above documents are reproduced in Morris and Scharf, *An Insider's Guide,* vol. II, 211–480.

that it should be established by the Security Council, as opposed to the other alternatives: by Resolution of the General Assembly or by treaty. The Secretary-General submitted his report on 3 May 1993, which examined the legal basis for the establishment of an international tribunal, and contained specific language for inclusion in the Statute.[141] The report also recommended that the tribunal should be established by a decision of the Security Council on the basis of Chapter VII, which would have the advantage of being 'expeditious and […] immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under chapter VII'.

The Government of the Federal Republic of Yugoslavia (FRY) raised fundamental objections to the establishment of the Tribunal, arguing that:

1. the establishment of an ad hoc tribunal in this instance was discriminatory, because no efforts had been made to prosecute perpetrators of war crimes in other conflicts;
2. a tribunal established by the Security Council would not be impartial, because of that body's allegedly one-sided approach to the conflict;
3. the drive to establish an international tribunal was 'politically motivated and without precedent in international legal practice';
4. the Security Council had no mandate to set up such a Tribunal; [142]
5. the invocation of Article 29 of the UN Charter, to create a subsidiary organ of the Security Council, was 'legally unfounded and arbitrary';
6. the Statute was so riddled with 'legal lacunae' that it was 'unacceptable to any State cherishing its sovereignty and dignity';
7. the Statute was contrary to the Constitution of the FRY, which prohibits extradition.[143]

The first three points are political objections. As discussed above, the method of establishment was inherently selective, but this does not necessarily impinge on its status as a properly constituted judicial body. The fact that a tribunal had not been established before does not preclude the establishment of one in this case. It is undeniable that the move was

[141] Report of the Secretary-General Pursuant to para. 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993.

[142] Brazil also expressed doubts about the competence of the Security Council to establish or exercise a criminal jurisdiction. Letter dated 6 April 1993 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, S/25540, 6 April 1993.

[143] Letter dated 19 May 1993 from the Chargé D'Affaires A. I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations addressed to the Secretary-General, S/25801.

'politically motivated and without precedent in international legal practice', but the political motivation was not anti-Serb, as is alleged in point 2, but rather the Security Council's exercise of its responsibilities in respect of international peace and security, as discussed above. The Statute is examined in Chapter 4. The final point, relating to extradition, is examined in Chapter 7.[144]

The Security Council unanimously adopted Resolution 827 on 25 May 1993. In this resolution, the Council requested that the Secretary-General urgently 'make practical arrangements for the effective functioning of the International Tribunal at the earliest time'. The task given to the Secretary-General was to put flesh on the bones of Resolution 827 and make the Tribunal a reality.

CONCLUSION

Akhavan suggested that it might be asked whether 'the nexus between peace and justice was simply an expression of outrage clothed in judicial terminology in order to legitimize the application of chapter VII'.[145] It was also suggested that the Tribunal was no more than a 'fig-leaf for inaction'.[146] Indeed, there is some merit to the allegation that the Tribunal was established to perform a dual function, to assuage public opinion and function as a bargaining chip in the ongoing peace negotiations,[147] neither of which concern its judicial purpose. The establishment of the Tribunal was the product of interconnected pressures: concern among domestic public opinion, combined with the failure of the international community to put a stop to the fighting; but it was also a product of changes in the international political system in the early 1990s.

The events of the early 1990s—the creation of safe havens for the Kurds of northern Iraq; and the imposition of arms embargoes on the former

[144] Basically, the objection is irrelevant, because the Statute does not provide for extradition, but rather for transfer, and creates binding obligations under international law that override any domestic law and international treaties, such as extradition agreements. See Chapter 7.

[145] Payam Akhavan, 'The Yugoslav Tribunal at a Crossroads', *Human Rights Quarterly,* 18 (1996), 263.

[146] For example, Yves Beigbeder, *Judging War Criminals: the Politics of International Justice* (London: Macmillan, 1999), 146–68; Michael Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics', *Tulane Journal of International and Comparative Law* 6 (1998), 6–56; David Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia', in Clark and Sann (eds.), *A Critical Study,* 402–22; Robertson, *Crimes Against Humanity,* 65–7; Scharf, *Balkan Justice,* 37.

[147] D'Amato, 'Peace vs. Accountability in Bosnia'; and Beigbeder, *Judging War Criminals,* 146.

Yugoslavia and Somalia—were the beginning of what might be, as Gow suggested, a 'revolution in international affairs'.[148] The invocation of Chapter VII in these situations represented a de facto shift towards regarding internal situations as threats to international security warranting mandatory Chapter VII enforcement measures. After this was formalized in the 1992 declaration, above, Chapter VII was invoked in a variety of situations, regarding the former Yugoslavia, Rwanda, Somalia, Liberia, Haiti, and Libya. The measures regarding Libya and the establishment of ad hoc international tribunals were the most radical manifestations of a 'seismic shift' in the interpretation of 'threat to international peace and security' to include violations of international law, even where committed within the borders of a single state. The result of this is that sovereignty can no longer be taken for granted: At the very least it is open to international scrutiny in cases of extreme violation.

Converging with this revolution was the ongoing process of development of international humanitarian law so that, in 1993, Madeleine Albright, US Ambassador to the United Nations, could affirm that 'international humanitarian law today is impressively codified, well understood, agreed upon, and enforceable'.[149] There existed extensive and well-developed rules of international humanitarian law, which were being flouted on a daily basis in the former Yugoslavia. Moreover, the Security Council were able and willing, legally and politically, to act not only to prevent abuses, but also to punish. The 'missing link' was the absence of an international institution competent to do so. The significant change in 1993 was that the Security Council was prepared to invoke Chapter VII in response to violations of international humanitarian law and establish an international criminal tribunal.

In creating such an institution, the Security Council began to fill the gap, at least on an ad hoc basis. The Tribunal, as a Chapter VII mechanism for the restoration and maintenance of peace, represented the convergence of Security Council powers and responsibility for international peace and security with enforcement of international humanitarian law. The Tribunal was a tool of politics, but it was a judicial, not a political tool. The distinction is crucial. It means that the Tribunal itself, once created, was independent. The independent status of the Tribunal meant that it developed a momentum of its own, so that, in time, it mattered less what the precise motives for its establishment were; success depended on

[148] James Gow, 'A Revolution in International Affairs—Governance, Justice and War', *International Relations,* XV (1) (2000), 1–10.

[149] S/PV. 3175 (1993), 22 February 1993.

the Tribunal's ability to independently manipulate the political context in which it operated in order to fulfil its judicial mandate. In order to achieve this, the Tribunal had to perform a delicate balancing act in order to fulfil its internal mandate, which was to deliver justice with reference to its external purpose, which was international peace and security. The particular tensions inherent in its status are examined in the following chapters.

3 Establishing a Court: 'A Mammoth Task'

Resolution 827 established the framework for the Tribunal. When they adopted Resolution 827, it is conceivable that most of the members of the Security Council did not understand the precise nature and extent of the commitment they were entering into. The process of establishing an international tribunal, let alone operating it, was tremendously difficult, involved, and expensive. Some of the difficulties involved had already been highlighted during the lengthy process of negotiations leading up to the adoption of the Statute. The practical difficulties were compounded by the complex political and diplomatic environment in which the Tribunal was established, and the fact that there was very little precedent to draw on.[150] In November 1994, when the President of the Tribunal addressed the General Assembly for the first time, presenting the first Annual Report, only one indictment had been issued by the Tribunal and no trials had yet been conducted. Cassese points out what seems obvious, but was not well understood or widely acknowledged:

> [T]o make an international criminal tribunal function one needs several things. One needs a courtroom as well as a secure place to hold the accused pending trial. […] One also needs international prosecutors and judges, as well as law clerks, experts in court management, court reporters and other appropriate staff. In addition, one needs security officers responsible for the protection of both judges and prosecutors, as well as of victims, witnesses and defendants; on top of that one needs guards charged with the custody of persons awaiting trial. It is clear that the logistic requirements of an international criminal court are numerous and varied

[150] The International Military Tribunals at Nuremberg and Tokyo were different in a number of respects: they were military, not criminal courts and were established on behalf of the Allied nations to try the defeated leaders of Germany and Japan, whereas the ICTY was established by the Security Council on behalf of the entire international community. Logistically, it was simpler at Nuremberg and Tokyo, in that there was a pre-existing court building in which to conduct the trial and basic facilities for the detention of accused. In the intervening period, the International Law Commission (ILC) had set out the crimes to be included in a Draft Statute for a permanent international criminal court, but little had been decided on the organization and procedure of such a court.

and markedly different from those necessary for setting up any of the various administrative bodies of the United Nations.[151]

This chapter charts the process of creating the Tribunal; and in particular the unique logistic requirements of an international criminal court. It examines the process of establishment from the adoption of Resolution 827 on 25 May 1993 to the end of the initial process of establishment. The first formal proceedings were underway in late 1994 to early 1995;[152] and the process of establishment was completed towards the end of 1996. This date coincides with the end of Justice Richard Goldstone and Judge Antonio Cassese's tenure as Chief Prosecutor and President of the Tribunal, respectively. It is also the point at which the Tribunal began to build momentum as a judicial body, having commenced its first full trial and conducted a number of investigations.

THE FIRST STEPS: PREMISES AND FINANCING

Resolution 827 was adopted unanimously, and the Statute prepared by the Secretary-General was adopted without modification. The speed with which the Statute was written and the urgency with which it was adopted had implications for the jurisdiction of the Tribunal, and for mechanisms for cooperation and judicial assistance, which are examined in detail in Chapters 4 and 6. The temporal, personal, and subject matter jurisdiction were tailored to meet the needs of the Tribunal as an ad hoc mechanism for the restoration of peace, and the Statute was deliberately conservative because of the lack of time. Following the adoption of 827, several States made interpretative statements, setting out their understanding of certain technical and jurisdictional elements which sought, for the most part, to mitigate against the conservative leanings of the Statute.

With regard to the establishment of the Tribunal, Resolution 827 determined that the seat of the Tribunal shall be in The Hague.[153] The Headquarters

[151] Address of Antonio Cassese, President of the ICTY, to the General Assembly of the United Nations, 14 November 1994, IT/87, 14 November 1994.

[152] The first indictment was confirmed in November 1994, and in February 1995 a number of other indictments were confirmed. See below, note 81. Judicial activity, in the form of hearings, did not commence until later in 1995.

[153] According to Julian Schutte, former Senior Legal Advisor in the Netherlands Ministry of Justice, the Dutch government was 'caught unprepared' by this. Julian J. E. Schutte, 'Legal and Practical Implications from the Perspective of the Host Country Relating to the Establishment of the International Criminal Tribunal for the Former Yugoslavia', in 'A Critical Study of the International Tribunal for the Former Yugoslavia', *Criminal Law Forum* 5/2–3 (1994), 424.

Agreement, concluded between the Government of the Netherlands and the United Nations on 27 May 1994 covered a number of issues arising from the establishment of the International Criminal Tribunal for Former Yugoslavia (ICTY), including the legal status and personality of the Tribunal and its staff, privileges and immunities afforded to judges and officials of the Tribunal under Dutch law, the premises of the Tribunal, provision of security for premises and staff, cooperation, and matters relating to the transfer and detention of accused.[154] The Dutch government located suitable premises for the Tribunal in the west wing of the Aegon Building in The Hague, leased from the Aegon Insurance company. The initial lease allocated 7,500 m^2 to the Tribunal. It took over the whole building at end of 1996, and leased 5,200 m^2 to the Organization for the Prohibition of Chemical Weapons (OPCW), until the completion of OPCW's headquarters down the road in The Hague. The Tribunal steadily expanded to fill the whole of this space, and rented additional offices elsewhere in The Hague.

One of the biggest obstacles in the way of the effective functioning of the Tribunal in its early years was inadequate funding. The first Prosecutor, Richard Goldstone, lamented the fact that 'The Tribunal has been the child of an insolvent parent, with all the consequences that has.'[155] The problem was that the Statute provided that the budget of the Tribunal would be drawn from the regular budget of the UN.[156] The addendum to the Report of the Secretary-General estimated that the operating costs for the first full year of operation would be approximately $31.2 million.[157] This was estimated to cover a staff of 373, plus eleven judges and related costs, such as language and verbatim records services. It did not include costs for premises, detention facilities, and imprisonment. The fact that the Tribunal's budget was to be taken from the regular UN budget meant that the Tribunal's budget was stymied in the ACABQ and Fifth Committee of the General Assembly. A debate ensued in the ACABQ about whether in fact the regular UN budget could be used to finance an initiative taken by the Security Council, or whether in requisitioning a portion of the regular UN budget the Security Council was usurping its authority. While this

[154] Agreement concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, July 29 1994, Annex to Letter dated 14 July 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/848, 19 July 1994.

[155] Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (North Carolina: North Carolina Academic Press, 1997), 84.

[156] Statute of the International Tribunal, Article 32.

[157] Security Council 3217th Meeting, UN Press Release, SC/5624, 25 May 1993, take 1.

discussion was ongoing, the Secretary-General was granted an initial $5.6 million for six months from 1 January to 30 June 1994.

The limited and insecure financing had a serious impact on the ability of the Tribunal to establish itself as a functioning judicial body. The initial allocation was only for six months, which meant that the Tribunal could not enter into any commitments beyond this period. In practical terms, this meant that no formal lease of premises could be entered into, the Tribunal was not able to recruit experienced staff on other than short-term contracts, and it was not able to buy and install necessary technical equipment. The first Annual Report stated that the Tribunal was 'operating with one hand tied behind its back'.[158] A further $5.4 million was allocated for the period from 1 July to 31 December 1994. The problem was alleviated somewhat when the General Assembly granted specific authority to the Secretary-General to enter into a contract for the premises, and to recruit personnel on longer-term contracts.

Even after a budget of $32 million was approved in 1994, the amount was insufficient to support a fully functioning international criminal court. It covered basic rental, services, equipment, and staffing expenses, but less than 2 per cent was allocated to the process of investigation. This created difficulties, especially when travel privileges were suspended on several occasions owing to lack of funds, notwithstanding the fact that there was money available in the Trust Fund. The judges made a formal request to the Secretary-General that the Tribunal be exempted from 'drastic financial measures' imposed by the Office of the Under-Secretary-General for Administration and Management on all UN organs. They argued that the budgetary restraints 'cut the very heart from the Tribunal', since its effect would be to make the OTP conduct paper-chase from afar, 'a course which cannot but bring discredit to the Tribunal'.[159] On one occasion, Goldstone took the initiative and suggested to the Pakistani Ambassador in The Hague that Pakistan, who had donated $1 million to the Trust Fund, inquire about the availability of money in the Trust Fund for the Tribunal. Within a day or two the money was released.[160]

The problem was compounded in 1995 by the funding crisis within the United Nations itself. UN Members owed the organization over $3.1 billion, more than half of which was owed by the United States. As a consequence,

[158] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/49/342, S/1994/1007, 29 August 1994, 16.

[159] CC/PIO/023-E, The Hague, 9 October 1995.

[160] R. J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), 86–8.

it was decided that half of the budget for the Tribunal would now come from the peacekeeping budget, and the Tribunal relied on voluntary contributions of money, staff, and resources from a number of States in order to function. Voluntary contributions totalled $5,389,795 by the beginning of 1996. There were also donations in kind, including computing equipment and video equipment. The US contribution was of an estimated value of $2,300,000. Video cameras and computers were also donated from the United Kingdom to an approximate value of $31,700. By 2000, the Tribunal was operating on an annual budget of $95,942,600. It is now a mammoth operation with a budget of $223,169,800 in 2002–3 and employing over 1,000 staff from over eighty countries.

THE CHAMBERS

The Statute provided for the basic framework for the organization of the Tribunal. There are three separate organs: the Chambers, the Registry, and the Office of the Prosecutor (OTP). The process of setting up and establishing working practices for each will be examined below.

The Chambers was the first organ of the Tribunal to be established and staffed. In accordance with the Statute, the judges were elected by the General Assembly in September 1993, sworn in on 17 November 1993, and commenced work soon after. At the time of establishment the Chambers were composed of two Trial Chambers and an Appeals Chamber, to be served by eleven judges. The selection of judges was compared to a beauty contest, because the method of selection was somewhat superficial. It required candidates to parade their academic and judicial qualifications. On paper, in the Statute, the requirements were extremely high. The candidates were meant to be 'persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.'[161] Most candidates were from academia, rather than practising judges; and this impacted on decisions on jurisdiction and procedure, since they were informed by a certain legal philosophy, as discussed in Chapters 4 and 5. The judges were more inclined to take a 'world view' of the issues at hand, and interpret their role as not only deciding the case at hand, but making a contribution to the development of international law.

The list was submitted to the Security Council who reduced it to twenty-two names. The General Assembly elected the eleven judges from

[161] Statute of the International Tribunal, Article 13.

this list of nominees on 15 September 1993. The original list of judges elected was as follows: Georges Michael Abi-Saab (Egypt); Antonio Cassese (Italy); Jules Dechênes (Canada); Germain Le Foyer de Costil (France); Li Haopei (China); Adolphus Godwin Karibi-Whyte (Nigeria); Gabrielle Kirk McDonald (USA); Elizabeth Odio-Benito (Costa Rica); Rustam S. Sidhwa (Pakistan); Ninian Stephen (Australia); Lal Chand Vohrah (Malaysia). The French judge, Germain Le Foyer de Costil, resigned and was replaced by Judge Claude Jorda. There have been a couple of significant changes since the creation of the Tribunal, for example, the Appeals Chamber is now shared with the International Criminal Tribunal for Rwanda (ICTR), established by the Security Council in November 1994.[162] In May 1997, five of the original judges were re-elected for a second four-year term, and six new judges were appointed. On 3 May 1998, the Security Council established a third Trial Chamber to cope with the increasing workload, and three new judges were elected.[163] Finally, on 30 November 2000, the Security Council approved an additional pool of *ad litem* judges to be made available to the Tribunal.[164]

The first session of the Tribunal was held at the Peace Palace in The Hague from 17 to 30 November 1993. The eleven judges were assigned to two Trial Chambers and the Appeals Chamber on a rotating basis, so that every judge would have the opportunity to sit on the Appeals bench, but would not hear a case at the appeals stage that they had already heard at the trial stage.[165] This system presented some problems, since it does not ensure a complete separation between the appeals and trial proceedings, even though it safeguarded against the same judges hearing the case at both stages.

Further sessions were scheduled for 17 January to 11 February 1994, 25 April to 29 July 1994, and 19 September to 4 November 1994.[166] Antonio Cassese was elected President and Elizabeth Odio-Benito Vice-President.[167] The President of the Tribunal performed judicial, administrative, and political functions.[168] He or she was at the same time a judge, the diplomatic representative of the Tribunal, and responsible for overseeing

[162] S/RES/955 (1994), 8 November 1994.

[163] S/RES/1166 (1998), 3 May 1998.

[164] S/RES/1329 (2000), 30 November 2000.

[165] See M. Cherif Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers, 1996), 213.

[166] Report on First Session of International Tribunal for War Crimes in Former Yugoslavia, UN Press Release, SC/5767, 23 December 1993.

[167] *International War Crimes Tribunal for Former Yugoslavia elects its President, Members of Appeals and Trial Chambers,* UN Press Release, SC/5753, 18 November 1993.

[168] Report of the Group of Experts Established Pursuant to Resolution 53/212, 18 December 1998 (Group of Experts Report), at 19.

the management and administration.[169] He or she was also, symbolically at least, the 'highest moral authority'.[170] Article 14 of the Statute set out the procedure for electing a president and his judicial and administrative function. The president also serves as the presiding Judge in the Appeals Chamber of the ICTY, unless disqualified by having heard case at trial. Article 29 of the Statute and Rule 61(E) set out one of the most important diplomatic functions of the president—the procedure for the referral of a State's non-compliance with orders of the Tribunal to the Security Council. Unlike the Prosecutor, the President of the ICTY did not serve concurrently as President of the ICTR. Also unlike the Prosecutor, the President has a finite term of four years in which to serve.

The first President of the Tribunal, Antonio Cassese, was elected on 18 November 1994.[171] Cassese brought extensive academic experience and a great deal of credibility as a leading international lawyer. He was a member of the Human Rights Commission appointed by the Italian Prime Minister and a delegate of the Italian government of the Council of Europe Steering Committee for Human Rights, on which he served as Chairman from 1987 to 1988. From 1989 to 1993, he was President of the Council of Europe Committee for the Prevention of Torture. He has held the Chair of International Law at the University of Florence and at the European University Institute since 1975 and 1987, respectively. He held the Chair of International Law at the University of Pisa from 1972 to 1974, and has held the Chair of International Law at the University of Florence since 1975, and at the European University Institute since 1987. He also had diplomatic experience, having served as a Member of the Human Rights Commission appointed by the Italian Prime Minster and a delegate of the Italian government to the Council of Europe Steering Committee for Human Rights. From 1989 to 1993, he served as President of the Council of Europe Committee for the Prevention of Torture, and from 1987 to 1988 he served as Chairman of the Council of Europe Steering Committed for Human Rights. Graham Blewitt recalled that he played a crucial role alongside Goldstone as the driving force behind development of Tribunal in the early stages.[172] There was a great deal of

[169] The Statute specifies this role as that of the Registrar, but the Rules of Procedure and Evidence put the onus on the President as the final arbiter. Interview with Stephàne Bourgon, Chef de Cabinet in the Office of the President of the Tribunal, The Hague, 27 November 2000.[21] Interview with Stephàne Bourgon, 27 November 2000.

[170] Interview with Stephàne Bourgon, 27 November 2000.

[171] International War Crimes Tribunal for Former Yugoslavia elects its President, Members of Appeals and Trial Chambers, SC/5753 (1993), 18 November 1993.

[172] Interview with Graham Blewitt, 27 November 2000.

cooperation between the separate organs in the early days on administrative matters, and in terms of public relations, but after Cassese and Goldstone had left informal contact between the prosecutor and the president diminished as each now had more clearly defined judicial function, conducted separately. Gabrielle Kirk McDonald, an American, was elected President of the Tribunal on 17 November 1997. She had been elected by the UN General Assembly as a Judge of the ICTY in September 1993 and re-elected on 20 May 1997 for a second four-year term. The French judge, Claude Jorda, was sworn in on 16 November 1999. Another American, Judge Theodor Meron, was elected President of the Tribunal on 27 February 2003 and took up office on 11 March 2003.

At the first plenary session, the judges set about devising a detailed set of Rules of Procedure and Evidence (RPE). The reason that the rules were drafted even before the OTP was up and running was that the judges were eager to begin trials as soon as possible, so it was necessary to provide the necessary structure, and an early publication of the rules would allow time for comments and suggestions to be made by States and non-governmental organizations (NGOs) for possible amendments. Furthermore, the rules were intended to provide guidance for the prosecutor in the conduct of investigations and preparing cases for trial. It was also felt that the rules would assist Member States with the enactment of implementing legislation in order to comply with Resolution 827.[173] The judges also set about devising a set of regulations governing the assignment of defence counsel and rules of detention.[174] The Registry had responsibility for both these areas in practice.

It was expected that the courtroom would be ready by 21 October 1994.[175] However, work on transforming an executive meeting room in the Aegon Building into the Tribunal's first courtroom, which commenced in July 1994, was not completed until December 1994.[176] In the event, the

[173] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/49/342, S/1994/1007, 29 August 1994, 20–21.

[174] Ibid., p. 30. Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal (adopted 5 May 1994; as amended 17 November 1997), IT38/Rev. 7; Directive on Assignment of Defence Counsel, Directive No. 1 of 1994 (as amended 30 January 1995); United Nations Detention Unit Regulations to Govern the Supervision of Visits to and Communication with Detainees (as amended 17 November 1997), IT/98/Rev. 2.

[175] International Tribunal for the Former Yugoslavia operational as a criminal court as of this Autumn, United Nations Press Communiqué, IT/82, 28 July 1994.

[176] The judges played the major role in designing the courtroom and in choosing the furniture and equipment. The advantage of having it purpose built was that it could be designed to fit with the specific requirements of the Tribunal, such as the need for a simultaneous translation system, which allows the trial to be conducted in either of the two official languages of the Tribunal or in BCS. *Bulletin,* No. 5/6, 24 June 1996, 7. It was recognized at the outset that a single courtroom would be insufficient for the volume of cases that were to be heard. However, budgetary constraints made the construction of further courtrooms impossible, and it was only when the Tribunal had proved its worth and established for itself a significant caseload that a second and third courtroom were constructed with the aid of voluntary donations from States. In July 1997, the UK government donated £330,000 for a second courtroom.

delay did not have any effect, since there were no cases to try in October 1994. The first indictment was not even confirmed until November 1994, and even then there was no one in custody.[177]

One question that arises is why the judges were appointed before the OTP had been set up and started work, and consequently there was nothing to judge? In an article in the UN Chronicle in March 1994, it is surmised that, having been sworn in and drawn up RPE during the first two-week session of the Tribunal, the judges would begin hearing cases at two more sessions in 1994, 25 April to 29 July and 19 September to 4 November.[178] Exactly which cases is a mystery, since there was no prosecutor to bring them. One possible explanation is that the judges were appointed to demonstrate that the Tribunal existed in reality as well as on paper; and they set about forming the infrastructure of the Tribunal. It was also envisaged in December 1993 that the prosecutor would shortly take office, and that the process of investigation and prosecution 'shall begin with minimum delay'.[179] This was not to be the case. In fact, as discussed below, it took nearly two years for a prosecutor to be appointed and take office, and nearly a year more before the first judicial activity took place.

THE REGISTRY

The Registry was the sole administrative organ, and served both the OTP and the Chambers. This caused problems for the OTP, who would have preferred to have had autonomy over their own budgets. The potential conflict of interest for the Registry in discharging its responsibility with regard to the Chambers on the one hand, and the prosecutor on the other, was also recognized in the Report of the Group of Experts, which recommends that the OTP be self-administered, as would be the case in domestic legal systems.[180]

[177] The early indictments were prepared under considerable pressure from the Judges, who were frustrated at having nothing to do once they had formulated the Rules of Procedure and Evidence. This had implications later on when cases came to trial, as discussed below, and in Chapter 8.

[178] *UN Chronicle,* March 1994, 66.

[179] Report on First Session of International Tribunal for War Crimes in Former Yugoslavia, UN Press Release, SC/5767, 23 December 1993.

[180] Group of Experts Report, at 22, 247.

The Statute provided that the Registrar would be appointed by the Secretary-General, in consultation with the President of the Tribunal, for a four-year term. Theo van Boven was appointed Acting Registrar by the Secretary-General in January 1994. Dorothee de Sampayo Garrido-Nijgh was appointed on 1 February 1995, and served two four-year terms. Her successor, Hans Holthius, was appointed on 11 December 2000. Jean-Jacques Heintz was appointed Deputy Registrar on 18 April 1997.

The Report of the Secretary-General spelt out the duties of the Registry: public information and external relations; preparation of minutes of meetings; conference service facilities; printing and publication of all documents; all administrative work, budgetary, and personnel matters; and serving as the channel of communication to and from the International Tribunal.

The Registry was organized into five sections dealing with Security, Press and Information, Legal Support, Administrative Services, and Judicial Support Services.[181] Administrative services comprise personnel, finance, general services (travel, supplies, inventory, management of the premises, and reproduction of documents), electronic support services, the library, and translation and interpretation services. It was also responsible for the Victims and Witnesses Unit, which was set up in accordance with Article 22 of the Statute to perform three functions: to recommend protective measures for victims and witnesses; and to provide counselling and support, in particular in cases of rape and sexual assault.

The Judicial Support section of the Registry was responsible for the management of the system of legal aid to indigent accused and assistance to defence counsel (Defence Counsel Unit);[182] the day-to-day management of the UN Detention Unit; the Victims and Witnesses Unit; and court management and support services, such as notification of sessions, assistance during hearings, indexing and filing of documents, management of the judicial archives, and transmission of documents, such as warrants of arrest.

THE OFFICE OF THE PROSECUTOR

The Office of the Prosecutor (OTP) took considerably longer than the Chambers and Registry to get up and running, mainly because of the delay in appointing a prosecutor, but also because of logistical difficulties

[181] Bulletin No. 2, 22 January 1996, 2.

[182] Interview with Christian Rohde, Defence Counsel Unit, ICTY, 27 November 2000.

which thwarted its evolution.[183] The method by which the prosecutor is appointed is set out in the Statute, which provided that he or she shall be appointed by the Security Council on nomination by the Secretary-General.[184] In the event it was not so straightforward. The process of finding and appointing a chief prosecutor was difficult precisely because it was recognized that it was such a critical and politically charged position.

The first person to be nominated was the then Chairman of the Commission of Experts, Cherif Bassiouni, on 26 August 1993, but he was rejected. The official reasons given by the United Kingdom for their opposition to Bassiouni's candidature was that he lacked the requisite practical experience and administrative skills called for by the post.[185] Sir David Hannay, UK representative, stated at the Council meeting in which Resolution 827 was adopted that, 'for the effective functioning of the Tribunal, the judges, prosecutor, and staff must have considerable practical experience in the field of criminal prosecution'.[186] According to Forsythe and Scharf, however, it was precisely his effectiveness as Chairman of the Commission of Experts that was a barrier to his appointment.[187] Venezuela's representative to the Security Council said that he had been opposed because he was seen as 'a fanatic who had too much information'.[188] As an alternative, the UK government put forward a British candidate for the post, John Duncan Lowe, Scottish Attorney General. In informal polling, each received seven votes in favour, with one abstention (Brazil). In order to break the deadlock, the Secretary-General nominated Bassiouni, but the United Kingdom countered this by stipulating that the selection of a prosecutor must be by consensus, which effectively scuppered any chance of either Bassiouni or Lowe's appointment.[189]

In October 1993, Ramón Escovar-Salom was appointed Chief Prosecutor.[190] Escovar-Salom was then the Attorney-General of Venezuela, and, according to a UN Press Release, his credentials were that he had 'followed closely international developments in the field of human rights

[183] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at para. 30.

[184] Statute of the International Tribunal, Article 17.

[185] Scharf, *Balkan Justice,* 76.

[186] Security Council 3217th Meeting, UN Press Release SC/5624, 25 May 1993, take 6.

[187] David Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia', in Clark and Sann, *A Critical Study of the International Tribunal for the Former Yugoslavia, Criminal Law Forum,* 5/2–3 (1994), 408; Scharf, *Balkan Justice,* 76–7.

[188] Scharf, *Balkan Justice,* 76.

[189] Ibid., 77.

[190] S/RES/877 (1993), 21 October 1993.

and international humanitarian law'.[191] However, he was unable to take up the post immediately, and, in February 1994, he formally resigned, which was a 'major blow' to the Tribunal, both in terms of its ability to get up and running and in terms of its credibility.[192] Eight nominees were vetoed by the Security Council during the next eight months. In fact, at the same time as Cassese offered the post to Goldstone, the matter was due to be taken up at the G7 meeting in Naples in July 1994. Five of the previous eight nominees had been vetoed by Russia, and the question being raised was whether Russia hoped to destroy the Tribunal, or whether it was merely that they objected to a prosecutor being from a NATO member state.[193]

Justice Richard Goldstone was finally appointed in July 1994, and he took office on 15 August 1994. Goldstone recalls how he had some doubts, because he was not an experienced prosecutor, nor was he experienced in international humanitarian law.[194] Nevertheless, he was 'an inspired choice'.[195] He was an experienced judge, having served in the Transvaal High Court since 1980, and had also had experience of conducting investigations into politically sensitive areas.[196] In 1991, he was appointed to lead the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (the Goldstone Commission). He gives the following reasons for his selection: 'The government was aware that I would not make findings against it without good cause, and the majority of South Africans had confidence that I would not hesitate to make findings against the government if the evidence justified it. '[197] In other words, he inspired confidence on both sides. He brought credibility to the Tribunal, and a reputation for impartiality and independence.

The one thing that Escovar-Salom had been able to achieve during his short tenure as a prosecutor was to recommend Graham Blewitt for appointment to the position of Deputy Prosecutor on 20 January 1994.[198]

[191] International War Crimes Tribunal for the Former Yugoslavia opens on 17 November in The Hague, UN Press Release, SC/5745, 15 November 1993.

[192] Report of the International Tribunal, 29 August 1994, 16. See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia,* 211–12.

[193] Goldstone, *For Humanity,* 23.

[194] Interview with Judge Richard Goldstone, 25 February 2001.

[195] Minna Schrag, 'The Yugoslav War Crimes Tribunal: An Interim Assessment', *Transnational Law and Contemporary Problems,* 7 (1997), 18.

[196] He was appointed by F. W. De Klerk to conduct a judicial inquiry into the death in custody of Clayton Sizwe Sithole in January 1990. Soldier in Umkhonto we Sizwe and boyfriend of Zindzi Mandela. Goldstone, *For Humanity,* 1.

[197] Ibid., 14.

[198] Blewitt had been involved in the Australian efforts to prosecute Nazi war criminals and prior to that had worked on drug-trafficking and organized crime. He had been contacted by the United Nations in 1992 and asked to sit on the UN Commission of Experts, but had turned it down, because the first prosecution for war crimes was about to be mounted in Australia so it was a crucial time. In December 1993, the prosecutions in Australia were being wound up and closed down, so at this point Blewitt, aware of the difficulties that were being encountered in getting the ICTY off the ground, contacted the UN and indicated his availability. Interview with Graham Blewitt, 28 March 2000.

Blewitt took up the post on 21 February 1994 and set about the task of establishing the office. The judges, having written the rules, had left, so there was only Graham Blewitt and the UN official serving as Registrar, Herman Gilli, at The Hague. It has been suggested that Blewitt was chosen as no more than a convenient fall guy on whose shoulders blame would fall in the event of failure.[199] It was certainly an inauspicious start to the first plenary session. The prosecutor made two announcements: here is your new deputy prosecutor, and goodbye.[200]

There were a number of fundamental questions to be resolved in order to set up a fully functioning prosecution team. The procedures for doing all the things that were long-established in various domestic systems were not in place for the ICTY, such as taking witness statements, how to prepare the witness to testify, how much evidence was enough to indict, and what form indictments should take.[201] In June 1994, staff began to arrive. Approximately twenty gratis personnel were donated from the United States. The others were what has been described as the 'war crimes mafia': individual lawyers and police who had been involved in war crimes investigation and prosecution in a number of states. The small staff set up offices in a couple of rooms in the Aegon Building, and in these early days, they hardly even had telephones and had empty desks.[202]

The office was organized as follows: a Prosecution Section, with prosecuting attorneys and legal advisers; an Investigation Section, consisting of investigators, analysts, and interpreters; and a Special Advisery Section consisting of advisers on such matters as international law, military organization, and the history of the former Yugoslavia. Finally, there was established an information and records division consisting of the Computer Operation and Administrative Records Sections.[203] The prosecutor also established liaison offices in Zagreb, Belgrade, and Sarajevo. Only Zagreb was functioning early on. Sarajevo was considered too dangerous until

[199] Interview with William Fenrick, Head of Legal Advisery, OTP, The Hague, 28 March 2000.

[200] Interview with Graham Blewitt, 28 March 2000.

[201] Schrag, 'The Yugoslav War Crimes Tribunal', 18.

[202] This account of the early process of the establishment of the OTP is based largely on a series of interviews conducted in March 2000 with Graham Blewitt, William Fenrick, John Ralston, and Gavin Ruxton.

[203] Richard J. Goldstone, 'The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action', *Duke Journal of Comparative and International Law,* 6/5 (1995), 7.

Implementation Force (IFOR) arrived there, following the conclusion of the Dayton Accords. The functions of the field offices were to provide support for teams of investigators on mission, to act as liaison between the OTP and local and national governments, NGOs, and UN agencies, to provide expert legal advice on republic and federal law, and to advise on important relevant developments in the region.[204]

A major obstacle in the early days was the fact that it was difficult to recruit staff, especially experienced investigators.[205] Of over 300 applications and expressions of interest, there were only a very small number with investigative expertise and experience. It was also difficult to attract high quality and experienced candidates, partly because it was not possible to offer secure long-term appointments. The difficulties in recruiting staff were compounded by UN bureaucracy. It has been suggested that the initial foot-dragging in the UN Office of Legal Affairs was an attempt at 'politically motivated sabotage'.[206] Eventually, however, the Tribunal was able to get the normal UN recruiting procedure waived. The decision taken by the Under-Secretary-General for Administration and Management in May 1994, to establish 'practical and expeditious personnel arrangements', meant that, in effect, the authority to appoint staff up to the D-1 level was delegated to the Registrar.[207]

This decision was the result of an incident in March 1994 that had a strong impact on the UN official who was in The Hague acting as Registrar. A potential witness, the Chief of Police in Stupni Do, contacted the Tribunal to notify them that he was willing to testify, as long as he was protected, because he was already convinced that his life was in danger.[208] Blewitt sought the assistance of the Dutch government to relocate him to the Netherlands. The witness was transported to The Hague, but it was a difficult operation and there were threats of reprisal against UN Forces.

[204] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at para. 3.

[205] Ibid., 39. The problem has continued to thwart the OTP. UN rules restricting promotion of General Services staff to Professional level posts, and those relating to the retention period for interns, have resulted in the loss of valuable staff members. Group of Experts Report, at 137.

[206] 'A Tribunal for Beginners', *War Report,* May 1995, 23.

[207] Report of the International Tribunal, 29 August 1994, 34–5. Tribunal staff, like UN staff, are recruited on normal UN scales: G: for general service staff; P: for professional level; and D: for diplomatic level, including Senior Legal Advisers and the Chief of Investigations. The only appointments subject to UN approval after this time were that of the Chief Prosecutor and Registrar. The Judges were elected by the General Assembly, as discussed above.

[208] His Deputy Chief of Police had already been assassinated.

Blewitt identifies this as the turning point for relations with the United Nations, because it was only when he witnessed the reality of a functioning prosecution section and witness protection programme, both hallmarks of a judicial system, that it became real for the acting Registrar. Blewitt says that he watched what was unfolding 'with his mouth open'.[209]

After this, the situation improved dramatically, at least in relation to staffing.[210] Blewitt called on former colleagues in war crimes units in Australia, New Zealand, Canada, England, Scotland, and Germany, who already had some expertise in dealing with war crimes investigation and prosecution and had a shared experience and mutual trust, since there had been a degree of overlap between the various units. These people formed the nucleus of the OTP. Crucially, they all shared the belief that war crimes prosecutions were not only desirable, but were also entirely feasible. They did not share the scepticism surrounding the establishment of the Tribunal in some quarters of the United Nations and the academic and policy-making community.[211] Blewitt says that he never had any hesitation in believing that the Tribunal was going to be a reality.[212]

LAUNCHING INVESTIGATIONS

Before investigations could begin, there was a myriad of issues to be resolved that would be taken for granted in a domestic legal system, such as what an indictment should look like in form and substance, what the requirements are for a sufficient charge, whether multiplicity or duplicity apply to charges, how specifically the acts must be stated, must the evidence supporting the charges be stated in the indictment, and what details regarding the accused must be in the indictment.[213] It was also necessary to adopt an approach that would bring together disparate perspectives in a form that

[209] Interview with Graham Blewitt, 28 March 2000.

[210] Report of the International Tribunal, 29 August 1994, 40. Goldstone recalls that the delegation of authority to the registrar led to more problems, since the process was made more complex by 'unimaginative and sometimes malicious officials' seconded to the ICTY from other UN offices in order to advise the registrar. Goldstone, *For Humanity,* 86.

[211] Goldstone recalls a conversation he had with former Prime Minister Edward Heath soon after his appointment to the post of Chief Prosecutor. Heath asked him why he had accepted such a 'ridiculous job'. His opinion was that if people wanted to murder one another, as long as they were not doing it in his country, it was none of his business. Goldstone, *For Humanity,* 74.

[212] Interview with Graham Blewitt, 28 March 2000.

[213] Guidelines were established on a range of issues, including: general issues of accountability, UN rules, information security, personnel issues, dealing with classified material, interviewing witnesses, accused, and suspects, preparation of an indictment, mission procedure, evidence collection and collation, file management, disclosure obligations, search and seizure, arrest procedures, requests for assistance, suspect identification, and sources. Interview with John Ralston, 27 November 2000.

would be workable and recognizable to all.[214] All staff were experienced, some at the highest levels of the legal and police systems of their respective countries. It was, therefore, 'no small feat to bring such a group to a consensus on how such issues should be resolved'.[215]

Investigation teams were also organized. Blewitt drew on his experience investigating war crimes in Australia, which had convinced him that the conduct of investigations should be primarily a police function, with lawyers adding advice and direction, rather than the other way round. The rationale behind this was that the prosecutors, by keeping a distance from the investigative process, would maintain a degree of objectivity. This decision has held as the guiding principle as the Tribunal has grown, but it met with opposition in some quarters, mostly from lawyers. The more normal relationship, and one which would have been preferred by some, would be to have prosecuting attorneys directing the police.

The starting point for investigations was the report of the UN Commission of Experts and information furnished by governments and NGOs.[216] This dictated the formation of investigation teams, focusing on separate geographical areas or sets of crimes. Separate teams for 'leadership research' and 'military analysis' were also established in the early stages. By late 1995, the experience of conducting investigations revealed the need to adapt the structure of the Investigations Section within the Office. It was divided into four subunits: the Intelligence Analysis Unit, responsible for analysing information coming into the office and disseminating it to other units; the Strategy Unit; the Investigation Development Unit; and the Special Projects Unit, responsible for debriefing witnesses, analysing power and legal structures and providing a chronology of events, empirical studies of violations to serve as a frame of reference, and providing information to domestic investigations being conducted.[217]

[214] Michael Keegan, 'The Preparation of Cases for the ICTY', *Transnational Law and Contemporary Problems,* 7 (1997), 126.

[215] Keegan, 'The Preparation of Cases for the ICTY', 124.

[216] The OTP established a close working relationship with the UN Commission of Experts, which greatly eased the transfer of material from the Commission to the Tribunal where it formed the backbone of the early work. A staff member was sent to Chicago to examine the Commission's database, compiled at St. Paul University under the management of Cherif Bassiouni. The whole of the material was transferred to the Tribunal in April 1994.

[217] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at 138.

A major problem facing the OTP in the beginning was the conflict between the urgency in issuing indictments and the necessity for ensuring that all indictments, particularly the first ones, were 'appropriate'.[218] Financial considerations and lack of concrete support to meant that there was still a question mark over the credibility of the Tribunal.[219] Allegations of cynicism and lack of resolve centred on the failure to provide the Tribunal with adequate resources for it to be effective, and in turn created pressure for the Tribunal to start work, to at least be seen to be doing something constructive. One of the consequences of this was that it soured the relationship between the Tribunal's judges and the Prosecutor's Office. Goldstone said that this relationship has been a 'complicated and sometimes unhappy one'.[220] In Autumn 1994, the judges threatened to publicly denounce Goldstone, so in order to avoid a public row the prosecutor brought the first indictment against Dragan Nikolić for grave breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity, allegedly committed at the Sušica Camp in eastern Bosnia in the summer of 1992. The indictment was confirmed on 4 November 1994.[221]

In February 1995 the judges issued a statement publicly criticizing the prosecutor's strategy.[222] The judges expressed concern about the urgency with which indictments were being issued, and urged the prosecutor to 'apply the resources that have now been made available…in order to issue appropriate indictments at the earliest possible time'.[223] Soon after, nineteen Bosnian Serbs were indicted for atrocities allegedly committed in the summer of 1992 against civilians held at the Omarska camp, in the Prijedor municipality in north-western Bosnia.[224] Dusko Tadić and Goran Borovnica were also indicted for alleged crimes committed against

[218] Goldstone, 'The International Tribunal for the Former Yugoslavia', 7.

[219] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at paras 171–8.

[220] Goldstone, *For Humanity,* 89.

[221] Dragan Nikolić 'Susica Camp', IT-94-2, 4 November 1994. The timing of the indictment was to precede the forthcoming ACABQ meeting on the Tribunal's budget. Goldstone, *For Humanity,* 105. See Chapter 8.

[222] The declaration was drawn up by the Judges and shown to the Prosecutor before it was released. Goldstone apparently said he could live with it. Antonio Cassese, International Criminal Justice Mechanisms: Are They Really so Needed in the Present World Community?, Lecture organised by the Centre for the Study of Human Rights, London School of Economics, 13 November 2000.

[223] *The Judges of the Tribunal for the Former Yugoslavia Express their concern regarding the substance of their programme of judicial work for 1995,* CC/PIO/003-E, 1 February 1995. This was taken up in an article in *Le Monde* entitled 'La grogne des Juges du Tribunal de La Haye' [The grumbling of the Hague Tribunal Judges], on 2 February 1995.

[224] Željko Meakić, Miroslav Kvočka, Dragoljub Pracać, Mladen Radić, Milojica Kos, Momčilo Gruban, Dušan Knežević, Zoran Žigić 'Omarska Camp', IT-95–4, 13 February 1995.

civilians within and around the Omarska camp.[225] The standard of the indictments was reasonably low: they satisfied the requirements for an indictment set out in Rule 47 of the Rules of Procedure and Evidence, but the prosecutor had wanted to wait until there was evidence 'beyond reasonable doubt' and issue trial ready indictments.

However, the most damaging thing for the Tribunal would have been a public row, while it was still in its infancy and the first budget had not yet been approved. The detrimental consequences of this in terms of the quality of indictments and the issuing of indictments against 'small fry' are examined in Chapter 8. It is ironic that the judges forced the prosecutor to do precisely what they had been criticizing him for, issue indictments against lower-level perpetrators, by demanding indictments before the cases against those at the higher levels were sufficiently ready. It was also ironic that Cassese was so critical of the time it took to get the OTP investigations to a stage where indictments were made, when he had himself acknowledged the enormous logistic difficulties to be overcome in order to establish a fully functioning judicial organ.[226]

Two developments in April 1995 signalled the end of the initial process of establishment: the transfer of an accused, Tadić, to the UN Detention Centre in Schreveningen and the request for deferral of investigations from the Government of Bosnia and Herzegovina relating to the Bosnian Serb leadership.[227] These two events marked a turning point for the Tribunal and prompted a headline in *De Telegraaf* on 27 April 1995: 'The paper tiger is roaring.'[228]

CONCLUSION

In his address to the General Assembly on 7 November 1995, Cassese stated that 'In the 2 years since November 1993 we have gone from being a lofty—some might have said nebulous—idea to a living reality.'[229] The perception that the Tribunal was no more than a 'nebulous idea' was the

[225] Dusko Tadić and Goran Borovnica 'Prijedor', IT-94-1, IT-94-3, 13 February 1995. Tadić was already in custody in Munich.

[226] Note 2, earlier.

[227] Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in Respect of Radovan Karadžić, Ratko Mladić, and Mico Stanisić, 21 April 1995.

[228] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at 180.

[229] Address of Antonio Cassese, President of the ICTY, to the General Assembly of the United Nations, 7 November 1995.

result of the speed with which it was created and of suspicion as to the motives behind its creation. The 'flurry of activity' referred to in Chapter 2,[230] which led to the Tribunal being established in the first place, gives the impression that Resolution 827 was adopted before there was time to consider the consequences. In reality, the process of establishing an international criminal court was much more complex and logistically much more difficult than the speedy adoption of Resolution 827 implied. This was acknowledged by the UN Group of Experts, which was commissioned to audit the Tribunal in 1999:

> To the extent that there may have been expectations that the Tribunal could spring to life and, without going through seemingly slow and costly developmental stages, emulate the functioning of mature experienced prosecutorial and judicial organs in national jurisdictions in adhering to a high standard of due process, such expectations were chimerical. No system of international justice embodying standards of fairness, such as those reflected in the creation of the ICTY and ICTR, would, under the best of circumstances, either be inexpensive or free of the growing pains that inhere in virtually all new organizations.[231]

Tremendous hurdles, in the form of practical, logistic, financial, and political problems, were overcome in order to transform the Tribunal from a 'nebulous idea' of the Security Council to a living reality. The practical difficulties were in establishing the infrastructure of the court—finding premises, building courtrooms, and setting up offices. Logistic difficulties were encountered in terms of recruiting staff, particularly in the OTP; and financial constraints were imposed by having a limited and insecure budget. Finally, external political considerations, which manifested in, on the one hand, the delay in appointing a prosecutor, and at the other extreme pressure to issue indictments, made the task all the more difficult.

The fact that the Tribunal was created in a 'flurry of activity' had consequences beyond the initial process of establishment examined in this chapter. The Tribunal had to invent everything from scratch; from devising RPE and interpreting its own jurisdiction to developing mechanisms for state cooperation. By early 1996, the judges recognized that the Tribunal was entering 'a new and critical phase'.[232] The new phase was not the end of the process of establishment, but the start of a new one in which these difficulties had to be overcome.

[230] Antonio Cassese (ed.), *The Path to The Hague: Selected Documents on the Origins of the ICTY* (The Hague: ICTY, 1996), 13.

[231] Group of Experts Report, at 148.

[232] *Judges say Tribunal is entering 'new and critical phase',* CC/PIO/028-E, 23 January 1996.

4 Jurisdiction: 'Beyond Any Doubt'?

In order to fulfil its internal mandate, it was imperative that the Tribunal had the power to exercise jurisdiction over the crimes alleged to have been committed. Whilst 'Jurisdiction without political will is an ineffectual weapon';[233] equally, the exercise of political will to prosecute without jurisdictional basis is futile. Jurisdiction is 'the authority by which courts and judicial officers take cognizance of and decide cases.'[234] There were two aspects to this with regard to the International Criminal Tribunal for Former Yugoslavia (ICTY): the authority of the prosecutor to initiate and conduct investigations; and the authority of the court to have cases brought before it. The role and function of the prosecutor is examined in Chapter 8. This chapter examines the exercise of jurisdiction by the court, the legal basis for the establishment of the ICTY by the Security Council, the assertion of primacy by the ICTY over national courts, and the temporal, territorial, personal, and subject matter jurisdiction set out in the Statute of the Tribunal.

The method of establishment and external mandate of the Tribunal had a number of core implications for jurisdiction. First, the speed with which the Statute was drafted and adopted—the flurry of activity to turn what Cassese termed a 'nebulous idea' into a living reality—meant that there was no room for debate on the technicalities, save for a number of interpretative statements made by members of the Security Council. Second, the drafters of the Statute were keen to avert one of the major criticisms of the Nuremberg and Tokyo tribunals being levelled at the ICTY—that the prosecution of individuals for acts which were illegal only after the fact violated the principle *nullem crimen sine lege, nulla poena sine lege* (no act is criminal unless it is laid down in law and no act can be punished unless punishment is prescribed by law).[235] Both of these factors together explain

[233] *New York Times,* 8 February 1994.

[234] Ginsburgs, G., and Kudriavstev, V. N. (eds.), *The Nuremberg Trial and International Law* (London: Martinus Nijhoff, 1990), 55.

[235] Article 15 of the International Covenant on Civil and Political Rights. D. J. Harris, *Cases and Materials on International Law,* 4th edn. (London: Sweet and Maxwell, 1991), 610–19.

why the Statute was a very conservative document. The Secretary-General recognized the importance of ensuring that the Tribunal apply only rules of international humanitarian law that are 'beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.'[236]

As an ad hoc tribunal, it had a limited and specific mandate, and its competence was restricted accordingly in terms of subject matter and temporal and territorial jurisdiction. The other consequence of its status was that the judges took into account, when determining matters of law, the wider legal and political context in which the Tribunal operated, and its wider mandate. This manifested in a tendency to interpret the law in a way that furthered the development of international humanitarian law as a means of contributing to the maintenance of international peace and security, rather than simply on a case-by-case basis.[237] The Trial Chamber in the Čelebići case considered that 'The interpretation of the provisions of the Statue and Rules must…take into consideration the objects of the Statue and the social and political considerations which gave rise to its creation.'[238] There is crucial distinction between this and 'politicization', however. Taking the external political mandate into account in decisions in the courtroom was justified, whereas politically biased proceedings would not have been. This distinction will be examined in more depth in this chapter and in Chapter 5. The judges also took the political mandate of the Tribunal into account in so far as they sought to maximize its deterrent role. This is not an unusual interpretation of the judicial role, which has as a proper concern the wider deterrent consequences of criminal prosecution.

The political impact of legal decisions on jurisdiction was twofold. The first element was that decisions handed down by the court were intended to have a restorative impact in the region. The creation of an historical record is important in the context of post-conflict societies where many different 'truths' about what happened abound. But this could only be successful if the Tribunal was perceived as a credible judicial institution, which relates to the point above that the jurisdiction of the Tribunal had to be 'beyond any doubt'. The second aspect is that decisions handed down by the court were politically charged and required consideration of

[236] Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808, S/25704 (1993), 3 May 1993, at 34.

[237] Meron considers that this is entirely in accordance with the mandate. Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Humanitarian Law', *AJIL*, 88 (1994), 79–87.

[238] Judgement, *Prosecutor* v. *Delalić and others,* IT-96-21, 16 November 1998, at 170.

political events as factual elements to establish jurisdiction. The question of whether the conflict was international, crucial for the application of the grave breaches provision of the Geneva Conventions, was important politically because the question of the character of the conflicts raised issues of statehood, sovereignty, and recognition, which could only be resolved with reference to political as well as legal criteria, such as the timing of events and the motives of the recognizing States. The question was also highly politically charged because, assuming that it has been determined that Croatia and Bosnia were deemed to be independent States at the time in question, for the conflict to be deemed international there had to be proof of the involvement of federal forces in Croatia in 1991, acting under the control of the Belgrade regime, and involvement of the Serbian Government and the Federal Republic of Yugoslavia (FRY), and the Government of Croatia, in Bosnia during 1992–95. Internationally, the exercise of jurisdiction by the Tribunal had implications for future attempts to enforce international humanitarian law in an international criminal forum.

LEGAL BASIS: WAS THE TRIBUNAL 'ESTABLISHED BY LAW'?

The Tribunal was established and the Statute adopted by the Security Council, acting under Chapter VII, as a means of restoring and maintaining peace. The powers and responsibilities of the Security Council were examined in Chapter 2. The questions raised here with regard to jurisdiction are: (1) did this method of establishing an international criminal court satisfy the requirements for it to be deemed 'established by law'?; and (2) on what basis was it competent to exercise jurisdiction?

Criminal jurisdiction over one's own territory and citizens is a core element of sovereignty, and is fiercely guarded. Jurisdiction for events which took place in other states or over foreign nationals is, therefore, exceptional.[239] It is now generally accepted that there are certain crimes of international concern that give rise to universal jurisdiction, to be exercised

[239] Jurisdiction is claimed by States according to five general principles: the territorial principle; the nationality principle; the protective principle; the universality principle; and the passive personality principle. *Introductory Comment to the Harvard Research Draft Convention on Jurisdiction With Respect to Crime,* (1935), in Harris, *Cases and Materials,* 251. The Harvard Research Draft is the product of the unofficial work of a number of US lawyers and is not in any way binding. It is, nevertheless, of considerable value as an extensive study of customary law and state practice.

by national or international courts, such as war crimes, crimes against humanity, and genocide.[240] The 1949 Geneva Conventions and the 1948 Genocide Convention make this explicit with regard to grave breaches and genocide, respectively. Each of the four 1949 Geneva Conventions contains the following provision on jurisdiction: 'Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before their own courts'. The 1948 Genocide Convention specifies in Article I that genocide, whether committed in wartime or peacetime, is an international crime, and that persons accused of genocide shall be tried by 'a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction'.[241]

In the case of the ICTY, the legal basis for jurisdiction derived from the UN Charter; specifically, from the powers and responsibilities of the UN Security Council in matters of international peace and security. Whereas Nuremberg and Tokyo were based on the joint exercise of universal jurisdiction of the Allied Powers; the Tribunal, as a Chapter VII mechanism, was the repository of the exercise of universal jurisdiction on behalf of each and every UN Member State. The powers vested in the Security Council resulted from the abdication of sovereignty to that body by States in the area of international peace and security. The creation of a Tribunal amounted to the abdication of sovereignty in the area of criminal jurisdiction, but only where international peace and security was threatened.[242]

As discussed in Chapter 2, the legal basis for the establishment of the Tribunal was challenged in the Tadić case. In a motion filed on 23 June 1995 the Defence challenged the jurisdiction of the Tribunal on three grounds: first, that the Tribunal was unlawfully established by the Security Council; second, that the Tribunal was improperly given primacy over national courts; and third, that the Tribunal lacked subject matter jurisdiction under Articles 2, 3, and 5 of the Statute to try the accused.[243] Prior to consideration of the substantive issues, the Judges determined whether in fact the ICTY was competent to hear and make judgements on the lawfulness of its own establishment. In its Decision of 10 August 1995, the Trial Chamber ruled that the Tribunal was not competent to review

[240] Other international crimes are hostage-taking, apartheid, hijacking, and drug-trafficking. See Bassiouni, M. C., *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (London: Martinus Nijhoff, 1987).

[241] Roberts, A., and Guelff, R., *Documents on the Laws of War,* 2nd edn. (Oxford: Clarendon Press, 1994).

[242] See Chapters 1 and 2.

[243] Defence Motion on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1-T, 23 June 1995.

the decision of the Security Council and declined to make a ruling on the basis that 'the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation'; and that the Security Council never intended to create a body empowered to question the legality of the law that established it.[244]

The Appeals Chamber, however, considered that it was competent to judge the legality of its own establishment and that the concept of jurisdiction relied upon by the Trial Chamber was too narrow. It argued that jurisdiction, rather than meaning competence to consider certain elements, really means legitimate power to state the law, from the Latin origin of the word, *jurisdictio*: 'The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit'.[245] The inherent jurisdiction of any judicial body to determine its own jurisdiction was held to be necessary to the functioning of a court: 'The first obligation of the Court—as of any other judicial body—is to ascertain its own competence'.[246]

The second issue was whether the question at hand was political, not legal, and therefore 'non-justiciable'.[247] Judge Li took the view that whether the situation constituted a threat to international peace and security and what measures should be taken were political questions, 'of which the Judges of this Tribunal, trained only in law and having little or no experience in international political affairs, are really ignorant'; and consequently, any review of Resolution 827 was 'worthless in fact and in law'.[248] The majority ruling of the Appeals Chamber, however, was that the doctrine of 'non-justiciable disputes' was outdated and non-applicable. The Appeals Chamber Decision decided that the court was 'duty-bound to exercise jurisdiction where there is a legal question capable of a legal

[244] Decision on the Defence Motion on Jurisdiction, *Prosecutor* v. *Tadi* , IT-94-1-T, 10 August 1995.

[245] Ibid., at 10–12.

[246] Judge Cordova, dissenting opinion, *Advisory Opinion on Judgements of the Administrative Tribunal of the ILO Upon Complaints Made Against the UNESCO,* 1956 ICJ Rep. 77, 163, (23 October 1956), cited in Ibid., at 18. Aldrich finds this interpretation reassuring since it emphasizes the right of the individual to challenge the validity of the Statute of the Tribunal and even the validity of its own creation. George H. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia', *American Journal of International Law,* 90 (1996), 65.

[247] Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, *Prosecutor* v. *Tadi* , IT-94-1, 7 July 1995, at 12–14. See Chapter 2.

[248] Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadi* , IT-94-1, 2 October 1995, at 3.

answer'.[249] As discussed in Chapter 2, the Appeals Chamber decided that although the matter of a determination of a threat to the peace was essentially political, the choice of mechanism used to address such a threat was a legal question, and that the answer was that establishment of a Tribunal fell squarely within the powers of the Security Council under Article 41 of the UN Charter. The Tribunal, thereby, met the requirements of having been 'established by law'.

Whilst this was undoubtedly the right decision on establishment, the decision to accept jurisdiction to rule on the lawfulness of establishment is questionable. Even if the Tribunal had the inherent authority to determine the basis for its own jurisdiction, the power of review over the legality of its own establishment was limited in so far as it related only to its assumption of jurisdiction over the case before it. The court did not have power of judicial review of Security Council resolutions, so the legal effect of a decision that the Tribunal was not lawfully established would have meant that the court was not competent to hear the case before it, and not that the resolution itself should be set aside or amended, although that might be the ultimate consequence.[250] It is possible that the Appeals Chamber ruling, which relied on an expansive notion of jurisdiction, was motivated by self-preservation on two grounds: first, a desire to be seen to be doing something and make contributions to international legal scholarship by ruling on matters outside the scope of the Tribunal's mandate; and second, it is questionable whether a panel of judges, even those of impeccable integrity, could rule impartially on the lawfulness of their own institution. This does not amount to politicization, however. Rather, the tendency to go outside the bounds of what is required for the case at hand in order to further the development of international law could be described as excessive 'legalization'.

PRIMACY OVER NATIONAL COURTS

Article 9 of the Statute provided that, while the ICTY and national courts had concurrent jurisdiction, the Tribunal shall have primacy over national courts, and had the power to 'formally request national courts to defer to

[249] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 24.

[250] Judicial review is the power of a judicial body 'to approve, set aside or amend any order' of another particular body, unless that body is supreme. Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 17–18.

the competence of the International Tribunal in accordance with the present Statute'. It was considered necessary to take the 'extraordinary and unprecedented' step of making concurrent jurisdiction subject to the primacy of the Tribunal because of doubts about the effectiveness and impartiality of national courts;[251] but the intention was not to preclude the exercise of jurisdiction by national courts. Rather, it was to ensure that the Tribunal had the power to command deferral of cases in national courts, if it saw fit, and to permit those cases to go ahead in national courts, where appropriate. Arbour pointed out in 1997 that the exercise of jurisdiction by national courts did not mean that the Tribunal had somehow failed, rather, it demonstrated the fact that the ICTY and national courts had concurrent jurisdiction, and that such cases could properly be prosecuted in either forum.[252]

Two requests for deferral were issued by the Tribunal in 1995: the first to Germany in respect of Tadić; and the second to the Government of Bosnia and Hercegovina in respect of investigations underway into the culpability of the Bosnian leadership, Radovan Karadžić, Ratko Mladić, and Mico Stanisić (the Bosnian Leadership case).[253] The Defence in the Tadić case challenged the assertion of primacy by the Tribunal on the basis that it violated the principle *non bis in idem* (a person shall not be tried twice for the same crime) because Tadić was being tried already in Germany.[254] In its decision of 14 November 1995, the Trial Chamber stated that

> [T]here can be no violation of *non bis in idem,* under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been indicted, he has not yet been tried for those charges. As a result, the principle *non bis in idem* does not bar this trial before this Tribunal.[255]

The second basis for the challenge was that deferral violated the principle *jus de non evocando* (the right to be tried by one's own national courts). However, this principle was, according to the Appeals Chamber, designed to prevent trial by specially created courts for political offences; the principle is,

[251] Morris, V., and Scharf, M. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis,* vol. 1 (New York: Transnational Publishers, 1996), 126. James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', *American Journal of International Law;* 87 (1993), 639.

[252] CC/PIO/171-E, 19 March 1997.

[253] Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in Respect of Radovan Karadžić, Ratko Mladić, and Mico Stanisić, 21 April 1995.

[254] It is provided for in Article 10 of the Statute that the any request for deferral should not violate the principle *non bis in idem,* except in certain extenuating circumstances.

[255] *Non Bis in Idem, Prosecutor* v. *Tadić,* IT-94-1, 14 November 1995.

therefore, not breached by transfer to 'an international tribunal created by the Security Council acting on behalf of the community of nations'.[256]

The Appeals Chamber denied the Defence motion, but undertook to examine the other points raised. First, the Defence argued that the assertion of primacy by the Tribunal violated the domestic jurisdiction of Bosnia and Hercegovina; and that the assertion of primacy over domestic courts 'constitutes an infringement upon the sovereignty of the States directly affected'.[257] Significantly, the Appeals Chamber found that the assertion of primacy did indeed constitute an infringement of sovereignty, but that this was precisely the intention of the Security Council in creating the Tribunal.[258] The Tribunal, as a Chapter VII creation, 'trumps' sovereignty.

The arguments put forward by the prosecutor in the Bosnian Leadership case were based on political, rather than legal, arguments. The prosecutor argued that the ICTY was the 'proper forum' in which to bring a case against the accused owing to the gravity of the crimes.[259] It was also noted that the political effect of publicizing investigations against Karadžić and Mladić could be positive for the Tribunal: 'Following the announcement of the two deferral applications the attitude of some governments and non-governmental organisations have become more positive towards the Tribunal'.[260] The reason for giving the Tribunal primacy was political, therefore, but the authority to assert primacy, enshrined in the Statute and deriving from the UN Charter, was legal.

TERRITORIAL AND TEMPORAL JURISDICTION

Article 1 of the Statute conferred jurisdiction for 'serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'. The Tribunal had no cut-off date. The

[256] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 62.

[257] Defence Motion on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 23 June 1995, at 2.

[258] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 58.

[259] Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in Respect of Radovan Karadžić, Ratko Mladić, and Mićo Stanišić, 21 April 1995; Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić, and Mićo Stanišić, 15 May 1995.

[260] Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić, and Mićo Stanišić, 15 May 1995, at 21.

Secretary-General's report states that: 'As an enforcement measure under chapter VII…the life-span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto'. Resolution 827 specified that the jurisdiction of the Tribunal should be 'between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace'.[261] At what juncture does a situation cease to be a threat?

The President of Republika Srpska, Biljana Plavšić, argued that the mandate of the Tribunal should have been cut off with the signing of the Dayton Peace Agreement in 1995, or the changeover from Implementation Forces (IFOR) to SFOR a year later.[262] At the time of the negotiation and signing of the Dayton Peace Agreement, there was speculation that this would happen. Greenwood pointed out in 1993 that the terms of the Statute implied that if the Security Council had been forced to choose between the Tribunal and a peace agreement it might have decided to terminate or circumscribe the work of the Tribunal in order to restore international peace and security.[263] After all, if the ultimate goal was the restoration and maintenance of peace, and there was friction between the justice function of the Tribunal and its ultimate goal, then peace had to take precedence, which would have meant that the jurisdiction of the Tribunal would be curtailed. The point is made by Tavernier that, 'in the final count, if a conflict were to arise, considerations linked to maintaining peace would probably prevail'.[264]

In the event, the jurisdiction of the Tribunal was not terminated after the signing of a peace agreement and the entry into Bosnia of IFOR in late 1995–early 1996. Rather, it was included as an integral element of the peace process, in recognition of the nexus of justice and peace. Consequently, the Tribunal had jurisdiction over alleged crimes committed in Kosovo in 1998–99, and continues to have jurisdiction to date.[265]

[261] In contrast, the Statute of the ICTR limits its temporal jurisdiction to 1994.

[262] Letter dated 2 January 1997 addressed to the UN Secretary-General, Kofi Annan from the President of Republika Srpska, Biljana Plavšić, *Position of Republika Srpska Regarding the International Tribunal for War Crimes.* Reprinted in full in, *The Unindicted: Reaping the Rewards of 'Ethnic Cleansing',* Human Rights Watch Report, 91(D) (1997).

[263] Christopher Greenwood, 'The International Tribunal for Former Yugoslavia', *International Affairs,* 69 (1993), 647.

[264] Paul Tavernier, 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', *International Review of the Red Cross,* 321 (November–December 1997), 611.

[265] As of July 2001, peace has not yet been fully restored, let alone maintained in the territory of the former Yugoslavia. See discussion below with regard to the application of Article 5.

The jurisdiction of the Tribunal was tied to the determination that it continues to contribute to the restoration and maintenance of peace, and without it there would be a serious threat or a breach to the peace. The Tribunal's mandate would expire only when the Security Council actively determines that the situation no longer constitutes a threat. Even then, the activity of the Tribunal would continue as a measure for the maintenance of international peace and security, although, if its jurisdiction is terminated, it can no longer act as a real-time law enforcement body. The purely legal considerations for the length of time that the Tribunal has to continue were considered in the *Report on the State of the ICTY and Prospects and Reform Proposals,* and the Report of the Group of Experts Established Pursuant to Resolution 53/212, 18 December 1998 (Group of Experts Report). According to statistics of cases already in progress, current indictments, and ongoing investigations, and the capacity of the Tribunal in May 2000, the length of time to hear the remainder of the cases before it at the time of the Report was estimated a minimum was to be until the end of 2016. If any circumstances, such as failure to arrest the accused within the allotted time, occurred, a further ten or sixteen years was envisaged. This could be much longer since most cases go to appeal, and even when the Tribunal has finished its caseload, it will have to exist in minimal form until every convicted person has served out their sentence.[266] In reality, there was no need for a proactive termination of the Tribunal's jurisdiction, since the very commission of crimes over which the Tribunal has jurisdiction constitute a threat to international peace and security.[267] Only when crimes are no longer committed is there no longer a threat to the peace, and therefore the Tribunal does not have jurisdiction, but there would be no reason for it to have jurisdiction, since there would not be any crimes to be prosecuted.

INDIVIDUAL CRIMINAL RESPONSIBILITY

The Tribunal had jurisdiction over individuals for the direct commission of crimes and for command responsibility. The principle of individual criminal responsibility for international crimes was confirmed at Nuremberg: 'crimes against humanity are committed by men, not by abstract entities, and only by punishing individuals who commit such

[266] http://www.un.org/icty/pressreal/RAP000620e.htm ; and Report of the Group of Experts Established Pursuant to Resolution 53/212, 18 December 1998 (Group of Experts Report).

[267] See Chapter 2.

crimes can the provisions of international law be enforced'.[268] Immunity with regard to the official capacity of individuals, even Heads of State, was explicitly ruled out in Article 7 of the Statute of the Tribunal.[269] This was consistent with Security Council Resolutions 764 and 771, which warned that persons who committed or ordered the commission of grave breaches of the Geneva Conventions were individually responsible in respect of such breaches.[270] The Secretary-General noted that, because of the nature of the tribunal, he had received numerous submissions stressing the importance of provisions relating to the individual criminal responsibility of Heads of State, Government officials, and persons acting in an official capacity.[271] Unlike Nuremberg, however, there was no provision for the prosecution of organizations, as such.

The stipulation in Article 6 does not specify which persons should be prosecuted. The interpretation of the mandate of the Tribunal by the prosecutor was that those at the highest levels should be the foremost priority, but this was essentially a question of prosecutorial policy, rather than a legal determination.[272] The legal parameters included any person regardless of status, level, responsibility, or nationality. Although the prosecutor had the *authority* to investigate any person, this did not entail an *obligation* to bring charges against every person suspected of the commission of the crimes within the jurisdiction of the court. A degree of selectivity was required because it was not realistic to attempt to prosecute every alleged crime.

[268] Cited in Lyal S. Sunga, *Individual Responsibility in International Law* (London: Martinus Nijhoff, 1992), 38. See also Ian Brownlie, *Principles of Public International Law,* 4th edn. (Oxford: Clarendon Press, 1990), 305.

[269] In 1998–99, the Pinochet case threw this into stark relief. In a landmark judgement, the House of Lords held Head of State immunity was held not to apply in relation to the crime of torture in respect of General Augusto Pinochet. Opinion of the Lords of Appeal for Judgement in the Cause, *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Pinochet (Respondent) (on Appeal from a Divisional Court of the Queen's Bench Division); Regina* v. *Evans and another and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Pinochet (Respondent) (on Appeal from a Divisional Court of the Queen's Bench Division),* 25 November 1998. This judgement was set aside on the basis that it could be construed as biased because one of the Judges, Lord Hoffman, served as Director and Chair of Amnesty International Charity Ltd. The new ruling, on 24 March 1999, limited the crimes on which Pinochet could be extradited to crimes of torture committed after the entry into force of the 1984 Torture Convention. The ruling that immunity did not apply for crimes of conspiracy to torture and torture was upheld, however. For full discussion, see Marc Weller, 'On the Hazards of Foreign Travel for Dictators and Other International Criminals', *International Affairs,* 75/3 (1999), 599–617.

[270] S/RES/764 (1992), 13 July 1992; S/RES/771 (1992), 13 August 1992. See also Statement by the President of the Security Council, S/24378 (1992), 4 August 1992.

[271] Report of the Secretary-General S/25704 (1993), at 55.

[272] See Chapter 8.

It was not only the direct perpetrators of crimes who were liable to be prosecuted. An individual may also be held criminally responsible for a crime committed by a subordinate. The judgement in the Čelebići case provided the first elucidation of the concept of command responsibility since the Nuremberg Tribunal. The Trial Chamber found that it applies, 'not only to military commanders, but also to individuals in non-military positions of superior authority [and] not only persons in *de jure* positions, but also those in such positions *de facto*'.[273] As at Nuremberg, the defence of superior orders or duress was explicitly ruled out in the Statute. In the Erdemović case, the Trial Chamber determined that duress could be ruled out as a defence for crimes against humanity, since the nature of the offence meant that the requirement of proportionality could never be satisfied. They did, however, accept his extreme remorse, his surrender to the Tribunal and cooperation with the Office of the Prosecutor (OTP), his guilty plea, and his young age and low rank in the VRS as mitigating factors in sentencing.[274]

In legal terms, there are two types of responsibility, direct and indirect. Direct responsibility is incurred for positive acts, such as orders or commands. For example, in the Rule 61 hearing in the Vukovar case, the prosecutor asserted the individual criminal responsibility of the three accused on the basis that they 'may not have pulled the triggers on the guns that killed the 260 or so men, but they did everything else they could to see that this crime was executed'.[275] Indirect responsibility is incurred on the basis of omissions—the failure to prevent or punish the commission of a crime. The latter was more difficult to prove, since it is not only deliberately turning a blind eye to criminal conduct, and thereby condoning such conduct; a superior may also be held responsible for criminal negligence—not fulfilling his or her duty to be aware of such conduct where there was a reasonable expectation of knowledge of the offence or, being aware, neglecting to take action.

The importance of prosecuting those at the highest levels of responsibility was clear. The judges in the Kupreskić case lamented that: 'At the end of the trial, we have come to the conclusion that, with the possible exception of one of the accused, this Trial Chamber has not tried the major culprits, those who are most responsible for the massacre of 16 April 1993, those

[273] Judgement, *Prosecutor* v. *Delali* □ *and others,* IT-96-21, 16 November 1998, at 363, 378.

[274] Ibid., at 57. See Robert Cryer, 'One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemović Case at the ICTY Appeals Chamber', *Journal of Armed Conflict Law,* 2 (1997), 193–208.

[275] Prosecutor's Final Submission Rule 61 Hearing, *Prosecutor* v. *Mrkši* □ *and others,* IT-95-13, 28 March 1996, 12.

who ordered and planned, and those who carried out the very worst of the atrocities—against innocent civilians'.[276] However, the Tribunal has 'full jurisdiction not only over "great criminals" like in Nuremberg…but also over executors', regardless of status or seriousness of the alleged offence.[277] Theoretically, the court has jurisdiction to try every alleged criminal, although this would not be practicable. Selectivity, however, is a matter for prosecutorial discretion, not an element of jurisdiction (see Chapter Eight).

SUBJECT MATTER JURISDICTION

The Statute conferred jurisdiction over four categories of offence set out in Articles 2–4 of the Statute: grave breaches of the 1949 Geneva Conventions; violations of the laws and customs of war; genocide; and crimes against humanity. All four categories were considered to be sufficiently established in law to be 'beyond any doubt' part of customary international law so that the *nullem crimen* principle was adhered to. Unlike at Nuremberg, the Yugoslav Tribunal does not have jurisdiction to prosecute 'crimes against peace'. James O'Brien noted that the decision not to include the crime of aggression was appropriate because it would inevitably involve the Tribunal 'squarely in the political issues surrounding the conflict'.[278] It was feared that this would compromise the credibility of the Tribunal as an independent and impartial judicial body. The omission of 'crimes against the peace' does not affect jurisdiction for the other crimes before the court unlike at Nuremberg where there was a required nexus between crimes against peace and war crimes or crimes against humanity. The Secretary-General's Report considered that the rules that are 'beyond any doubt' were those embodied in the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and the Regulations annexed thereto, the Nuremberg Charter and Judgement, the UN Convention for the Prevention and Punishment of the Crime of Genocide, and the 1949 Geneva Conventions.[279]

Article 2 provided for jurisdiction for grave breaches of the 1949 Geneva Conventions. Grave breaches are the following enumerated acts

[276] Judgement, *Prosecutor* v. *Kupreskić and others,* IT-95-16, 14 January 2000.

[277] Sentencing Judgement, *Prosecutor* v. *Erdemović,* IT-96-22, 29 November 1996, at 83.

[278] O'Brien, 'The International Tribunal', 645.

[279] As Greenwood notes, the 1977 Additional Protocols to the Geneva Conventions are slightly more problematic in that whereas virtually every State has ratified the 1949 Geneva Conventions, only a handful of States have ratified the two Additional Protocols. They are now generally regarded as being statements of customary law, and were so applied during the Gulf War. Greenwood, 'The International Tribunal', 644.

when committed in international armed conflict and against victims who are classified as 'protected persons or property': wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction or appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly.[280] Geneva Convention IV also specified as grave breaches: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention.[281] All of these acts were enumerated in the Statute of the Tribunal. 'Protected persons' include: the wounded and the sick on land, and members of the medical personnel and chaplains of the armed forces of the Parties to the conflict; the wounded, sick, and shipwrecked at sea; prisoners of war; and 'persons who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict of which they are not nationals'.[282]

The first issue of contention was the application of Article 2 to international and non-international armed conflicts. The Defence in the Tadić case argued that not only Article 2, but Articles 3 and 5 applied to international armed conflict only, and that the alleged crimes, even if proven, did not occur in the context of an international armed conflict, but in an internal armed conflict so the Tribunal did not have jurisdiction.[283] The Prosecutor responded that the conflicts in the former Yugoslavia should be characterized as international in their entirety; and in the alternative, even if they were characterized as internal, Articles 3 and 5 apply to internal armed conflicts.[284] In its Decision of 10 August 1995, the Trial Chamber denied the Defence motion on the basis that the notion of international

[280] 1949 Geneva Convention I, Article 50; 1949 Geneva Convention II, Article 51; 1949 Geneva Convention III, Article 130.

[281] 1949 Geneva Convention IV, Article 147.

[282] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949; Geneva Convention III Relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Article 4.

[283] Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, *Prosecutor* v. *Tadić,* IT-94-1-T, 23 June 1995. Tadić was not charged with genocide, so the application of Article 4 was not challenged.

[284] Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, *Prosecutor* v. *Tadić,* IT-94-1, 7 July 1995. The applicability of Articles 3 and 5 are discussed in detail below.

armed conflict was not a jurisdictional criterion of Article 2, since 'nothing in the words of the Article expressly require its existence…[and] there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions';[285] and that, in any case, Articles 3 and 5 each apply to both internal and international armed conflict, so that there was no need to determine the character of the conflict prior to asserting jurisdiction over the case at hand.[286]

The Defence responded to this by shifting its ground, arguing on appeal that, in fact, there was not a 'legally cognisable armed conflict' of any sort—internal or international—at the time and place that the alleged offences were committed; and that the situation in Prijedor was that of a political assumption of power by the Bosnian Serbs, not involving armed combat, so the Tribunal did not have jurisdiction under Articles 2, 3, or 5.[287] The prosecution, meanwhile, persisted in its view that international armed conflict was a jurisdictional element of Article 2, which was contrary to the Trial Chamber's Decision of 10 August 1995, and argued that the adoption of the Statute by the Security Council amounted to an implicit recognition of the character of the conflict as international, since it included the grave breaches provisions which are only applicable to international armed conflict.[288] This view concurred with the opinion of the Commission of Experts that

> The character and complexity of the conflicts concerned, combined with the web of agreements on humanitarian issues the parties have agreed among themselves, justify an approach whereby [the Commission] applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.[289]

However, contrary to the suggestion of the prosecutor before the Appeals Chamber, the choice of 1 January 1991, 'a neutral date', for the beginning of the period of the Tribunal's jurisdiction, was intentional, precisely so

[285] Decision on the Defence Motion on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1-T, 10 August 1995, at 49–51. This view was also put forward in the *amicus curiae* brief submitted by the US government. Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal* v. *Dusan Tadić,* IT-94-1, 17 July 1995, at 35. If this argument is followed through to its conclusion, Article 3, relating to violations of the laws and customs of war, would not require a nexus with armed conflict, since it is not explicitly provided for in the terms of the Article, which is absurd.

[286] Decision on the Defence Motion on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1-T, 10 August 1995.

[287] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 65. For discussion of the applicability of Articles 3 and 5, see the following.

[288] Ibid.

[289] Letter dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council, S\25274, 10 February 1993.

that it would not prejudice any decisions by the Tribunal on the character of the conflict.[290] The United States proposed that the Statute deem the conflict to be international in character, but this was rejected on the grounds that it should be decided by the Trial Chamber on the basis of factual evidence.[291]

The Appeals Chamber ruling on this question was that the alleged crimes were committed in the context of an armed conflict, but they declined to make a ruling on the character of the conflict, leaving it to be determined on a case-by-case basis.[292] The Appeals Chamber also declined to enter into the alternative argument put forward by the prosecutor, that grave breaches could be regarded as applicable in internal armed conflict on the strength of agreements entered into by the parties.[293] The Appeals Chamber overturned the Trial Chamber ruling that international armed conflict was not a jurisdictional requirement for Article 2: 'Although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflict'.[294] The Appeals Chamber's conclusion was that, 'In the present state of development of the law, Article 2 of the Statute only applies to offences committed when in the context of an international armed conflict'.[295] In that case, the characterization of the conflict as international or internal at the time and place of the alleged crimes was crucial.

The question of whether it was an international armed conflict raised political and legal questions. The legal determination of the character of the conflict depended on the timing of the dissolution of the Socialist Federative Republic of Yugoslavia (SFRY), and the effect of unilateral declarations of independence and of recognition by other States.[296] It was also

[290] 'This is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised'. Report of the Secretary-General, S/25704 (1993), at 62.

[291] Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, S/25575, 12 April 1993.

[292] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 70. The definition of armed conflict agreed on by the Appeals Chamber is discussed below, with regard to Article 3.

[293] An agreement was signed on 22 May 1992 by the parties to the conflict within the Republic of Bosnia and Hercegovina: Alija Izetbegović, Radovan Karadžić, and Miljenko Brikić (President of the Croatian Democratic Community). The Agreement was based on Common Article 3 of the 1949 Geneva Conventions, which implies that the parties viewed the conflict as internal, but agreed to apply rules applicable to international armed conflicts. *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* at 85.

[294] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 78.

[295] Ibid., at 84.

[296] For discussion of constitutional issues and the process of dissolution, see: James Gow, 'Serbian Nationalism and the Hissssing Snake in the International Order: Whose Sovereignty? Which Nation?', *Slavonic and East European Review;* (1994), 456–76; and Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law;* 86 (1992), 569–607, esp. 586–96.

politically charged, since it turned on the nature and extent of the involvement of external actors in the conflicts in Croatia in 1991 and in Bosnia in 1992–95, once they had become independent States. In the Tadić case, the Appeals Chamber took pains to point out the additional consequences of the characterization of the conflict: 'Should the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf'.[297]

As discussed in Chapter 2, in 1991, the SFRY was made up of six constituent republics: Slovenia, Croatia, Serbia, Bosnia and Hercegovina, Montenegro, and Macedonia. Serbia also comprised the two autonomous regions of Vojvodina in the north and Kosovo in the south, but these regions did not have the status or rights of the constituent republics. By the end of 1992, the SFRY had completely dissolved, and it had been replaced by the independent States of Slovenia, Croatia, Macedonia, and Bosnia and Hercegovina, and the FRY, a voluntary federation of the Republics of Serbia and Montenegro. It is important to note that in the Yugoslav case, the process was one of dissolution, not secession. The SFRY was constitutionally a union of sovereign states, not a state in which autonomy had been devolved to minorities in territorially defined units. Greenwood argues that, once Croatia and Slovenia had established themselves as independent states, hostilities between them and the Yugoslav People's Army (the JNA) were clearly international in character. This is correct, but it is not as simple as that because the dissolution of the SFRY and the establishment of independent States did not happen simultaneously. Rather, between 15 May 1991, when the Federal Council failed to elect Stipe Mesić to the presidency,[298] and 27 April 1992, when the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro proclaimed the FRY as the successor to the SFRY, the SFRY was in a process of dissolution.[299]

During this period, it is unclear exactly when independence occurred and what the status of the Republics was during the period of dissolution before their establishment as independent states. Slovenia and Croatia

[297] Judgement on Appeal, *Prosecutor* v. *Tadić,* IT-94-1, July 1999, at 97.

[298] Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor* v. *Mrkšić and others,* IT-95–13, 3 April 1996, at 25.

[299] According to the Badinter Commission, 'the composition and workings of the essential organs of the Federation … no longer meet the criteria of participation and representativeness inherent in a federal state'. Weller, 'The International Response', 589.

issued unilateral declarations of independence on 25 June 1991, but voluntarily suspended these declarations until 8 October 1991. Meanwhile, the European Commission (EC) asked the Badinter Commission to consider the question. On 15 January 1992, the EC declared that it had decided to proceed with full recognition of Croatia and Slovenia. Germany had already, on 23 December 1991, announced its decision to recognize both Slovenia and Croatia. In respect of Bosnia and Macedonia it found that there were still 'important matters to be addressed'.[300] With regard to Bosnia, the 'important matter' was the question of a referendum on independence, to be held on 1 March 1992.[301] Following the referendum, which was overwhelmingly in favour of independence, but boycotted by the Bosnian Serbs, Bosnia declared its independence from the SFRY on 6 March 1992. The EC announced its decision to grant recognition on 6 April 1992, and the United States followed suit the next day. The final element of dissolution was the 27 April 1992 proclamation of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, which joined the two Republics in the new FRY.[302]

As Weller notes, recognition was clearly used as a political tool;[303] although the legal effect of recognition was to turn the conflict as a whole definitively from an internal war to an international one.[304] It was the intention that recognition would be used as a bargaining chip, withheld until an overall settlement could be achieved. In addition, the 1991 EC Guidelines on Recognition imposed a qualitative as well as a quantitative element to statehood.[305] It was no longer sufficient to fulfil the Montevideo conditions of territory, population, government, and capacity to enter into relations with other states.[306] Qualitative elements, such as guarantees of

[300] Weller, 'The International Response', 586.

[301] With regard to Macedonia, the 'important matter' was the Greek objection to the use of the name Macedonia, because in their view it implied territorial claims with respect to the areas inhabited by the Macedonian population in Greece.

[302] The FRY claimed to succeed to the legal and political personality of the SFRY, but this was challenged by most of the EC and the United States. Its statehood was never contested, however, only its right to succeed to the rights and obligations of the SFRY. Weller, 'The International Response', 595–6.

[303] Weller, 'The International Response', 587.

[304] Gow notes two main implications of this. First, the borders of Bosnia and Croatia gained added significance as international borders; and second, Belgrade's sponsorship and involvement in the war in Bosnia could be treated by the UN Security Council as unlawful aggression. Gow, *Triumph of the Lack of Will,* 36.

[305] EC Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, adopted at an extraordinary European Political Council ministerial meeting in Brussels on 16 December 1991. See, Martin Dixon, *Textbook on International Law,* 2nd edn. (London: Blackstone, 1993), 104–5; Weller, *The International Response,* 587–8.

[306] Montevideo Convention on the Rights and Duties of States, 1933. In Harris, D. J., *Cases and Materials on International Law,* 102.

full representation for minorities and protection of human rights, were introduced. This strategy was foiled by the German decision to grant early recognition to Slovenia and Croatia. The other members of the EC were conscious of the need to maintain a united front because of the moves toward deeper economic and political union, which was proceeding concurrently with the unfolding crisis in Yugoslavia, so the early German recognition forced the rest of the EC to act in order to maintain the appearance of unity.

In respect of Croatia, in order that grave breaches charges were successful against the former JNA officers accused of crimes committed during the attack on Vukovar in November 1991, the conflict had to be characterized as international.[307] In the Rule 61 hearing in this case, the prosecutor submitted that the attack on Vukovar was part of a 'war waged by the government of Yugoslavia in Belgrade against an independent Croatia, thus a war between two sovereign states, in other words international'.[308] A strong argument can be made that in November 1991, Croatia was de facto independent, even if it was not formally recognized as such, since the granting of recognition was withheld as a political lever, rather than the failure to fulfil legal criteria. However, in the Rule 61 hearing in the Vukovar case, Judge Jorda asked the expert witness for the prosecution, James Gow, a question which, with hindsight, Gow interprets as meaning 'How was the question of independence viewed at the time?'; to which the answer would have been that Croatia was not viewed as being an independent state by the international community until it was recognized as such.[309] Even if recognition was a political lever, its legal effect was constitutive, not declaratory. In that case, Article 2 was not applicable. If Croatia was not independent on 25 June 1991, and it remained part of the SFRY, albeit in a process of dissolution, the war was not international in character.

The same question was raised in respect of Bosnia in the interim period of dissolution, between the Croatian and Slovenian declarations of

[307] Mile Mrksić, Miroslav Radić, and Veselin Sljivancanin were indicted in November 1995 for mass killing at Ovcara, near Vukovar, of approximately 260 captive non-Serb men who had been removed from Vukovar Hospital on 20 November 1991. Slavko Dokmanović was also indicted but his indictment was sealed until after his arrest in June 1997. Indictment, Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin, and Slavko Dokmanović "Vukovar", IT-95-13a, 14 November 1995.

[308] Prosecutor's Final Submission Rule 61 Hearing, *Prosecutor* v. *Mrkšić and others,* IT-95-13, 28 March 1996, 11.

[309] This discussion of the classification of the armed conflict benefited enormously from discussions with James Gow, who acted as Expert Witness for the Prosecution in the Tadić case, among others.

independence, which spelled the de facto end of the federation, and the Bosnian declaration of independence, on 6 March 1992, and its recognition on 27 April 1992. This issue has not yet come before the court, because, although there was fighting in Bosnia before full-scale war broke out following the declaration of independence, no one has yet been charged (publicly, at least) with grave breaches committed in Bosnia during this period. The situation was different from that of Croatia and Slovenia, since Bosnia's declaration of independence came much later. Up until at least this time, Bosnia was still a constituent republic of the SFRY, albeit in a process of dissolution. The status of Bosnia between 6 March and 7 April 1992, however, is debatable. If, as argued above with regard to Croatia, the effect of recognition was declaratory, then Bosnia became independent on 6 March 1992. If the effect of recognition was constitutive, the date of independence is 7 April 1992.[310] There is a strong case for arguing that the effect of recognition was declaratory in this context, where recognition was withheld as a bargaining chip, rather than as the result of any failure to fulfil legal criteria for statehood. Croatia and Slovenia were recognized on 15 January 1992, which spelt the end of the SFRY; but the recognition of Croatia and Slovenia and even of Bosnia did not signal the end of the process of dissolution. This did not occur until 27 April 1992.

The other question with regard to Bosnia concerned the application of grave breaches provisions to crimes committed after 19 May 1992, the official date of JNA withdrawal from Bosnia and the creation of separate armies—the Yugoslav Army (VJ) and the Bosnian Serb Army (VRS). This question turns on the degree of involvement of external forces—Belgrade and Zagreb—in the conflict in Bosnia from this date until the end of the conflict. In the Tadić case, the application of Article 2 depended upon there being an international armed conflict at the time and place at which the alleged crimes took place, in June 1992. The Trial Chamber judgement acquitted Tadić of grave breaches in May 1997, in a complex ruling that confused many observers, and led to some misleading conclusions about the character of the conflict.[311] In its decision of 7 May 1997, the Trial Chamber concluded that, although an international armed conflict existed

[310] See Dixon, *Textbook on International Law,* 102–3.

[311] The majority view in the May 1997 decision of the Trial Chamber in the Tadić case was held up as vindicating the stance taken by Belgrade that, after May 1992, the totality of the conflict in Bosnia was internal and not international in character. See, for example, Robert M. Hayden, 'Bosnia's Internal War and the International Criminal Tribunal', *Fletcher Forum of World Affairs,* 221 (1998), 45. Hayden, probably intentionally, since he had been a witness for the Defence in the Tadić case, conflated the determination that the conflict was not international at the time and place that the alleged crimes were committed with the characterization of the conflict as a whole.

in at least part of the territory of Bosnia and Hercegovina, because the victims were in the hands of Bosnian Serb forces, and not a party to the conflict *of which they were not nationals,* they were not protected persons.[312] They found that the VRS were not under the effective control of the VJ, to the extent that they could be considered de facto organs or agents of the Government of the FRY.

In its ruling, the Trial Chamber applied the test from the *Nicaragua Case* at the International Court of Justice (ICJ) of effective control.[313] The relevant parts of the case for the Tadić judgement were whether the extent of support given to the *contras* by the US government was restricted to unlawful intervention, or whether it amounted to the use of force; and whether the United States was responsible for violations of international humanitarian law committed by those rebels. The ICJ held that a high degree of control was necessary for this to be the case. It required that a Party not only be in effective control of a military or paramilitary group, but that the control be exercised with respect to the specific operation in the course of which breaches may have been committed. Transposed to the Tadić case, at issue was whether the degree of support given to the VRS by the Government of the FRY amounted to an armed attack, rendering the conflict international in character, and implying a degree of control which would mean that the victims were in the hands of a party of which they were not nationals. Effectively, this would require a degree of control by the FRY over the VRS sufficient to make the VRS agents of the FRY.

Judge McDonald, dissenting, followed the evidence presented by the prosecutor to its logical conclusion, and in essence made the argument that the prosecutor should have made, that the withdrawal of the JNA and the creation of the VRS was 'a legal fiction'.[314] The prosecutor presented extensive historical background evidence, but took the view that it should not tell the judges what to think, but leave it to their discretion to determine the issue according to the evidence. There was a mismatch between the prosecution's understanding of its obligation to prove the

[312] See, for example, Robert M. Hayden, 'Bosnia's Internal War and the International Criminal Tribunal', *Fletcher Forum of World Affairs,* 221 (1998), at 607.

[313] The Government of Nicaragua brought a case against the United States at the ICJ, claiming that the US government under Ronald Reagan had violated international law by laying mines in Nicaraguan internal and territorial waters and giving assistance to the *contras. Case concerning Military and Paramilitary Activities in and against Nicaragua,* ICJ Reports 1986, 14.

[314] Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *Prosecutor* v. *Tadić,* IT-94-1, 7 May 1997, at 7.

guilt of the accused beyond reasonable doubt in respect of the alleged crimes, and the judges' interpretation that not only the guilt of the individual accused but the basis for jurisdiction must be proven beyond reasonable doubt. The prosecutor failed to do the latter. What should have been made clear by the prosecutor was that the only changes after 19 May 1992 were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organization and individual units, and a change in the insignia. There remained 'the same weapons, the same equipment, the same officers, the same commanders, largely the same source of payments, the same goals and mission, the same tactics, and the same operations'.[315]

McDonald's lengthy dissent provided the basis for the prosecution's appeal, which was successful. On 15 July 1999, Tadić was found guilty on the grave breaches charges on which he had been acquitted by the Trial Chamber. The Appeals Chamber ruling was that there was an international armed conflict and that the victims were protected persons, since the requirement for the victims to be protected persons was that of a 'demonstrable link' between the VRS and the FRY.[316] The requirement was not, as applied by the Trial Chamber, evidence of *effective* control, but rather of *overall* control. The Appeals Chamber decided that, in 1992, the VJ exercised the requisite measure of control over the VRS: 'What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense.[317]

Moreover, the Appeals Chamber decided that, in order that protection is extended to civilians in contemporary inter-ethnic conflicts, the definition of nationality should be replaced by the dual factors of allegiance to, and effective protection by, the State.[318] *Ethnicity* not *nationality* was the differentiating criterion for the application of grave breaches. The decision was motivated by a conscious effort to extend the protection afforded by

[315] Ibid.

[316] Judgement on Appeal, *Prosecutor* v. *Tadić,* IT-94-1, 15 July 1999, at 69.

[317] 'Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade'. Judgement on Appeal, *Prosecutor* v. *Tadić,* IT-94-1, 15 July 1999, at 152.

[318] Ibid., at 166.

the Geneva Conventions to as many as possible. The law in this instance was adapted to suit the particular requirements of the case, in accordance with the general purpose of the law, which is to protect victims.

The Čelebići case was the second judgement to deal with the question of the classification of the conflict.[319] The assertion of jurisdiction for Article 2 charges in this case rested on a similar set of factual circumstances in that the same question surrounding the degree of involvement of external actors arose, albeit in a different context. In this case, however, the Trial Chamber was 'in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature'. It followed Judge McDonald's dissenting opinion in the Tadić case that 'The withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the Federal Republic of Yugoslavia in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs'.[320]

The Lašva River Valley and Ahmici cases related to fighting between the Army of Bosnia and Hercegovina (ABiH) and the Bosnian Croat Army (HVO) between May 1992 and January 1994.[321] Blaškić, Kordić, and Čerkez and Aleksovski were all charged with grave breaches. In the Blaškić case, the Trial Chamber applied the same criteria as the Appeals Chamber in the Tadić case had applied to the VJ and the VRS to the relationship between the Army of Croatia (HV) and the HVO. The judges found that 'based on Croatia's direct intervention in Bosnia and Herzegovina [there is] ample proof to characterise the conflict as international'. As to the status of the victims, the judges followed the Appeals Chamber in the Tadić case in deciding that 'In an inter-ethnic armed conflict, a person's ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of

[319] The Čelebići case was the first indictment to deal with Bosnian Serb victims for crimes committed against Bosnian Serbs in the Čelebići camp (a former JNA facility) in the Konjic municipality in Bosnia and Hercegovina. *International Tribunal issues first indictment dealing with Bosnian-Serb victims,* CC/PIO/048-E, 22 March 1996.

[320] Judgement, *Prosecutor* v. *Delalić and others,* IT-96-21, 16 November 1998, at 234.

[321] Indictment, Tihomir Blaškić 'Lašva Valley', IT-95-14, 10 November 1995; Indictment, Zlatko Aleksovski "Lašva Valley", IT-95-14/1, 10 November 1995; Indictment, Dario Kordić and Mario Čerkez "Lašva Valley", IT-95-14/2, 10 November 1995; Indictment, Zoran Marinić "Lašva Valley", IT-95-15, 10 November 1995; Indictment, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić "Ahmici", IT-95-16, 10 November 1995; Indictment, Anto Furundžija "Lašva Valley", IT-95-17/1, 10 November 1995.

the victims as protected persons'.[322] The judges also refuted the Defence argument that the agreement signed between Croatian Democratic Community (HDZ) and the Serbian Democratic Party (SDS) and the Party of Democratic Action (SDA) committing the parties to honouring the provisions regarding internal armed conflicts covered in common Article 3 to the Geneva Conventions demonstrated that conflict was internal. In contrast, in the Aleksovski case, which dealt with the same set of factual circumstances, the Trial Chamber found that Article 2 was not applicable, since an international armed conflict did not exist, and acquitted the accused on all counts of grave breaches. On appeal, this decision was reversed, but the Appeals Chamber did not reverse the acquittal of the accused, 'since no useful purpose would be served by doing so'; because the question was one of law not fact, the facts are the same as in another count on which the accused had already been found guilty, so the consequence of his conviction would not be any increase in sentence.

In the Bosanski Samac case, the prosecutor requested that the Trial Chamber obtain judicial notice of the characterization of the conflict in Bosnia, which had been determined in Tadić and Čelebići judgements. The motion was denied. The prosecutor's submission was that after the Bosnian declaration of independence on 6 March 1992, and recognition in April 1992, the involvement of the VJ in support of the VRS meant that there existed an international armed conflict. The Trial Chamber took notice of the fact that Bosnia and Hercegovina proclaimed its independence from the SFRY on 6 March 1992; and was recognized by the EC on 6 April 1992; but determined that the facts do not stand alone as evidence of international armed conflict.[323] Rather, it is 'an issue of interpretation of historical facts which requires *inter partes* discussion'; and different conflicts of different nature took place so that 'It would be for each Trial Chamber, depending on the circumstances of each case, to make its own determination on the nature of the armed conflict upon the specific evidence presented to it'. International armed conflict had to be proven in every case with reference to the time and place in which the alleged crimes took place.

There was some indication that the judges followed rulings in previous cases, although there was no obligation to do so. The Appeals Chamber formally considered the question of whether it was bound by previous

[322] Judgement, *Prosecutor* v. *Blaškić,* IT-95-14, 3 March 2000, at 127.

[323] Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia and Herzegovina, *Prosecutor* v. *Todorović,* IT-95-9, 25 March 1999.

decisions. Its reasoning was that, although normally, in both common and civil law systems, the highest courts will follow their previous decisions and will only depart from them in exceptional circumstances, given that the fundamental purpose of the Tribunal is the prosecution of persons responsible for serious violations of international humanitarian law, this purpose was best served by an approach which recognized that there may be instances in which the strict, absolute application of that principle may lead to injustice. So, while there was some scope for following previous decisions, the judges decided that they were free to depart from them for 'cogent reasons in the interests of justice'. The consequence of this was that the arguments had to be rehearsed time and again in court, which was a difficult and lengthy process. The additional consequence was that the prosecution dropped grave breaches charges in some cases, relying instead on Article 3 of the Statute.

Article 3 conferred jurisdiction over violations of the laws and customs of law. Neither the Statute nor the Secretary-General's report specified which rules are applicable to international, and which to internal armed conflicts;[324] but it was implicit in the Yugoslav Statute that violations of the laws and customs of war are applicable in both. The interpretive statements made by France and the United States at the time of adoption of the Statute stated that Article 3 covered all obligations under international humanitarian law agreements in force in the territory of the former Yugoslavia, including common Article 3 of the 1949 Geneva Conventions and the 1977 Protocols.[325] In any case, as James O'Brien noted: 'Whether or not it is well-established international law that common Article 3 gives rise to individual criminal responsibility, the prohibitions in that article are part of the law of the former Yugoslavia, and the Tribunal can therefore rely on it without violating the *nullem crimen* principle.'[326]

As applied at the ICTY, Article 3 was essentially a 'residual provision' in that it conferred jurisdiction for acts that did not fall under the more stringent jurisdictional requirements of grave breaches, either because of the nature of the crime, or because the act was committed in the context of an

[324] It is useful to draw a comparison with the Statute of the ICTR, which explicitly confers jurisdiction for violations of international humanitarian law committed in internal conflicts under Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II. The Statute of the ad hoc Tribunal for Rwanda is indicative of a 'more expansive approach', which implies that the absence of explicit jurisdiction for the Additional Protocols to the Geneva Conventions in the Yugoslav Statute does not deny the criminality of these offences. Theodor Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law,* 89 (1995), 554–77; and Meron, 'War Crimes in Yugoslavia', 83.

[325] S/PV. 3217 (1993), 25 May 1993.

[326] O'Brien, 'The International Tribunal', 647.

internal armed conflict, and/or against a victim who was not 'protected' under the terms of the Geneva Conventions.[327] The only criterion for the application of Article 3 was the existence of an armed conflict. The Appeals Chamber in the Tadić case ruled that '[A]n armed conflict exists whenever there is a resort to armed force between States of protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[328] This ruling was relied upon in every subsequent case before the Tribunal, and can be regarded as settled.[329]

Article 5 conferred jurisdiction for crimes against humanity. The inclusion of crimes against humanity in the Nuremberg statute was in order to fill a gap in international law in that crimes committed against one's own civilian population or against the population of allied States could not be regarded as war crimes *stricto sensu*. The prosecution of such crimes at Nuremberg was harshly criticized as the application of law *ex post facto*. There was, however, no doubt as to their validity in law in 1993. According to the Report of the Secretary-General, crimes against humanity are inhumane acts of a very serious nature, committed as part of a widespread or systematic attack against any civilian population, on a widespread or systematic scale.

The Statute also specified that there must be a nexus with armed conflict, even though the Secretary-General's report stated that crimes against humanity are prohibited 'regardless of whether they are committed in an armed conflict, international or internal in character'.[330] The stipulation of a nexus with armed conflict was viewed at the time as a conservative interpretation, and was not a requirement under the Statute of the International Criminal Tribunal for Rwanda (ICTR), or of the International Criminal Court (ICC).[331] Nevertheless, it was deliberate and interpretative statements made by France, the United States, the United Kingdom, and Russia at the time of adoption of the Statute and resolution 827 that reiterated the requirement of a nexus with armed conflict.[332] In the Blaškić

[327] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 89–91.

[328] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 70.

[329] Judgement, *Prosecutor* v. *Delalić and others,* IT-96-21, 16 November 1998, at 192.

[330] Report of the Secretary-General, S/25704 (1993), at 47. In the Tadić case, the Appeals Chamber upheld the argument put forward by the Prosecutor that crimes against humanity do not require a connection with any conflict at all. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 141.

[331] The Rome Statute's definition is much wider, in the sense that it does not require a nexus with armed conflict and includes other enumerated acts, such as apartheid and enforced disappearance.

[332] S/PV. 3217 (1993), 25 May 1993.

case, the judges recognized that although there is no requirement in general terms under customary international law of a nexus with armed conflict, the court must adhere to the stipulation in the Statute: 'An armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal'.[333]

In November 2000, the prosecutor, Carla Del Ponte, called for an amendment to the Statute, in order to remove the nexus with armed conflict, so that there was no bar to the investigation of crimes committed in Kosovo where it was considered to be unclear whether or not an armed conflict continues to exist.[334] However, there was no need to extend the jurisdiction of Article 5, since it could be argued that the fact that a number of Chapter VII Security Council resolutions remained in force, including the mandate for the entry by KFOR into Kosovo in June 1999 to perform a peace enforcement function, was evidence that even if an overt state of armed conflict does not exist, peace had not been achieved either. According to the Appeals Chamber in the Tadić case, international humanitarian law ceases to apply once a peace settlement is achieved.[335] An overall settlement had not yet been achieved for Kosovo.

As stated earlier, the Secretary-General's report specifies crimes against humanity as inhumane acts of a very serious nature, such as wilful killing, torture, or rape, committed as part of a widespread or systematic attack against any civilian population. There are several points worth noting in this statement. First, the list of crimes set out in the Statute, which also included extermination, enslavement, deportation, imprisonment, and persecution, is not exhaustive—the final clause conferred jurisdiction for 'other inhumane acts'. Second, crimes against humanity are directed against *any* civilian population, not just one's own. Finally, the requirement that crimes against humanity form part of a widespread or systematic attack was not included in the terms of Article 5, but it was recognized as a crucial jurisdictional element for crimes against humanity. This raised a set of issues. First, crimes against humanity are part of a widespread *or* systematic attack, so only one of these conditions must be proven, not both. In terms of proof, what quantity of crimes show that there is a widespread attack, and that the crime was not committed in isolation?; and what constitutes a systematic attack? In the Blaškić case, the Trial Chamber concluded that proof of the existence of a political

[333] Judgement, *Prosecutor* v. *Blaškić,* IT-95-14, 3 March 2000, at 66.

[334] JL/PIS/542-E, 24 November 2000.

[335] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1, 2 October 1995, at 70.

objective, or a plan 'pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that is, to destroy, persecute, or weaken a community'. This could be shown by the following:

1. perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
2. the preparation and use of significant public or private resources, whether military or other; and
3. the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[336]

In the Tadić case, the Trial Chamber considered that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity:

> Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. To convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.

However, the Appeals Chamber reversed this judgement and ruled that the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute. It was not, therefore, a jurisdictional requirement, but rather an element of the crime.

Article 4 of the Statute conferred jurisdiction over the crime of genocide. The term genocide is often used because of the emotive power of the word. It invokes images of the Second World War concentration camps and the lines of skulls in Cambodia. However, it is important to stress that the *crime* of genocide has a narrow legal definition. Genocide does not require a nexus with armed conflict of either kind. Article 4 of the Statute reproduced the exact wording of the relevant provision of the 1948 Genocide Convention, which defined genocide as the commission of one or more of a set of enumerated acts, with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. It is not enough to commit murder, even on a vast scale, it must be with the intent to destroy in whole or in part an entire group. For this reason it is

[336] Judgement, *Prosecutor* v. *Blaškić,* IT-95-14, 3 March 2000, at 203.

extremely difficult to prove, and was charged in only a handful of cases at the ICTY.[337]

In the *Akayesu* Case before the ICTR, the judges found that conviction for genocide requires the 'specific intent to commit genocide' as a personal goal; so a person is not guilty if, even if knowing of an overall plan to commit genocide, he was not deliberately participating in it.[338] At the ICTY, Jelišić's trial was concerned with proof of intent. The accused, Goran Jelišić, pleaded guilty to thirty-one counts of war crimes and crimes against humanity. He was also accused of genocide in respect of the same acts, to which he pleaded not guilty. The material element of the offence was proven, since he had already pleaded guilty to war crimes and crimes against humanity in respect of the same crimes. The prosecutor alleged that the fact that Jelesić had presented himself as the 'Serbian Adolf' and had declared his intention to kill Muslims at Brčko was proof of his intent to commit genocide. The Trial Chamber found that this was not enough, and that his behaviour was evidence of 'a disturbed personality…which presents borderline, anti-social and narcissistic characteristics and which is marked simultaneously by immaturity, a hunger to fill a "void" and a concern to please superiors', and not of genocidal intent.[339] Jelišić was duly acquitted in respect of genocide. In their deliberations, the judges considered the two elements to *mens rea* for genocide: first, that the victims belonged to an identified group; and second, that the accused committed the crimes as part of a wider plan to destroy the group as such.[340]

On the first question, the judges decided that the definition of a group could not be an objective determination. Instead, they decided that 'It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators'.[341]

Even if the victim did not identify themselves with the group in question, it was the perception of the perpetrator that mattered. So, if a person was killed because they were a Bosnian Muslim, for example, it is not the

[337] The following have been publicly indicted for genocide: Zeljko Meakić (IT-95-4 "Omarska Camp"); Radovan Karadžić and Ratko Mladić (IT-95-5 "Bosnia and Herzegovina", IT-95-18 "Srebrenica"); Dusko Sikirica (IT-95-8 "Keraterm Camp"); Goran Jelišić (IT-95-10 "Brcko"); Simo Drjlaca (deceased) and Milan Kovacević (deceased) (IT-97-24); Radislav Krstić (IT-98-33 "Srebrenica"); Radoslav Brdjanin and Momir Talić (IT-99-36 "Krajina"); and Momcilo Krajisnik (IT-00-39 "Bosnia and Herzegovina").

[338] Ibid., at 86.

[339] Judgement, *Prosecutor* v. *Jelesić,* IT-95-10, 14 December 1999, at 108.

[340] Ibid., at 66.

[341] Ibid., at 70.

fact of them being a Bosnian Muslim per se, it is the fact that they represented a group, and were killed as part of an overall attempt to destroy the group, in whole or in part. This could be charged as genocide even if it transpired that the victim was in fact a Bosnian Serb, if the perpetrator believed he was killing a Bosnian Muslim, because the intent would have been to destroy the Bosnian Muslim group in whole or in part.

The second difficulty lay in defining what is meant by the 'intent to destroy, in whole or in part [the group], as such'. The judges in the Jelišić case considered that the term 'as such' means that the intent must be to destroy the group as separate and distinct entity, and not merely some individuals because of their membership of a particular group.[342] The latter would be prosecutable as a crime against humanity (persecution), where 'the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such'. Genocide requires the intent to destroy, whereas persecution does not, although methods of persecution include murder, which is the destruction of a person who is a member of a group. But if the intention is not to destroy the group, or part of a group, but rather to destroy the person, it cannot be genocide. This was upheld in the judgement in the Kupreskić case in January 2000: 'The killing of Muslim civilians was primarily aimed at expelling them from the village, not at destroying the Muslim group as such. This is therefore a case of persecution, not of genocide'.[343]

The situation was complicated further because the intent must be to destroy the group 'in whole or in part'. Therefore, it was not necessary to intend to achieve the complete annihilation of a group, but how much of a group must be targeted for the intent to be to destroy in part? The judges in the Jelišić case considered that 'in part' means that the intent can be limited to a particular geographical region, or even to a limited number of members of the group.[344] In Bosnia, the intent of the Bosnian Serbs was not to destroy the Bosnian Muslim group as such, even though the outcome was the same as if it had been. The objective was rather to clear areas of Bosnia and Hercegovina that were strategically important of Bosnian Muslims. The means of ethnic cleansing varied, but in many areas it consisted of killing large numbers of the group, or selected members of the group, because of the impact this would have on the group. Crucially, however, not because of the impact it would have on the survival of the group as such, but because it would force them to move.

[342] Judgement, *Prosecutor* v. *Jelesić,* IT-95-10, 14 December 1999, at 79.

[343] Judgement, *Prosecutor* v. *Kupreskić and others,* IT-95-16, 4 January 2000 at 751.

[344] Ibid., at 82.

Once they had left, the Bosnian Serbs were not concerned about what became of them. The Genocide Convention was a product of the experience of the Holocaust; and it has imperfect application to the Bosnian case, which makes it difficult to prosecute. The Nazi objective was to achieve *lebensraum,* but the destruction of the Jews was not a means to this end, it was an end in itself—the 'final solution'. In Bosnia, however, the destruction of the Bosnian Muslim group was not the end, it was the means to the end.

There was a considerable degree of overlap, so that the same act could be charged on a number of counts. However, as the foregoing discussion demonstrates, Articles 2 and 4 were significantly more difficult to prove in terms of establishing jurisdiction. Article 2, because it required proof of international armed conflict; and Article 4, because it required proof of specific intent to commit genocide, both of which were difficult to establish. It was much more straightforward to establish jurisdiction for Articles 3 and 5, both of which required a nexus with armed conflict, of an internal or international character.

The reason that the prosecution engaged in lengthy and complex legal arguments in order to establish jurisdiction for grave breaches and for genocide was that the ideology of the OTP under Justice Richard Goldstone as Chief Prosecutor was informed by a desire to go beyond the individual cases and further codify and expand international humanitarian law.[345] This objective was in accordance with the external mandate of the Tribunal as a measure for the maintenance international peace and security, since the development and strengthening of international humanitarian law was held to contribute to the maintenance of international peace and security. On the other hand, the difficulties in establishing jurisdiction led to extremely lengthy and complex trials, which had a detrimental impact on the ability of the Tribunal to deliver justice fairly and expeditiously, which was its internal mandate. Sassoli and Olson opined that 'One sometimes has the impression that the ICTY is comparable to an elderly person wanting to clarify as many questions as possible before dying, while ordinary courts build up their jurisprudence by crossing each bridge when they come to it'.[346] There had to be a trade-off between these two imperatives.

[345] Karim Khan, Legal Adviser, OTP, Seminar on International Criminal Tribunals, King's College London, 12 May 1999. Fenrick points out that the utility of the Tribunals will be to add flesh to the bare bones of treaty provisions. Fenrick, W. J., 'International Humanitarian Law and Criminal Trials', *Transnational Law and Contemporary Problems,* 7 (1997), 43.

[346] Marco Sassoli and Laura M. Olson, 'The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic case', *ICRC,* 82 (2000), 769.

CONCLUSION

The political mandate of the Tribunal impacted in three ways on jurisdiction. It informed the drafting of the Statute in that it was essentially very conservative because of the perceived need to ensure that the law applied by the Tribunal had a firm legal basis. The political mandate also defined the territorial and temporal jurisdiction of the Tribunal inasmuch as it was tied to the situation that was deemed to be a threat to international peace and security. Finally, it impacted on the interpretation of jurisdiction by the court, as discussed in relation to the legal basis for the Tribunal and the application of grave breaches provisions. Crucially, both the prosecutor and the judges tended to view the decisions handed down by the court as relevant not only to the case at hand, but externally to the further development and codification of international humanitarian law. This was undeniably the case, but the internal mandate of the Tribunal was to hear cases brought before it. The question was whether the external consequences, such as the development of international law or the construction of an historical record, were no more than beneficial corollaries, or were an inextricable part of the mandate. Given that the judicial process was conducted as a means of achieving the external mandate, international peace and security, the development of international humanitarian law through the judgements of the Tribunal were an inextricable part of that mandate, but were not allowed to encroach on the determination of the guilt or innocence of the individual accused.

When Arbour took over in 1996, the ideological drive to expand and develop the law was gradually taken over by more pragmatic zeal to expedite the cases at hand, and thereby function effectively as a criminal court. The contribution to the development of international law championed by Arbour was to be found in setting an example of effective international criminal prosecution, setting precedents in terms of securing compliance, and resolving procedural questions, as discussed in Chapter 5.[347]

[347] Arbour, L., 'Progress and Challenges in International Criminal Justice', *Fordham International Law Journal,* 21/2 (1997), 531–40.

5 Procedure: 'Justice Must Not Only be Done, but Must be Seen to be Done'

Chapter 4 highlighted a number of issues with regard to the impact of the political mandate on the exercise of jurisdiction by the Tribunal, and conversely, the consequences of legal decisions on jurisdiction in the political arena. This chapter examines a set of issues arising from the formulation and interpretation of the Rules of Procedure and Evidence (RPE) of the Tribunal with regard to its status as a political tool. This is not a detailed examination of the Tribunal's RPE, nor of its jurisprudence.[348] Rather, it is an analysis of the procedure of the Tribunal in as far as it related to the impact of politics on law, and vice versa. As stated by Judge Shahabuddeen, there was a need for 'reasonable judicial flexibility', in order to strike the correct balance between competing imperatives of politics, justice, and equality.[349]

On the one hand, there was a legal imperative for judicial propriety, which coincided with the political imperative that justice must be seen to be done. Former President Cassese stated in 1997:

> [T]he Tribunal relies on the widespread publication of its judicial acts and commentaries thereon for the fulfilment of its mandate. In accordance with the well-known

[348] For detailed analysis, see M. Cherif Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers, 1996); Dixon, R., 'Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals', *Transnational Law and Contemporary Problems,* 7 (1997), 81–102; Dugard, J., and van den Wyngaert, C. (eds.), *International Criminal Law and Procedure* (Aldershot: Dartmouth, 1996); John R. W. D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (New York: Transnational, 1998); King, F. P., and La Rosa, A. M., 'International Criminal Tribunal for the Former Yugoslavia: Current Survey', *European Journal of International Law,* 1 (1997), 123–79; King, F. P., and La Rosa, A. M., 'Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *European Journal of International Law,* 9 (1998), 757–60; Morris, V., and Scharf, M. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia : A Documentary History and Analysis,* vol. I (New York: Transnational Publishers, 1996); Murphy, S. D., 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *American Journal of International Law,* 93/1 (1999), 57–97.

[349] Separate Opinion of Judge Shahabuddeen, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor* v. *Aleksovski,* IT-95-14/1, 2 July 1998, 4.

> maxim, 'Justice must not only be done, but must be seen to be done', it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community.[350]

This statement echoed the Secretary-General's report on the drafting of the Statute, which stated that it was 'axiomatic that the international tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'[351]

Legal and political imperatives were not always coincidental. There was a set of balancing acts that had to be successfully juggled by the Tribunal: the fair, impartial, and expeditious administration of justice set against the sheer volume of material and complexity of cases; and the rights of the accused versus the rights of victims and witnesses, and the international interest in prosecution. The Tribunal was the defender of international human rights standards in two respects: It was a vindication of the human rights of the victims; and, as the first truly international criminal tribunal, it had to be exemplary in its observance of human rights standards relating to the rights of the accused. In addition, in the context of an international tribunal there were additional tensions created by the welding together of a number of different legal traditions, tensions that were most evident between civil law and common law procedures and principles. To make things more difficult, the Tribunal did not have the luxury of time to develop rules of procedure and evidence. As Judge Dechênes pointed out, the Tribunal was 'navigating uncharted waters'.[352]

THE STATUTE AND RULES OF PROCEDURE AND EVIDENCE

International humanitarian law is not an international criminal code; it is both more and less than that. Its purpose is to protect combatants and non-combatants from unnecessary suffering and safeguard the basic human rights of persons who fall into the hands of an enemy.[353] It is best

[350] 'Foreword by the former President of the International Criminal Tribunal for the former Yugoslavia', *International Review of the Red Cross,* 321 (1997), 602.

[351] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808, S/25704 (1993), 3 May 1993, at 106.

[352] Jules Dechênes, 'Toward International Criminal Justice', in Roger S. Clark and Madeleine Sann (eds.), *A Critical Study of the International Tribunal for the Former Yugoslavia,Criminal Law Forum,* 5/2–3 (1994), 269.

[353] W. J. Fenrick, 'International Humanitarian Law and Criminal Trials', *Transnational Law & Contemporary Problems,* 7/1 (1997), 26.

viewed as having a preventative function, rather than as a basis for criminal prosecution. The fact that it has come into existence through international treaties and conventions, often conceived on an abstract level, and through the development of customary international law, means that it contains ambiguities.[354] An obvious lack was that, although there is a clear list of offences, there is no clear guidance on evidentiary or procedural matters. The fact that there have been so few prosecutions, and even fewer in the context of an international tribunal, means that the judges had very little in the way of precedent to draw on.[355]

The starting point for this examination of the procedural aspects of the Tribunal is the Statute. As discussed in the previous chapter, the OLA draft statute was adopted without amendment by the Security Council. According to Tavernier, this explains why there are shortcomings. The first is that the Statute provisions on procedure were vague or incomplete.[356] Article 21 set out minimum standards for a fair trial, and reproduced the minimum guarantees provided in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[357] Second,

[354] W. J. Fenrick, 'International Humanitarian Law and Criminal Trials', *Transnational Law & Contemporary Problems,* 7/1 (1997), 26.

[355] The Trial Chamber in the Tadić case pointed out that even the Nuremberg and Tokyo Tribunals are of little value for procedural precedent. Both had very limited Rules of Procedure, and did not seek to find a compromise between common law and civil law in the same way as the ICTY does. Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses, *Prosecutor* v. *Tadić,* IT-94-1, 10 August 1995, at 22.

[356] Paul Tavernier, 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', *International Review of the Red Cross,* 321 (1997), 612.

[357] International Covenant on Civil and Political Rights (ICCPR), Article 14:(a)

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, the accused shall be entitled to a fair and public hearing […].
>
> (b) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> (c) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (d) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (e) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (f) To be tried without undue delay;
>
> (g) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (h) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (i) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (j) Not to be compelled to testify against himself or to confess guilt.

Harris, D. J., *Cases and Materials on International Law* (London: Sweet and Maxwell, 1991), 615–6.

the drafters of the Statute did not have time properly to consider the amalgamation of common law and civil law systems. Instead, the Statute, drafted primarily by common law experts, was greatly influenced by common law, but tempered with concessions to civil law. This amalgamation created considerable ambiguity.[358] As with the adversarial common law system, the prosecutor was independent and had authority for the initiation and conduct of investigations. However, the judges were given a much more extensive role during proceedings than would be acceptable in a common law system, and the format for trials more closely reflected civil law systems, with no jury.

At the International Criminal Tribunal for Former Yugoslavia (ICTY), in common with the civil law system, the judges were judge and jury. This system was challenged by the Defence in the Tadić case. The Defence argument was that the system exposed the accused to the risk of a 'speculative' trial, and opined: 'there is the danger of high media exposure and low-quality justice'.[359] Why this should be the case just because there was no jury was not stated. In fact, a jury system would be more unfair to the accused, given the extensive media coverage of the war. The rationale for having judges determine the guilt or innocence of the accused was that they were deemed better equipped to remove themselves from the emotive power of media coverage of the war, and make independent and impartial judgements on the case in hand.

This rationale should be set against the procedure for selecting judges. As discussed in Chapter 3, because of the high profile of the Tribunal, those who were put forward were largely 'academic' rather than 'professional' judges, which means that, while they can set themselves apart from the media coverage, it is questionable whether or not they can set themselves apart from the desire to contribute to the political and legal development of international law and institutions. In the Čelebići case, the Defence challenged the judicial independence of Judge Odio Benito

[358] Tavernier, 'The Experience of the International Criminal Tribunals', 612.

[359] Opening Statement of the Defence in the Case of Duško Tadić, *Prosecutor* v. *Tadić,* IT-94-1, 7 May 1996, at 2. Doubtless, this objection will be raised by the defence in the Miloševoć and others case and in the Karadžić and Mladić cases, since all have been widely covered in the media and in all cases the accused have already been denounced as 'war criminals'. See, for example, 'Serb war criminals flaunt their freedom', *Sunday Times,* 23 June 1996; 'Judge urges West to arrest war criminals', *Guardian,* 22 October 1996; 'This war criminal must be brought to justice', *Observer,* 4 October 1998.

after her appointment as Vice-President of Costa Rica. The judges' terms of office had been extended so that they could complete the case, beyond the normal term of office, and Odio Benito was appointed to take up the political appointment on the expiry of her term at the ICTY. In the Kordić case, the Defence sought the disqualification of Judges Jorda and Riad, on the basis that they would be prejudiced by having heard closely related testimony and evidence in the Blaskić case. The request was denied. The Bureau decided that sitting in the Blaskić trial would not affect the impartiality of the judges, and noted that the unique jurisdiction of the ICTY made it inevitable that there would be some overlap of issues.[360]

The RPE were drafted by the judges during their first session, in early 1994. The RPE govern every aspect of proceedings, from investigation and the preparation of an indictment, review of the indictment and issuance of arrest warrants, pre-trial and trial proceedings, including the protection of victims and witnesses, and rules of evidence, judgement, penalties, appellate proceedings, review proceedings, sentencing, and cooperation and judicial assistance. The first version of the rules, numbering 125 in total, was issued on 11 February 1994. The judges initially produced a draft set of rules attempting to cover every eventuality, which was deemed to be too unwieldy. The RPE that were adopted in February 1994 took a more general approach.[361]

Numerous amendments were made to the RPE, in accordance with its development into a fully functioning court.[362] For example, in response to the deployment of Implementation Force (IFOR) in January 1996, the judges agreed to include a new rule to provide for the transmission of arrest warrants to 'any appropriate authority or international body, such as IFOR'.[363] At a subsequent plenary session, on 22–23 April 1996, another rule was adopted in order to enhance the capability of the prosecutor to investigate: Rule 40*bis* provides for a system of provisional detention for suspects transferred to The Hague for questioning. As former President Cassese stated in his Address to the General Assembly on 19 November 1996:

> One might ask: why were the Rules not perfectly comprehensive, consistent and clear in the first place? To ask this question is to answer it. It would have been simply impossible for the first truly international criminal tribunal to have adopted the first ever international criminal procedural and evidentiary code from a first

[360] See Sean D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *American Journal of International Law,* 93 (1999), 87.

[361] Interview with Graham Blewitt, Deputy Prosecutor, ICTY, 28 March 2000.

[362] The most recent amendments were made in April 2001. Rules of Procedure and Evidence, adopted 11 February 1994, as amended 12 April 2001, IT/32/Rev. 20.

[363] Rule 59*bis*. Amended 18 January 1996. *Bulletin,* No. 3, 22 February 1996.

> draft dealing perfectly with all the diverse issues with which the Tribunal has to cope […]. It would have been equally impossible for all the issues […] to have been perfectly anticipated and solved at the beginning of 1994, more than 12 months before the first accused even arrived at the Tribunal.[364]

The next major set of amendments occurred in July 1998, and were designed to speed up the process. At the plenary session on 9–10 July 1998, the judges conducted an in-depth review of the rules of procedure, with the aim of streamlining proceedings, 'not to try cases with lightning speed […] but to conduct our proceedings in the most efficient and expeditious manner, consistent with full respect for the rights of the accused'.[365] The review was undertaken in consultation with external international and criminal law experts, and papers were also submitted by two defence counsel.[366] The main changes were the assignment within each Trial Chamber and for each case a pre-trial judge to conduct all pre-trial matters, thus making hearings before the full chamber unnecessary and the shift to a single judgement, comprising sentencing as well as judgement; finally, there was provision for amendments to indictments to be considered by the judge who confirmed it in the first instance.

The impetus to speed up the process prompted the President of the Tribunal, Judge Claude Jorda, to call for a number of changes to the procedure of the Tribunal, including a wider remit for the function of legal officers in the preparation of cases and the appointment of additional *ad litem* judges when he took over from Judge McDonald in November 1999. Jorda's *Report on the State of the ICTY and Prospects and Reform Proposals* was issued on 12 May 2000. It was prepared in response to the UN Commission of Experts Group Report, which had assessed the effectiveness of the Tribunal.[367] The plan was conceived in order to address the problem of 'managing quantity whilst not permitting itself to sacrifice the exemplarity and quality of its proceedings'. It took account of legal and political considerations, namely the long- and medium-term outlook of the Office of the Prosecutor (OTP), procedural constraints, the expectations of the international community to hold accountable the most senior

[364] Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations, 19 November 1996.

[365] *Bulletin,* No. 21, 27 July 1998, 1.

[366] Two workshops were conducted: one on 27 February 1998 with Ms Carol Bruce, M. Marcel Le Monde, Dr Ernst Markel, Judge James Moran, and Mr Paul Vander Straeten; and the second one on 10 March 1998 with Professor Jean Pradel and Professor Mark Summers. Papers were submitted by Mr Toma Fila and Mr Russell Hayman. Report of the Group of Experts, established pursuant to Resolution 53/212 (Group of Experts Report), 18 December 1998.

[367] The Group of Experts was convened in order to review the functioning and progress of the Tribunal, in view of the fact that after almost seven years and budgets totalling $400 million, only fifteen trials had been conducted by the ICTY and ICTR. Group of Experts Report, at 35.

officials, and the place of the Tribunal within the international humanitarian law mechanism in view of the establishment of the ICC.[368]

The objective was to determine the scale and nature of the work remaining to be done by the Tribunal, and to devise a way of dealing with the massive case-load as quickly as possible, particularly with regard to those at the highest levels of responsibility, without sacrificing the interests of justice.[369] A number of possible solutions were considered in the report, but the solution that was decided upon was that the pre-trial procedure be reviewed so that more of the case was prepared prior to trial, allowing for a shorter trial. It recommended in this context that the management of cases prior to trial would be undertaken by senior legal officers in the Chambers and not by the judges themselves. This was not a delegation of judicial responsibility, since the discretion of the legal officers was limited to taking judicial administrative decisions, such as setting deadlines and hearing depositions, not deciding issues of jurisdiction.[370] This solution did not solve the problem of a bottleneck at the trial stage, so the report proposed the selection of a pool of judges, to be called on *ad litem* to form a trial chamber. This was a major alteration, which required an additional Security Council resolution.[371]

The imperative to speed up trials was informed by political and legal considerations. The legal consideration was the right of the accused to an expeditious trial. The political considerations coincided with this in one sense, that it was a part of justice being seen to be done. However, this same consideration also mitigated against speeding up trials. The former prosecutor, Louise Arbour, viewed the efforts to speed up the process as misguided. These are after all, she says, extremely complex and important trials, which form part of the process of peace and reconciliation, so they should be conducted solemnly and with gravitas.[372] There is an international interest, as well as the interest of the victims, which should be set above the rights of accused to a speedy trial. In her view, in assessing where the correct balance lies between the rights of the accused and the international interest, the Tribunal should err on the side of the international interest, which is concomitant with the interest of the victims, and the external mandate as an instrument of international peace and security. The remainder of this chapter examines these competing imperatives

[368] *Report on the State of the ICTY and Prospects and Reform Proposals,* 3. http:www.un.org/icty/pressreal/RAP000620e.htm .

[369] See Chapter 4.

[370] Interview with Stephane Bourgon, 27 November 2000.

[371] The Security Council adopted Resolution 1329 on 30 November 2000, establishing a pool of *ad litem* judges in the ICTY and enlarging the membership of the ICTR, and amended Articles 12–14 of the Statute of the ICTY accordingly. S/RES/1329 (2000), 30 November 2000.

[372] Interview with Justice Louise Arbour, 23 January 2001.

with reference to three aspects of procedure: investigation and indictment; rules of evidence; and the protection of victims and witnesses.

INVESTIGATION, INDICTMENT, AND RULE 61

Rules 47–53 govern the preparation and issuing of indictments. The base line for bringing an indictment was that the prosecutor was 'satisfied in the course of an investigation that there is sufficient evidence to prove reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal'. This requirement turned on its head the requirement to prove the guilt of the accused 'beyond reasonable doubt'. 'Reasonable' was defined by the ICTR Trial Chamber in the following terms: 'fairness, moderation, sensibility, and sound judgement. The term reasonable grounds can be interpreted as facts and circumstances which could justify a reasonable or ordinarily prudent person in believing that a suspect has committed a crime.'[373] If the judge was satisfied that a prima facie case exists, the indictment is confirmed. The consequence of a confirmation of an indictment was that an arrest warrant is issued, in accordance with Rule 55(a), and transmitted to the State authorities where he is believed to be residing. The additional consequence was that the suspect now had the status of an accused.

The very public nature of the early indictments meant that in some quarters it was viewed as an assertion of guilt. The presumption of innocence is an important guarantee which, in respect of media portrayal of the Tribunal, was often lacking. The accused were more often than not referred to as war criminals, even before the trial had commenced. This problem was exacerbated where Rule 61 hearings took place (see later). The standard for confirmation of an indictment was high: prima facie, according to the interpretative statement made by the US representative on the adoption of the Statute of the Tribunal, meant a 'reasonable basis to believe that a crime was committed by the person named in the indictment'.[374] It was not, however, equal to the finding of guilt 'beyond reasonable doubt'.

The crucial difference between the tenure of Goldstone and Arbour as Chief Prosecutor was that, under Goldstone, most of the indictments were issued with a fanfare of publicity and a number of Rule 61 hearings took

[373] Decision on a Preliminary Motion Filed by Defence Counsel for an Order to Quash Counts 1, 2, 3 and 6 of the Indictment, ICTR-96-10, 30 June 1998.

[374] S/PV. 3217 (1993), 25 May 1993.

place; whereas under Arbour the majority of the indictments were issued under seal, in accordance with Rule 53, which allowed for non-disclosure of the indictment 'in the interests of justice', to protect confidential information obtained by the prosecutor, or to prevent an opportunity for securing custody of the accused from being lost.[375] The reason for this was that under Goldstone the Tribunal was in a process of establishment, as discussed in Chapter 3, and the issuing of indictments was the only means of establishing the image and credibility of the Tribunal.[376]

The same rationale lay behind the formulation of Rule 61. It was devised in order to ensure that the Tribunal was not rendered ineffective by the non-appearance of accused, and to enable the Tribunal to take effective steps to ensure that States do not ignore warrants.[377] It is worth recalling that in 1994 the conflict in Bosnia was ongoing, and without the cooperation of the respective Bosnian Serb, Bosnian Croat, and Bosnian government authorities, there was little prospect of obtaining custody of accused, unless, as with Tadić, they had sought refuge elsewhere. The view that Rule 61 was devised as a means of giving the judges something to do is also held by Murphy, who makes the point that, owing to the lack of indictees in custody, the ICTY judges looked for other work to do.[378] They were also motivated by the desire to give the Tribunal a high profile public image, and demonstrate that it was getting on with its mandate, something that could only be done by the commencement of judicial proceedings. This view is also vindicated by the fact that, following the Karadžić and Mladić hearings, in July 1996, no more were held. This was mainly because progress was reached in obtaining custody of accused from 1997 onwards, which meant that the Tribunal could operate as a functioning criminal court and the judges were occupied with trials.[379] It was also because Arbour was strongly opposed to Rule 61 hearings on the basis that they were incomprehensible from the point of view of a criminal lawyer, since the hearings clearly showed what evidence the prosecutor had in his or her possession, and were a waste of valuable time and resources.[380]

[375] See Chapter 7.

[376] See Chapter 3.

[377] In 1995–96, six Rule 61 proceedings were conducted, resulting in the issue of seven international arrest warrants against the following accused: Dragan Nikolić and Milan Martić; Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin; Ivica Rajić; and Radovan Karadžić and Ratko Mladić.

[378] Murphy, 'Progress and Jurisprudence', 58–9.

[379] See Chapter 7.

[380] Interview with Justice Louise Arbour, 23 January 2001. Her view is upheld in the Group of Experts Report, which states that Rule 61 hearings, while they are not equivalent to a trial in absentia, impose a needless cost burden on the Office of the Prosecutor. Group of Experts Report, at 59–60.

Rule 61 provided for a hearing in open court of the evidence that was submitted to the judge when the indictment was confirmed; and served a predominantly political, rather than a judicial, purpose. The rule was conceived in order to reconcile demands for trials in absentia, called for by civil law experts, with the refusal of common law experts to consider it, and the fact that it was ruled out by the ICCPR.[381] The Secretary-General's report stated that 'a trial should not commence until the accused is physically present before the International Tribunal. Other reasons not to conduct trials *in absentia* were set forth by Goldstone: they have a tendency to be viewed as no more than 'show trials', and so do not satisfy calls for justice; the evidence is untested and any conviction and sentence are 'empty shells' and would be so perceived; and if the person is subsequently detained, the earlier trial would have to be set aside anyway.[382] Trials *in absentia* would not, therefore, satisfy the political and legal requirement that justice should be 'seen to be done'.[383]

Greenwood opined that Rule 61, conceived as a means also of satisfying the desire for a public hearing in the absence of the requisite state cooperation to obtain custody of the accused, has resulted in 'a kind of hybrid, a legal aberration and a substitute that satisfies no one'.[384] The procedure fell short of a trial *in absentia,* and in doing so did not ensure full respect for the rights of the accused, because there was no defence. Lawyers acting on behalf of Radovan Karadžić filed a motion challenging the fairness of Rule 61 proceedings and requesting access to documentation. The Chamber denied the right of the accused to make such a challenge until he submitted to the jurisdiction of the court.[385]

The practical consequence of Rule 61 hearings was that, if the Trial Chamber considered that there were 'reasonable grounds'[386] for believing the accused committed any or all of the charges in the indictment, it had the power to issue an international arrest warrant, the consequence of which was that the accused was effectively restricted to his country of refuge.[387] The main value, however, was symbolic. In the absence of trials, as discussed above, it was the only way in which the Tribunal was able to create a 'permanent judicial record … of the horrendous crimes that have

[381] Report of the Secretary-General, at 101.

[382] Opening Statement by Justice Goldstone, *Prosecutor* v. *Nikolić,* IT-94-2, 9 October 1995, at 1.

[383] Note 3, earlier.

[384] Tavernier, 'The Experience of the International Tribunals', 615.

[385] Decision rejecting the request submitted by Messrs Medvene and Hanley III, *Prosecutor* v. *Karadžić & Mladić,* IT-95-5, 5 July 1996.

[386] This is below the threshold for determining guilt at trial, which must be 'beyond reasonable doubt'.

[387] Opening Statement by Justice Goldstone, *Prosecutor* v. *Nikolić,* IT-94-2, 9 October 1995, at 10.

been committed in the former Yugoslavia … attributing guilt to individuals [and] avoiding the attribution of collective guilt to any nation or ethnic group'.[388] It also, arguably, satisfied the right of victims to be heard.[389] For example, in the Rule 61 hearing on Srebrenica, Judge Riad summed up in the following terms:

> After Srebrenica fell to besieging Serbian forces in July 1995, a truly terrible massacre of the Muslim population appears to have taken place. The evidence tendered by the Prosecutor describes scenes of unimaginable savagery: thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers' eyes, a grandfather forced to eat the liver of his own grandson. These are truly scenes from hell, written on the darkest pages of human history.[390]

The aim was also to send a strong message to states that 'harbouring war criminals is anathema to the international community'; and that the absence of accused in custody is not a failure of the prosecutor or the Tribunal as a whole, but is a failure of States.[391] In this connection, it was also a means of drawing the attention of the international community to the failure of certain State or States to carry out their obligations under the Statute, and paved the way to the more formal referral of non-cooperation to the Security Council. Clearly, the main consideration with regard to Rule 61 hearings was the external legal and political impact.

Trial Procedure 1: Admissibility and Disclosure of Evidence

At the opening of the Tadić trial Judge McDonald stated that no matter what the external political and legal consequences, the trial itself concerned the guilt or innocence of the accused, and should be conducted accordingly:

> This is the beginning of the first trial before the International Criminal Tribunal for the former Yugoslavia […]. As such an occasion, this has certain historic dimensions. Nevertheless, we should all remember first and foremost that this is a criminal trial of an accused who a little over one year ago appeared before this

[388] Opening Statement by Justice Goldstone, *Prosecutor* v. *Nikolić,* IT-94-2, 9 October 1995, at 12.

[389] *The 'voice of the victims'. First witnesses to give evidence in open court in the Nikolić case,* CC/PIO/22-E, 4 October 1995. On the other hand, Mark Harmon, closing for the Prosecutor in the Karadšić and Mladić hearing, stated that it was intended not so much a chance for the victims to be heard as an encouragement to arrest the accused so that the victims may be heard at trial. Prosecutor's Closing Statement by Mr. Mark Harmon, *Prosecutor* v. *Karadšić & Mladić,* IT-95-5 & IT-95-18, 8 July 1996.

[390] Review of the Indictment, *Prosecutor* v. *Karadšić & Mladić,* IT-95-18, 16 November 1995, 351.

[391] Ibid., at 14.

> Chamber and entered a plea of not guilty. Under any system of justice, he is entitled to a fair trial and to ensure that he receives one is our paramount purpose for being here.[392]

Judge McDonald was right to state that proceedings before the court are primarily concerned with the guilt or innocence of the accused; but there were ways in which the political context impacted on decisions on procedure. The following discussion examines two sets of issues that exposed the interface of the internal and external mandates in the procedure of the Tribunal: rules of evidence (admissibility and disclosure) and protection of victims and witnesses.

Rule 89(A) specified that in cases not otherwise provided for, the Trial Chamber should apply rules of evidence which will 'best favour a fair determination of the matter before it and … consonant with the spirit of the Statute and general principles of law'. As Murphy pointed out, in the formulation of rules of evidence, the Tribunal charted a course somewhere in between stringent rules of admissibility in common law system and civil law tradition of allowing virtually anything.[393] In the Tadić case, with regard to hearsay evidence, the judges took a very wide view of admissibility. The Defence challenged this on the basis that it violated Article 21 of the Statute, which set out the right of the accused to examine witnesses. The motion was denied on the basis that the Statute and Rules of Procedure do not bar admission of hearsay as long as it satisfies the criteria set out in Rule 89(C). These are that it was 'relevant and found to have probative value'; and it is 'voluntary, truthful, and trust-worthy'. This approach adopted by the Trial Chamber in the Blaškić case was also one of extensive admissibility, with 'questions of credibility or authenticity being determined according to the weight given to each of the materials by the judges at the appropriate time.'[394]

The same principle was applied to the question of corroboration of witness testimony. In civil law systems: 'The determinative powers of a civil law judge are best described by reference to the principle of free evaluation of the evidence: in short, the power inherent in the judge as a finder of fact to decide solely on the basis of his or her personal intimate conviction.'[395] Similarly, the reliability of victims' testimony was judged on an individual basis; the judges held that it was not appropriate nor correct to conclude that a witness is deemed to be inherently unreliable solely

[392] [Transcript] Gabrielle Kirk McDonald, Presiding Judge, *Prosecutor* v. *Tadić,* IT-94-1, 7 May 1996.

[393] Murphy, 'Progress and Jurisprudence', 80.

[394] Judgement, *Prosecutor* v. *Blaškić,* IT-95-14, 3 March 2000, at 34.

[395] Opinion and Judgement, *Prosecutor* v. *Tadić,* IT-94-1-T, 7 May 1997, at 537.

because he was the victim of a crime committed by someone of the same ethnic group, creed, army, or other as the accused.[396]

Rule 93 related to evidence concerning a consistent pattern of conduct. Set against the requirement to dispense justice expediently was the fact that evidence of a consistent pattern of conduct is a necessary constituent element of certain crimes, so that it had to be argued in every case.[397] This kind of evidence is crucial to prove the existence of a systematic or widespread attack on a civilian population, or the existence of an international or internal armed conflict. As discussed in Chapter 4, it is crucial for the application of Articles 5 and 2, respectively. A Trial Chamber also had the option of taking judicial notice of proof of facts of common knowledge, either at the request of a party to a case or *propio motu* (on its own volition). In practice, the judges have been reluctant to do this, mainly because it risked prejudicing the rights of the accused in subsequent cases. In the Kovacević case, the judges ruled that the decision of one Trial Chamber does not bind another Trial Chamber which, in a different case, may be required to consider similar or related issues.[398] As discussed in Chapter 4, in the Bosanski Šamac case the prosecutor submitted a request for judicial notice of the fact that, after the Bosnian declaration of independence on 6 March 1992 and recognition on 6 April 1992, there was an international armed conflict due to the involvement of the JNA. The judges considered that Rule 94 was intended to apply to facts, not to the legal consequences of those facts, and cannot, therefore, apply to the legal characterization of the conflict.[399]

The other issue with regard to rules of evidence was disclosure. Rule 66 set out in detail the disclosure obligations incumbent on the prosecutor. The prosecutor was obliged to make available to the defence copies of supporting material which accompanied the indictment, copies of all statements of all witnesses whom the prosecutor intends to call at trial, and exculpatory evidence. The disclosure obligations of the Defence were discussed in the Tadić case: the issue arose as a result of the indication by a witness during cross-examination that he had made a statement to the defence. Initially, the motion was granted, but on reconsideration at the

[396] Opinion and Judgement, *Prosecutor* v. *Tadić,* IT-94-1-T, 7 May 1997, at 541.

[397] La Rosa, A. M., 'A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law With Those of Fair Trial', *International Review of the Red Cross,* 37 (1997), 648.

[398] Decision on Defence Motion to Strike Counts 4, 5, 8, 9, 10, 11, 13, and 15, *Prosecutor* v. *Kovacević,* IT-97-24, 6 July 1998.

[399] Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia and Herzegovina, *Prosecutor* v. *Todorović,* IT-95-9, 25 March 1999. See Chapter 4.

request of the defence it was denied. The reasoning was that in Rules 66–70, there is a 'clear distinction drawn between what the Prosecution must disclose as compared with the Defence, which, the reciprocal provisions apart, will have no disclosure obligation at all unless an alibi or special defence is sought to be relied upon and then only to a quite limited extent, never involving disclosure of witness statements'; and further that the doctrine of equality of arms should be 'inclined in favour of the Defence'.[400]

The alleged failure of the Prosecutor to fulfil its disclosure obligations was raised in a number of cases and was the subject of a motion alleging prosecutorial misconduct in the Furundžija case.[401] The Trial Chamber found that the conduct of the prosecutor had been 'conduct close to negligence', but did not constitute contempt. A formal complaint was issued to the prosecutor. Although there was a Code of Conduct for Defence Counsel, there was no such control on the conduct of the Prosecutor, nor was it within the mandate of the judges to devise such a code. The most that a Trial Chamber could do was to refer a formal complaint to the prosecutor to deal with as he or she saw fit.

One issue that arose was access to confidential documents in related cases for Defence counsel. In the Kordić and Čerkez case, the Defence requested access to documents relating to other cases concerning the Lašva Valley region.[402] The Trial Chamber determined that the prosecutor was obliged to disclose, since it was essentially the same case, but that such disclosure should respect any confidentiality and witness protection measures in place in the Blaškić case Trial Chamber.[403]

The Blaskić case also gave rise to questions about the competing obligations of the prosecutor to disclose material to the Defence and to respect the confidentiality of information provided under Rule 70. The Trial Chamber found in the Blaskić case that obligations under Rule 70 prevailed over disclosure obligations.[404] Rule 70 was unique to the Tribunal,

[400] Disclosure of Defence Witness Statements, *Prosecutor* v. *Tadić,* IT-94-1, 27 November 1996.

[401] 'The Trial Chamber should not have to remind or prompt the Prosecution of its obligations, nor pursue the Prosecution to ensure deadlines are met and orders complied with in their entirety.' The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, *Prosecutor* v. *Furundšija,* IT-96-17/1, 5 June 1998, at 5.

[402] Motion of the accused Dario Kordić and Mario Čerkez for access to the non-public materials in this case, *Prosecutor* vs. *Kordić,* IT-95-14, 16 September 1998.

[403] Opinion further to the Decision of the Trial Chamber seized of the case *Prosecutor* v. *Dario Kordić and Mario Čerkez* dated 12 November 1998, *Prosecutor* v. *Kordić,* IT-95-14, 16 December 1998.

[404] Decision on the Prosecutor's request for authorization to delay disclosure of Rule 70 information, *Prosecutor* v. *Blaškić,* IT-95-14, 6 May 1998, at 13–5.

and was one of the features of the RPE that was designed specifically for the Tribunal in order to enable it to obtain evidence that might otherwise not be provided to it by States and other entities on grounds of national security. The information would be used as a lead or pointer by the prosecutor, but was not to be disclosed in court. The rationale for this rule was to allow for useful information to be given without compromising national security. If the evidence was admitted in court, it would lead to revelations about the extent and type of intelligence they have, and crucially how they got it. Intelligence services were understandably reluctant to do this.

Rule 70 specifically provided that the evidence may not be used or disclosed without the express permission of the provider, and even if permission is granted, the Trial Chamber may not order the production of additional evidence, call witnesses, or compel a witness to answer questions relating to the information or its origin. Goldstone recounts an incident where the US government had provided to the Tribunal satellite pictures of mass graves outside Srebrenica under Rule 70.[405] In spite of the fact that the pictures had subsequently been printed in the *Washington Post,* the prosecutor had to secure the specific consent of the US government to use the pictures in court. The reason that States were unwilling to disclose information such as satellite imagery is that they were fearful of revealing methods and technologies or, indeed, lack of technology. With regard to the satellite imagery, the United States were fearful of divulging the degree of technology in their possession. They found a way round it because, for the purposes of the Prosecutor, a blurred image showing only that the ground had been disturbed in a particular time frame was sufficient.[406]

Trial Procedure 2: Victim and Witness Protection

The other area in which there had to be a trade-off between legal and political considerations was with regard to the protection of victims and witnesses, where the right of the accused to a fair trial was set against the requirement to protect victims and witnesses.

The *Tadić* case was the first time that the issue of the protection of victims and witnesses was addressed in an international court. The Decision of 10 August 1995 set down guidelines and procedural safeguards to be

[405] Goldstone, R., *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), 91–2.

[406] Interview with John Ralston, Chief of Investigations, OTP, ICTY, 27 November 2000.

applied for the determination of requested protective measures, thus establishing legal precedents, which have been followed in subsequent cases.[407] The Trial Chamber found that since the issue was entirely new and that the inherent problems were specific to the ICTY, it was not strictly bound by instruments such as the ICCPR and ECHR. Instead, the Tribunal had to come to its own interpretation and determine where the delicate balance lay between the right of accused to a fair trial and the need to protect victims and witnesses 'within its own unique legal framework'.[408]

The prosecutor sought different types of protective measures. The first was to keep witnesses' identities from the public, but disclose details to the defence. The second set of measures was aimed at keeping the identity of the witness confidential, even vis-à-vis the defence. On the question of anonymity, the Trial Chamber found that, given the emphasis on the protection of victims and witnesses in the Statute and the 'exceptional circumstances' that prevailed, anonymity could be granted; and that the 'situation of armed conflict that existed and endured in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*.[409] Because the granting of anonymity restricts, to some extent, the right of the accused to examine the witness, certain procedural guidelines were adopted:

1. Judges must be able to observe the demeanour of the witness 'in order to assess the reliability of the testimony'.
2. Judges must be aware of the identity of the witness.
3. The defence must be allowed ample opportunity to question the witness on matters unrelated to identity or current whereabouts.
4. The identity of the witness must be disclosed when there is no longer any reason to fear for his/her safety.[410]

The decision was criticized on the basis that it denied the accused the right to a fair trial, since he was not given the opportunity to examine witnesses against him.[411] Judge Stephen dissented, on the basis that the granting of anonymity was inconsistent with the Statute of the ICTY and, therefore, not allowed. He drew a distinction between, on the one hand, non-public disclosure of the identity of witnesses and, on the other,

[407] Decision on the prosecutor's motion requesting protective measures for victims and witnesses, *Prosecutor* v. *Tadić,* IT-94-1, 10 August 1995.

[408] Ibid., at 27.

[409] Ibid., at 61.

[410] Ibid., at 71–2.

[411] Monroe Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused', *American Journal of International Law;* 90 (1996), 235–8.

disclosure to the defence.[412] Judge Stephen argued that for victims the issue of protection does not arise because by giving evidence they or their family have reason to fear retaliation; rather, the combination of possible social consequences of it becoming generally known in communities in the former Yugoslavia that a woman has been a rape victim and the acute trauma of facing one's attacker in court and being made to relive the experience of the rape are paramount considerations. The customary protection measures to guard against these latter possible consequences are in camera proceedings, devices to avoid confrontation with the accused in court and carefully control cross-examination. He concluded that it is measures such as those, and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates.

In relation to anonymity of witnesses, Leigh argued that Chapter VII should not override international law obligations, namely the ICCPR.[413] This is debatable, since Article 103 of the UN Charter states explicitly that Chapter VII obligations override a prior inconsistent international law convention. But this was not the real issue. In this context, the interests of a fair trial should be balanced against the interests of the victims. It is wrong to assume that automatic priority should be given to the interests of the accused.[414] Although there were mechanisms for witness protection programmes in a number of countries,[415] potential witnesses were not always willing to relocate and adopt a new identity with all the implications that had; and in the absence of a police force with the remit to guarantee the safety of witnesses in the territory of the former Yugoslavia, there was little protection at home.

The difficulty was compounded because there was a lack of confidence in same Defence Counsel. The principle that the identity of witnesses should be disclosed to the defence was compromised in practice by the very real concern that Defence Counsel—and indeed the defendants themselves—would disclose the identity of witnesses and resort to intimidation in order to ensure that they did not testify. There have been several cases where Defence Counsel were found in contempt of court for conduct relating to the protection of witnesses. In 1999, Milan Vujin was found guilty of, among other things, 'interfering with witnesses in a manner which dissuaded them from telling the truth'. Vujin was fined 15,000NLG (£4,120). In December, Anto Nobilo (counsel for Blaskić) was fined

[412] Separate Opinion of Judge Stephen on The Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor* v. *Tadić,* IT-94-1, 10 August 1995.

[413] Monroe Leigh, 'Use of Unnamed Witnesses', 238.

[414] Christine M. Chinkin, 'Due Process and Witness Anonymity', *American Journal of International Law,* 91 (1997), 79.

[415] See Chapter 6.

10,000NLG for contempt of the Tribunal.[416] His offence was the disclosure in September 1997 of the identity and occupation of a protected witness. Nobilo argued that he had been unaware of the protection order. Such incidents highlight the problems inherent in prosecuting such crimes, when standards differ among different legal systems, and there was an additional risk that counsel may have their own political agenda. In this way, the Tribunal is not corrupted by its own political mandate, but by the politicization of the judicial process by Defence Counsel. Yet, if they are not given full information, the right of the accused to a fair trial is restricted.

Allegations were also made against an accused, Milan Simić (who was granted provisional release) and his counsel, Branislav Avramović: 'It is alleged that, from July 1998 to May 1999, Milan Simić and Branislav Avramović conducted a programme of harassment and intimidation, supported by bribery, in an effort to persuade [a witness] to testify on behalf of Milan Simić.'[417] However, based upon the evidence presented, the Trial Chamber was not satisfied 'beyond reasonable doubt' that the allegations of contempt made by the witness against the two Respondents were true. There was a suspicion that the witness was seeking relocation on the basis of these allegations and the story increasingly failed to match up, which was enough to present reasonable doubt.

The question of balance between the rights of the accused and the protection of witnesses had a high profile following the false evidence given by Witness L (Dragan Opačić) in the Tadić case. Protective measures were withdrawn for Witness L on 5 December 1996, following the discovery that he had lied under oath about the death of his father.[418] On 22 October 1996 the prosecution informed the Trial Chamber in closed session that, as a result of certain evidence put forward by the Defence, investigations had been commenced with respect to Witness L. Witness L asserted that he had lied at the behest of the Bosnian government authorities, who had allegedly 'trained' him to give evidence against the accused, Dusko Tadić. Consequently, the Prosecution advised the Trial Chamber that it could no longer rely on Witness L and invited the Trial Chamber to disregard his evidence entirely.

The protection of victims and witnesses was a central issue in the Blaškić case. Whilst they did not specifically rule out anonymity, the

[416] *Mr. Nobilo found to be in contempt of the Tribunal,* CC/PIU/375-E, 15 December 1998.

[417] Judgement in the Matter of Contempt Allegations against an Accused and his Counsel, *Prosecutor* v. *Simić,* IT-95-9, 30 June 2000.

[418] Decision on Prosecution Motion To Withdraw Protective Measures For Witness L, *Prosecutor* v. *Tadić,* IT-94-1, 5 December 1996.

judges took a different view to the decision in the Tadić case, finding that: 'the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.'[419] The ruling did not deny protective measures per se, but sought to apply a more stringent test than that applied in the Tadić case, particularly given that, in October 1996 when the decision was taken, the 'exceptional circumstances *par excellence*' of a state of armed conflict no longer existed in Bosnia.[420]

The Trial Chamber in the Tadić case also ruled on protective measures for Defence witnesses. On 25 June 1996 the judges granted a Defence motion to issue summons for twenty-five witnesses. Subsequently, it considered a Defence request for safe conduct—that immunity should be granted in respect of witnesses coming to testify. The Trial Chamber considered it appropriate 'although the Statue and the Rules do not provide for such measures' for 'witnesses who the Defence claims will provide evidence vital to its case [and] will not appear before the Trial Chamber unless granted safe conduct', with the caveat that immunity would not apply to crimes committed after the witnesses departure from their home country, and it was to be limited in time to fifteen days before and after the appearance of the accused.[421] The Trial Chamber also agreed to the Defence request for testimony to be given by means of a video-link, with the caveat that 'The evidentiary value of testimony of a witness who is physically present is weightier than testimony given by video-link.'

The Prosecutor asked for protection measures in respect of witnesses whose testimony is politically sensitive, or for reasons of national security. Mark Harmon, Senior Trial Attorney in the Blaškić case, highlighted the example of Stipe Mesić, whose testimony had been distributed to the Croatian press by President Tudjman; the result was that Mesić was branded a traitor.[422] Also, in the Blaškić case, the prosecutor requested that protective measures be granted in respect of nine witnesses, in order to

[419] Decision on the Application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses, *Prosecutor* v. *Tadić,* IT-94-1, 5 November 1996, at 24.

[420] Patel King and La Rosa, 'The Jurisprudence of the Yugoslavia Tribunal: 1994–1996', 160.

[421] Order Granting Safe Conduct to Defence Witnesses, *Prosecutor* v. *Delalić and others,* IT-96-21, 25 June 1998.

[422] Meeting with Mark Harmon, Senior Trial Attorney for the Prosecution, Report of the Law Society Delegation to the International Criminal Tribunal for the Former Yugoslavia, 28th–30th September 1998 (London: The Law Society, October 1999), 8.

protect national security interests.[423] Protective measures were approved for General Philippe Morillon in order to protect his own safety, and the safety of other French civilian and military personnel in the former Yugoslavia, and the 'essential security interests of France'. Morillon was allowed to testify in closed session and specify a number of topics that should be covered and that questions should be restricted to the content of the statement to be made by Morillon. The witness was also authorized to indicate if any of the information was confidential. Representatives of the French government and the UN Secretary-General were allowed to be present and to put forward any reasoned request necessary 'for the protection of the higher interests they have been assigned to protect.'[424] In this way, the Tribunal explored its scope to be creative in the application of its rules of procedure and evidence in order to ensure effective functioning where it relies on the cooperation of States.[425]

CONDITIONS OF DETENTION

An associated issue to that of Trial procedure is the conditions of detention in which accused are held and the length of time spent in pre-trial detention. Concern over the length of time spent on remand was acute with more and more accused in custody and in view of the fact that the Tribunal was obtaining custody of those at higher levels of responsibility: 'It is difficult to imagine the senior political and military leaders of the countries involved in the conflict spending many months on remand before their trials can begin.'[426] This was one of the factors that led to the review of the procedure of the Tribunal conducted by Jorda when he took office.[427]

The 'extreme gravity'[428] of the crimes alleged, the distance between the seat of the Tribunal and the domicile of the accused, and concern for the safety of witnesses and victims all combine to ensure that, unlike in the domestic setting, detention was the rule and liberty the exception. In only a handful of cases has provisional release been granted, and this has been on medical grounds.[429] According to Louise Arbour, the pre-trial

[423] Decision on the Prosecutor's Motion for Protective Measures, *Prosecutor* v. *Blaškić,* IT-95-14/1, 16 July 1998.

[424] Ibid.

[425] See Chapter 6.

[426] *Report on the State of the ICTY and Prospects and Reform Proposals,* 3. http:www.un.org/icty/pressreal/RAP000620e.htm .

[427] See earlier.

[428] Decision Rejecting a Request for Provisional Release, IT-95-14/1, 25 April 1996; Order Denying a Motion for Provisional Release, IT-95-14/1, 20 December 1996.

[429] Simic was released because he was wheelchair-bound from a bullet wound in his back, and the Detention Unit was not properly equipped to cater for him. The fact that he had voluntarily surrendered was also taken into account. Bail was set at $25,000 for the authorities of RS. Simic is confined to Bosanski Samac municipality, must not have any contact with any potential witness, and must register with local police regularly. General Djukic was released because he was terminally ill. Sean D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *AJIL,* 93/1 (1999), 78.

detention of accused would be objectionable if the possibility of conviction were low, but in the case of the Tribunal there is a high threshold for the confirmation of an indictment, so detention was not unreasonable.[430]

The deaths in custody of Slavko Dokmanović and Milan Kovacević in Summer 1998 raised a number of issues for the Tribunal. First, there was no specified procedure in either the Statute or the Rules for dealing with the death of accused. Prior to June 1998, two of those indicted by the Tribunal had died, but their deaths had not instigated any form of judicial activity for the Tribunal. The first, General Djordje Djukić, died soon after his provisional release in April 1996 on grounds of ill-health. The Prosecutor had requested that the indictment be withdrawn prior to his release, but the judges had determined that this was not necessary. Consequently, the charges were never officially withdrawn. The other, Simo Drljaca, was indicted along with Milan Kovacević, and was shot dead by SFOR soldiers during the course of the operation to detain the two accused.[431]

The deaths in custody of Dokmanović and Kovacević raised questions about the internal workings of the Detention Unit and the standards of health and psychiatric care provided to the detainees. Dokmanović was found dead in his cell in the early hours of Monday 29 June 1998, having committed suicide. His death required a judicial and a political response, both of which were tricky. From a legal viewpoint, Dokmanović's case had closed and he was awaiting judgement, due to be handed down the following week. Initially, there was some talk of releasing the judgement anyway, or at least some portion of it, in order to publicize the findings. On reflection, the judges decided that the only course of action open to them was to declare the case closed.[432] Dokmanović's suicide raised some serious questions about the conditions of detention in The Hague, and, particularly, the length of time defendants spent in custody.[433] Just over a month later, Milan Kovacević died of a heart attack in the Detention Unit on 1 August 1998.[434]

[430] Meeting with the Prosecutor, Judge Louise Arbour, *Law Society Report,* 8.

[431] *Accused Kovacević transferred to The Hague,* CC/PIO/225-E, 10 July 1997.

[432] One reason given for the prosecutor calling for the arrest of the other three accused of Vukovar crimes.

[433] *Accused Slavko Dokmanović found dead in his cell,* CC/PIU/327-E, 29 June 1998; *Completion of Internal Inquiry into the Death of Slavko Dokmanović,* CC/PIU/334-E, 23 July 1998. The inquiry found no evidence of negligence and attributed Dokmanović's death to depression.

[434] His case was half-way through trial and was significant in that it was the first case before the ICTY involving charges of genocide. The case was officially closed on 24 August 1998. Order Terminating the Proceedings against Milan Kovacević, 24 August 1998.

In response to both of these incidents, the President of the Tribunal convened a Working Group on Conditions of Detention. The Group was chaired by Judge Rodrigues, and included representatives from the Registry, the Detention Unit, and the Office of the Prosecutor. It met on several occasions to discuss possible amendments to the Rules of Detention. A questionnaire, sent to the Lead Counsel of each detainee, including those of Dokmanovic and Kovacevic, revealed that, of those who responded, the majority were dissatisfied with the standard of medical and psychiatric care. There are obvious special concerns for the UN Detention Centre, by virtue of the fact that there was a small population, all of whom were awaiting trial in an international and unfamiliar jurisdiction, and with a high level of media interest. Some were detained and transferred in particularly traumatic circumstances. Feelings of isolation could be exacerbated by linguistic difficulties and potential tension in the Detention Centre between the different ethnic groups. However, in an interview with *NRC Handelsblad* on 4 August 1998, one of the accused, Milan Simic, portrayed a somewhat more rosy view of the Detention Centre, saying that, on the contrary, it is 'the only place where the Dayton Agreement really becomes true'.[435]

A more positive view of the Detention Unit was propounded in July 1998, when British SFOR troops detained the wrong set of twins. The error was only rectified after the two had been transferred to The Hague. This led to outrage in the RS and Federal Republic of Yugoslavia (FRY) press, and ridicule in the British press, notably a cartoon in *The Times* with SAS soldiers snatching baby twins from a hospital crib, entitled 'The wrong twins'; and a headline entitled 'Who Dares Twins'.[436] In the end, the outcome was positive for the Tribunal and SFOR in public relations terms, because the two men who had been detained and transferred to The Hague returned to Bosnia fully compensated and publicly stated that they had been extremely well treated in The Hague.[437]

CONCLUSION

It was stated at the beginning of this chapter that there was a conscious effort to ensure that the administration of justice was fair, impartial, and expeditious—that justice was not only done, but was seen to be done.[438]

[435] Petra de Koning, Bosanski Samac, *NRC Handelsblad,* 4 August 1998.

[436] *The Times,* 24 July 1998.

[437] Their bonhomie towards British troops and the Tribunal was not dented by the fact that one of them had received a black eye in the course of the operation (used as evidence by the RS authorities that they had been badly beaten), and they continued to maintain good relations. Confidential Interview.

[438] Note 3, earlier.

This consideration was paramount because it served the external political mandate of the Tribunal as well as its internal mandate, which was to do justice. Mak contended in 1993 that 'despite well-meaning intentions the Tribunal will not succeed in providing a coherent legal framework within which justice will be served and instead it will only produce a sense of failure and discourage future attempts to enforce international humanitarian law'.[439] In fact, the Tribunal has succeeded in providing a coherent framework in which justice is served.[440]

In the context of the ICTY, however, there were additional legal, political, and pragmatic considerations, which did not always coincide. As Farer pointed out, there was an inherent difficulty in enforcing international humanitarian law, which is that the law on human rights in its most distilled form may not tolerate effective procedures and intimidating punishment. This dilemma is of particular significance in relation to the ICTR, where there is a wide divergence between sentences and conditions of detention imposed on Rwandan citizens convicted at the International Tribunal and those convicted by national courts. In national courts they might be sentenced to death, or if not serve out their sentence in a prison that does not even approach internationally recognized standards; whereas at the ICTR the maximum sentence is life and the convicted prisoners serve out their sentences in 'country club settings'.[441] For example, the rights of the accused had to be set against the protection of victims and witnesses and the national security interests of States, and there was tension between the need for justice to be done and the need for it to be seen to be done, as discussed with regard to Rule 61 proceedings, which were more concerned with the former than the latter.

The main contribution of the jurisprudence of the Tribunal was in ironing out some of these complex issues of procedure, which will be instructive in cases before the ICC and national court, as well as other ad hoc tribunals. The example of the ICTY demonstrated that there are no clear-cut answers. Rather, there are a series of trade-offs that must be managed. The key to finding the correct balance lay in understanding the relationship between the internal and external mandate of the Tribunal: justice must be done, and seen to be done, but that was not an end in itself. It had to be done in order to secure peace.

[439] Mak, T. D., 'The Case Against an International War Crimes Tribunal for the Former Yugoslavia', *International Peacekeeping,* 2 (1995), 563.

[440] The sheer volume of jurisprudence emerging from the tribunal is testament to the fact that, by the end of 1998, it had emerged as a fully functioning international criminal court. In 1998, for example, a total of 650 orders, warrants, decisions, and judgements were issued. *Judicial Supplement,* No. 1, 15 February 1999.

[441] Tom J. Farer, 'Restraining the Barbarians: Can International Criminal Law Help?', *Human Rights Quarterly,* 22 (2000), 93.

6 Cooperation and Judicial Assistance: The Tribunal's 'Artificial Limbs'

The particular status of the Tribunal as an ad hoc mechanism meant that it had to interact with the political context in which it operated in order to be able to function internally. Judge Cassese lamented in 1995 that the Tribunal is 'like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the state authorities; without their help the Tribunal cannot operate'.[442] Unlike at Nuremberg, the Tribunal did not find its accused already in custody, nor did it have control over the territory in which the crimes were committed. Although it had an investigative and a prosecutorial arm to carry out investigations and litigation, it was lacking a police force to carry out arrests, and had to ask for outside assistance to provide security and logistical support for investigators, as well as provide access to evidence and witnesses. Financial, political, diplomatic, logistic, and military support was, therefore, a requirement for the Tribunal to be able to deliver justice; not only from the States in the region, but also from other States and international governmental and non-governmental organizations.

Not only did the artificial limbs have to be put in place; they also needed to be operated. The need for State cooperation imposed an additional burden on the Prosecutor and President of the Tribunal to play a diplomatic and political role, as well as a judicial one.[443] First, there was a concerted effort to enhance the public profile of the Tribunal, and to ensure that its voice was heard. This was crucial in the early years, evinced by a high level of activity during the tenure of Goldstone and Cassese, particularly at the time of the signing of the Dayton Accords, and early stages of implementation in 1995–6.[444] Second, diplomatic relations were conducted by

[442] Address of Antonio Cassese, President of the ICTY to the General Assembly of the United Nations, 7 November 1995.

[443] See Chapter 4.

[444] Meetings took place between the president and foreign ministers and ministers of justice of Bosnia and Hercegovina, Croatia, and the FRY in January and May–June 1996; with the Secretary-General of NATO, Javier Solana, the SACEUR, General Joulwan, and the Commander of IFOR, Admiral Leighton Smith; with the President of the OSCE and the Head of the OSCE Mission in Sarajevo, Ambassador Frowick, and the High Representative, Carl Bildt; with the Foreign Ministers and Justice Ministers of France, the United Kingdom, Russia, and Germany, and with the US Under-Secretary of State; and with representative of the European Union—the then President of the European Council, Mrs Agnelli, as well as Jacques Santer, President of the European Commission. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1996/665, 16 August 1996, at 173–7.

the president with the UN and directly with governments in order to make administrative arrangements for the financing of the Tribunal, logistic support, such as the relocation of witnesses under the witness protection programme,[445] and arrangements for enforcement of sentences,[446] and, crucially, to report non-compliance with orders of the Tribunal to the Security Council. Third, diplomatic activity was conducted behind the scenes between the Office of the Prosecutor (OTP) and governments and international organizations on a routine basis in order to secure cooperation. As the Tribunal began to function more effectively as a criminal court, toward the end of the Goldstone/ Cassese era and during the tenure of Justice Arbour as Prosecutor, this area of activity was enhanced. Mechanisms for cooperation on this basis were agreed early on between States and international organizations and the Tribunal on matters such as the location of potential witnesses, the handover of material, and obtaining custody of accused.

This chapter examines the balancing of diplomatic, political, and judicial roles inherent in operation of the Tribunal's artificial limbs. A major aspect of this was obtaining custody of accused, which is examined in the following chapter; and the role and function of the prosecutor, which is the subject of Chapter 8. The present chapter sets out the legal framework for international cooperation and judicial assistance and examines the various levels at which cooperation occurs in practice: from public expressions of

[445] In November 1997, the United Kingdom was the first State to agree to provide assistance to witness protection efforts, and this support has continued, although details are confidential. Other states providing assistance include Canada, the Netherlands, and Denmark. CC/PIO/258-E, 7 November 1997.

[446] *Draft Agreement* Between the United Nations and the Government of Y on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia. By July 2001, only seven States had signed a formal agreement with the Tribunal in order that convicted persons may serve their sentences in their prisons. They are Italy, Finland, Norway, Sweden, Austria, France, and Spain. JL/PIS/482-E, 28 March 2000. Germany, while it has not signed a formal agreement, has an ad hoc arrangement so that Tadić was transferred to serve his sentence in Germany in October 2000. JL/PIS/538-E, 31 October 2000. Aleksovski and Furundšija were transferred to serve their sentences in Finland on 25 September 2000. JL/PIS/530-E, 25 September 2000.

support for the work of the Tribunal, and pressure exerted on the parties to the conflict to cooperate, to financial, logistic, and military support. The legal framework is important, but, in the end, as Lauterpacht argues, enforcement, 'whether desirable, expedient and practical is a problem of politics rather than of law'.[447]

INTERNATIONAL LAW OBLIGATIONS: THE UN CHARTER AND ARTICLE 29

The obligation on States to cooperate with the Tribunal derived from the UN Charter. The powers and responsibilities of the Security Council were discussed in Chapter 2. It is worth reiterating the main points here, in as far as they relate to cooperation and judicial assistance. Article 25 of the UN Charter specifies that all Member and Non-Member States are legally bound to carry out decisions of the Security Council under Chapter VII. This means that all States were obliged to cooperate with the Tribunal as a Chapter VII mechanism for the restoration and maintenance of international peace and security. Paragraph 4 of Resolution 827, creating the Tribunal: '*Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present Resolution and the Statute of the International Tribunal […]'.[448]

The Secretary-General reiterated this obligation in the May 1993 report: 'an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations'.[449] The obligation was further reinforced in Article 29 of the Statute of the Tribunal, which provided that 'States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber […].'[450] In practice, the establishment of the tribunal on the basis of a Chapter VII decision meant that States were under a binding obligation to cooperate and assist with all stages of the proceedings: both to comply with requests for assistance with the gathering of evidence and locating and interviewing witnesses, suspects, and experts, and the service of documents; and to give effect to orders issued by the Trial Chambers,

[447] Cited in Morris, V., and Scharf, M. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis,* vol. I (New York: Transnational Publishers, 1996), 336.

[448] S/RES/827 (1993), 25 May 1993.

[449] Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808, S/25704 (1993), 3 May 1993, at 126.

[450] Statute of the International Tribunal, Article 29.

such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial. Additional legal obligations are set out in relation to grave breaches of the 1949 Geneva Conventions and genocide. The Geneva Conventions impose a legal obligation on States Party to the Conventions to 'enact any legislation necessary to provide effective penal sanction for persons committing or ordering to be committed, any of the grave breaches of the present Convention … search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, … hand such persons over for trial to another High Contracting Party'.[451] The 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides in Article 1: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

Resolution 827 set out the obligation on States to enact implementing legislation, if necessary, in order to facilitate cooperation with the Tribunal. The President of the Tribunal issued *Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827, of 25 May* 1993 to UN Member States on 15 February 1994.[452] A number of States have signed bilateral agreements with the Tribunal on various aspects of cooperation, including agreements to take on responsibility for imprisonment of convicted criminals, namely: Finland, Italy, the Netherlands, Norway, Spain, Sweden, Denmark, France, the Republic of Bosnia and Hercegovina, Iceland, Germany, Australia, New Zealand, Austria, Belgium, the Republic of Croatia, Hungary, Switzerland, the United Kingdom, the United States, Greece, Ireland, and Romania. The Netherlands, as host country, signed an agreement with the United Nations detailing the framework and practical arrangements for the seat of the Tribunal in The Hague. In contrast to normal interstate mechanisms for cooperation and judicial assistance, however, Article 29 did not create bilateral relations between the Tribunal and States. Nor did it rely on a consensual framework; it was coercive. The failure to enact implementing legislation was not a justifiable impediment to cooperation. In legal terms, the obligation set out in Article 29 of the Statute superseded any domestic provisions.

[451] Article 49, Geneva Convention I; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV.

[452] Amnesty International, *The International Criminal Court: Making the Right Choices. Part III: Ensuring Effective State Co-operation,* IOR 40/13/97, November 1997, 18.

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) imposed on States a derogation of sovereignty, in the same way as with other Chapter VII mechanisms such as the imposition of sanctions or the use of military force. The legal framework for this was the UN Charter. As discussed in Chapter 4, Security Council enforcement action under Chapter VII effectively 'trumps' sovereignty.[453] The Trial Chamber in the Tadić case recognized this to be the express intention of the Security Council in creating the Tribunal as a Chapter VII enforcement measure.[454] The Appeals Chamber ruling in the Blaskić case in connection with the challenge made by Croatia to its obligations to enforce orders of the Tribunal is also important in this regard.[455] The judges distinguished the normal horizontal relationship represented by conventional mutual legal assistance arrangements that exist among sovereign states from the vertical relationship between the Tribunal and States.[456] The obligation to cooperate was not reciprocal and was universally binding.

The legal framework for cooperation for all former Yugoslav Republics, and for the entities involved in the implementation of the Peace Agreement, was reinforced in the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA), initialled at the Wright–Patterson Air Force base near Dayton, Ohio, on 21 November 1995, and signed in Paris on 15 December 1995.[457] This was repeated at the London Peace Implementation Conference on 8–9 December 1995, and further reinforced in Security Council Resolution 1022, which provided for the reintroduction of sanctions against the Federal Republic of Yugoslavia (FRY) in the event of non-compliance with the peace settlement.[458] The Dayton Agreement also provided for the creation of a Human Rights Commission and an International Police Task Force (IPTF). Both of these bodies were required to furnish information to the Tribunal's investigators.

Following the signing of the GFA in Paris on 14 December 1995, the UN Security Council adopted Resolution 1031, on 15 December 1995, which

[453] Article 2(7) of the UN Charter states that the principle of non-intervention in the domestic jurisdiction of any State 'shall not prejudice the application of enforcement measures under Chapter VII '.

[454] Decision on the Defence Motion on Jurisdiction, *Prosecutor* v. *Tadić,* IT-94-1-T, 10 August 1995, at 37. See Chapter 4.

[455] See Chapter 5.

[456] See Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. *Blaškić,* IT-95-14/1, at 26.

[457] General Framework Agreement for Peace in Bosnia and Herzegovina (GFA), Annex 1a, Article X: 'The Parties shall co-operate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorised by the United Nations Security Council, including the International Criminal Tribunal for the former Yugoslavia.' http://www.nato.int/ifor/gfa/gfa-frm.htm [02/09/1998].

[458] S/RES/1022 (1995), 22 November 1995.

reaffirmed previous Resolutions concerning compliance with the Tribunal and restated the obligation on all states to cooperate fully. According to US Secretary of State Madeleine Albright: 'The UN Security Council has made it clear that cooperation with the Tribunal will be considered an "essential" [*sic.*] part of implementing the agreement for purposes of deciding whether economic sanctions should be re-imposed.'[459] Resolution 1031 also authorized the establishment of the Implementation Force (IFOR) in order to fulfil the role specified in the Peace Agreement.[460]

Notwithstanding the legal obligations set out above, for the most part the 'voluntary compliance' model of enforcement of international law best describes the system of cooperation and judicial assistance operated by the ICTY. The prosecutor's submission in the subpoena hearing in the Blaškić case made the point that: 'As a matter of policy and in order to foster good relations with States, … co-operative processes should wherever possible be used, … resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary.'[461] The incentive for cooperation with the Tribunal was at least as much politically motivated as legally required. Even if the legal framework was one of coercion, the onus for dealing with day-to-day requests for assistance devolved to State authorities in practice and was carried out on the basis of voluntary compliance. It was only in the event that this model of voluntary compliance failed to yield any results that the matter was referred to the Security Council as a means of coercion.[462]

POLITICAL AND DIPLOMATIC SUPPORT

Two important elements of cooperation were public statements of support for the tribunal and the use of diplomatic and economic leverage to bring pressure to bear on recalcitrant governments in the former Yugoslavia to cooperate. These were deployed selectively, however; and

[459] Statement by Ambassador Madeleine K. Albright, US Representative to the United Nations Bosnia Peace Implementation Conference, London, 9 December 1995.

[460] See further and Chapter 7.

[461] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. *Blaškić,* IT-95-14, 29 October 1997, at 31.

[462] If a legal system works well, then disputes are in large part *avoided.* Violation of international law carries penalties apart from the normal sanctions associated with criminal conduct in the domestic setting, such as withholding membership of the 'club' or other material benefits of membership in international society. Higgins, R., *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 1.

no concrete action was taken to enforce obligations in cases of non-compliance, beyond verbal condemnation, until 1999, as discussed below.

As discussed in Chapter 3, until at least the end of 1994, following the appointment of Goldstone as Chief Prosecutor in August 1994 and the first indictment in November 1994, the Tribunal was in its initial process of establishment. Support in this phase was given, for the most part, in the form of financial contributions and donations of staff and equipment, the bulk of it from the United States, though not all. A number of other States contributed money, staff, and equipment, as discussed in the following. Diplomatic and political support was weak, which contributed to a lack of credibility for the Tribunal. The perception of ambivalence in the early days was exacerbated by the squabbling in the Security Council over the appointment of a prosecutor in 1993–4.[463]

More damaging still was the fact that far from being viewed as an instrument of peace, the Tribunal was viewed in some quarters as an obstacle to the peace process once it had issued indictments against Radovan Karadžić and Ratko Mladić in July 1995. There was some debate about the possibility of sacrificing the Tribunal in favour of a peace agreement; but this was not done. Holbrooke, in his memoirs, recalled that it was made clear to Milošević in the talks leading up to Dayton that there would be no compromise on the question of war criminals, particularly in relation to Karadzić and Mladić.[464] Holbrooke demanded that John Shattuck, US Assistant Secretary of State for Democracy, Human Rights, and Labor, be granted access to visit alleged war crimes sites in the Bosnian Serb entity. Although not direct support to the Tribunal, this was intended as 'a constant public reminder that even as we sought peace, we were not abandoning justice'.[465]

In the immediate phase of implementation, civilian aspects of the peace agreement were put on the back burner, and the Tribunal with them.[466] The German Foreign Minister was one of the few politicians to express public support for the Tribunal. His visit to the Tribunal, at the end of October 1996, was the first visit by a minister for foreign affairs. He took the opportunity to issue a personal appeal to Presidents Milošević, Tudjman, and Krajišnik to hand over suspects, and backed calls for a more robust interpretation of Implementation Force's (IFOR's) mandate.[467] The Tribunal

[463] See Chapter 3.

[464] Holbrooke, R., *To End a War* (New York: Random House, 1998), 107, 147.

[465] Ibid., 189, 261.

[466] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1998/737, 10 August 1998, at 213.

[467] 'The German Foreign Minister calls for arrests', *Tribunal Update,* No. 1, 28 October to 1 November 1996.

was excluded from full participation in the London Conference of the Peace Implementation Council in December 1996, although it was invited to send an observer.[468] This was in stark contrast to the meeting of the PIC in Florence six months previously, on 13–14 June 1996, where the ICTY was invited as a full participant. In the event, largely due to the fact that it was the then prosecutor, Louise Arbour, who attended as the ICTY observer, the issue of war criminals was put on the agenda and Arbour was invited to address the conference. She did so in strong terms, stating that the question of cooperation was 'not a matter of debate. This is the law!'[469]

Following the Conference, the British Foreign Secretary, Malcolm Rifkind, issued a telling statement warning indicted persons that they would be targeted.[470] This statement was the beginning of a change in the fortunes of the Tribunal, and in the attitude of the international community. Evidence of this shift occurred dramatically in Summer 1997, when concrete enforcement action was taken to obtain custody of accused, as discussed in Chapter 7. In addition to concrete action, increased diplomatic pressure was exerted on the issue of war criminals. For example, on 6 June 1996, the President of the Tribunal Antonio Cassese called for the reimposition of sanctions against the Bosnian Serbs for their failure to hand Karadžić and Mladić over to the Tribunal. The High Representative, Carl Bildt, and the United States were opposed to this course of action.[471]

At its meeting in Sintra in May 1997, the Steering Board noted the proposal of the High Representative that people cooperating with or condoning the rule of indicted persons should be denied visas to travel abroad, and supported the High Representative's recommendation that the Security Council should deny new economic assistance to those municipalities which continue to tolerate indicted persons working in a public capacity in violation of the Dayton agreement.[472] Hans van den Broek, EU External Relations Commissioner, told the international donors conference, held in July 1997, that 'Humanitarian assistance will be continued, but the overall political and economic influence and power held by people indicted for war crimes is such that it would be irresponsible to continue spending public funds for reconstruction purposes.' The

[468] 'Judges protest the "degradation" of the ICTY', *Tribunal Update,* No. 6, 2–4 December 1996.

[469] Ibid.

[470] Press Conference: The Secretary of State for Foreign and Commonwealth Affairs, the Rt. Hon. Malcolm Rifkind QC, MP, and the High Representative, Mr Carl Bildt, London, 5 December 1996. http://www.ohr.int:81/press/p961205a.htm [24/05/01]. See Chapter 7.

[471] International Affairs and Defence Section, House of Commons Library, *The Dayton Agreement: Progress in Implementation,* Research Paper 96/80, 9 July 1996, 23.

[472] International Affairs and Defence Section, House of Commons Library, *Bosnia: The Dayton Agreement—Two Years On,* Research Paper 97/110, 31 October 1997, 22.

Bosnian Serbs were warned that vital funds for redevelopment would be withheld until indicted accused were transferred to The Hague.[473]

On assuming the Presidency of the EU on 1 July 1997, Luxembourg made cooperation with the Tribunal a basic condition for progress in the development of bilateral relations.[474] This was important to Croatia, but it made very little impact on the FRY. Croatia had already been warned in May 1996 that in order to join the Council of Europe not only must it clean up its record on democracy and human rights, but also it must cooperate with the Tribunal.[475] It was no coincidence that the first Bosnian Croat indictee to surrender voluntarily to the Tribunal, General Tihomir Blaškić, did so shortly afterwards, on 1 April 1996.[476] A year later, Zlatko Aleksovski, who had been arrested in Croatia in June 1996, was handed over after the United States threatened to block international loans at the end of April 1997. In May 1997, Albright met with Croatia's Foreign Minister, Mate Granić, and asked for the surrender of a list of indicted accused.[477] One of the men on the list, Dario Kordić, had been a leading figure in the Croat mob uprising in Jajce in August 1997. Holbrooke recalls how he told Tudjman in August 1997 that he must send Kordić to The Hague if he wanted to improve relations with the US government.[478] Eight weeks later, on 6 October 1997, Kordić was one of the ten Bosnian Croats to 'voluntarily' surrender to The Hague.

By 1999 the situation had improved dramatically, and the international community gave considerable diplomatic and practical support to the Tribunal with regard to its investigations in Kosovo. This coincided with NATO's campaign of air strikes against the FRY, in March–June 1999, which led to allegations that the Tribunal was being manipulated by NATO to justify the bombing campaign, and was politicized as a result.[479] Assistance was forthcoming on a number of fronts, including the provision of evidence, public statements of support, assistance with investigations, and a guarantee to Arbour that ICTY investigators would enter Kosovo alongside KFOR. The intention to deliver evidence to the Tribunal was announced in advance, leaving the OTP 'tantalised and unsure if it would actually transpire'. Blewitt complained that 'It is only helpful if they're prepared to back it up with the evidence they say they've got.'[480]

[473] Ibid., 33.

[474] CC/PIO/223-E, The Hague, 3 July 1997.

[475] 'Croatia gets cold shoulder for human rights abuses', *Independent,* 30 May 1996.

[476] Bass, G. J., *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 256.

[477] Bass, *Stay the Hand of Vengeance,* 264.

[478] Holbrooke, *To End a War,* 351.

[479] Fatić, A., *Reconciliation Via the War Crimes Tribunal* (Aldershot: Ashgate, 2000). See Chapter 8.

[480] James Graff, 'The Prosecution's Case', *Time,* 19 April 1999, 38.

Further evidence of the increased importance of the Tribunal in UK policy came with the appointment, in April 1999, of David Gowan to the newly created post of Kosovo War Crimes Coordinator.[481]

Even though the provision of evidence to the Tribunal by the United Kingdom and the United States in particular was a major contributing factor to the timing of the indictment of Milošević, in May 1999, the indictment was issued on the basis of the evidence, not as a result of political pressure exerted on the prosecutor. In any case, as discussed in Chapter 8, when it was issued, there was some ambivalence toward the indictment among NATO Member States. During and after the bombing campaign, conflicting signals were sent out by the international community. On the one hand, there was some speculation that US officials were making a deal with Milošević in order to facilitate his exit to a safe haven in Russia or Greece.[482] On the other hand, the official UK line was that they remained committed to the goal of sending him to The Hague.[483] This was also the policy stance taken by the European Union, and the UN Special Envoy, Jiri Dienstbier, who stated that the real question was whether 'we are more interested in Milošević … or the future of ten million Serbs and probably the Balkans.'[484] Sanctions were kept in place as long as Milošević remained in power and a visa ban was extended to pro-Milošević officials, business partners, and cronies; but it fell short of making the arrest and transfer to The Hague of Milošević and his co-accused a condition.[485]

In the immediate aftermath of Milošević's downfall in October 2000, Western leaders took a conciliatory tone, choosing not to force the issue in

[481] See David Gowan, 'Kosovo: the British Government and the ICTY', *Leiden Journal of International* Law, 13 (2000), 913–29. David Gowan was appointed on 13 April 1999. The post was transformed to a more general one, but is still a high-level appointment.

[482] 'Informal talks reported on exit terms for Milošević', *New York Times,* 19 June 2000. http://www.nytimes.com/library/world/europe/061900/serbia-prague.html [20/06/00]. 'US seeks foreign haven for Milošević if he quits', *Guardian,* 20 June 2000.

[483] 'There will … be no question of any deal that spares Milošević from standing trial on these charges.' Statement by the Foreign Secretary, Robin Cook, London, 27 May 1999. http://www.fco.gov.uk/news/newstext.asp?2482 [27/5/99]. 'Milošević trial must go ahead says Cook', *Guardian,* 5 June 1999.

[484] He was rebuked by the Secretary-General for these remarks. 'Fury as UN envoy suggests war crimes amnesty for Milošević', *Guardian,* 5 October 2000.

[485] 'Sanctions to remain until Milošević goes, EU says', *Guardian,* 25 March 2000. The ban was lifted in respect of over 100 people, mainly Yugoslav military personnel, at the request of the new government, in November 2000. 'EU lifts travel ban on Milošević allies', *Guardian,* 16 November 2000.

such a fragile political environment, but there were some dissenters to this view. The Prosecutor, Carla Del Ponte, travelled to Belgrade to press the issue in January 2001; and momentum gradually built, which resulted in the transfer of Milošević to The Hague on 28 June 2001. Although the oil embargo and flight ban were lifted in October 2000, the United States and the United Kingdom were determined to retain key sanctions until Milošević was handed over. This policy was not shared by the whole of the European Union, however; Italy and Germany were alleged to be keen to lift sanctions, and even to grant immunity to Milošević.[486] In February, the United States made the provision of an aid package worth $100 million conditional on concrete signs of cooperation and imposed a deadline of 31 March 2001. On 9 March 2001, the United States specified exact conditions, one of which was the arrest of Milošević, but they did not go as far as to make his transfer to The Hague a condition.[487] Instead, aid was conditional on the transfer of an accused, it was not specified which one, to The Hague. Blagjoe Simic, a Bosnian Serb resident in Belgrade, duly voluntarily surrendered on 13 March 2001.[488] In the end, the combination of withholding financial assistance and international ostracization, coupled with domestic political manoeuverings in the FRY and Serbia, led to Milošević's detention and transfer to The Hague. The day after Milošević was transferred, $1.3 billion worth of aid was pledged to the FRY.[489]

FINANCIAL CONTRIBUTIONS AND DONATIONS IN KIND

A number of States made contributions to the voluntary fund over and above normal UN contributions that they were obliged to pay (Table 6.1). The voluntary fund covered specific expenses, including the Rules of the Road project and the Outreach Programme. The European Union contributed £1.3 million to the voluntary fund in December 2000 for the Outreach Programme, the Library, and the Defence Counsel Training Programme.[490] The United States pledged $500,000 to the Outreach

[486] 'West split on new push to get Milošević', *Guardian,* 9 October 2000.

[487] 'US makes arrest of Milošević a condition of aid to Belgrade', *New York Times,* 10 March 2001.

[488] 'Serbian mayor's surrender gives ray of hope to Hague tribunal', *Guardian,* 13 March 2001.

[489] 'Huge aid promise prompted handover', *Guardian,* 29 June 2001. Opinion in Serbia was also more favourable toward the handover following revelations of mass graves full of Kosovar Albanians, whose bodies had been transported from Kosovo in order to escape the attention of investigators. 'End of the line for the Butcher of Belgrade', *Observer,* 24 June 2001.

[490] LM/PIS/547-E, 7 December 2000.

Table 6.1 Contributions to the Voluntary Fund (in US$)

Austria	108,574
Belgium	74,892
Belgium	74,892
Cambodia	5,000
Canada	1,457,151
Chile	5,000
Cyprus	4,000
Denmark	263,715
EU/Carnegie Foundation	542,204
Finland	178,795
Germany	250,000
Hungary	2,000
Ireland	121,768
Israel	7,500
Italy	2,080,049
Liechtenstein	4,985
Luxembourg	194,163
Macarthur Foundation	200,000
Malaysia	2,500,000
Malta	1,500
Namibia	500
Netherlands	2,727,523
New Zealand	14,660
Norway	977,410
Pakistan	1,000,000
Portugal	10,000
Saudi Arabia	300,000
Slovenia	10,000
Spain	13,725
Sweden	461,626
Switzerland	674,516
UK	3,193,223
University of Utrecht	2,196
US	12,755,047

Source: Report of the International Tribunal, A/55/150 (2000), 7 August 2000.

Programme in April 1999, Norway contributed $32,000 in January 2001, the Netherlands, the United Kingdom, Finland, and Denmark also contributed, as did the John D. and Catherine T. Macarthur Foundation.[491] The exhumations programme is also largely funded through voluntary

[491] JL/PIU/397-E, 19 April 1999; LM/PIS/551-E, 2 January 2001.

contributions from Austria, Canada, Malaysia, the Netherlands, Sweden, Switzerland, and the United States.[492] In July 1997, the United Kingdom donated £330,000 for a new courtroom.[493] A third courtroom was built thanks to donations from the Netherlands ($1.65 million), the United States ($1 million), and Canada ($200,000 Canadian).[494]

Donations in kind were also made with the provision of seconded personnel and equipment.[495] For example, the United States and the United Kingdom donated thousands of dollars worth of computer equipment, and France donated courtroom video delay equipment. Initially, gratis personnel formed the backbone of Office of the Prosecutor (OTP) staff. In 1998, sixty-four gratis personnel were assigned by Canada, Denmark, Finland, Italy, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States, and by the International Commission of Jurists and the Open Society Institute.[496] The provision of gratis personnel was phased out in 1997, except that gratis personnel were allowed to be provided on an exceptional basis and, for six-month periods, for the Kosovo investigations.[497] Personnel were seconded to the Tribunal for this purpose by Iceland, Austria, France, Sweden, Canada, the United Kingdom, Switzerland, Denmark, and Belgium.[498]

[492] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/53/737, 25 August 1999, at 119.

[493] CC/PIO/228-E, 17 July 1997. Although this was welcomed as a sign of support from the new Labour government, the groundwork had been put in place by the previous government, in negotiations with the President following a meeting between Cassese and the UK Foreign Minister, Malcolm Rifkind, in April 1996. CC/PIO/068-E, 24 April 1996.

[494] CC/PIU/322-E, 8 June 1998.

[495] In July 1994, the United States seconded twenty-one personnel, which formed the basis of OTP staff. Other States to have seconded personnel include: UK (5), the Netherlands (3), Denmark (2), Norway (2), and Sweden (2). Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 25 August 1995, at 146. France seconded five magistrates to the OTP to help with the Rules of the Road project in February 1996 and forensic experts to assist with exhumations. At the same time, they made vehicles available for OTP investigators in Bosnia and donated audio-visual equipment for the courtroom. CC/PIO/036-E, 23 February 1996. In March 1996, Italy seconded four prosecutors for a period of six months to the OTP. CC/PIO/043-E, 14 March 1996.

[496] Report of the International Tribunal, A/53/219, 10 August 1998, at 260.

[497] General Assembly Resolution 51/243, adopted 15 September 1997, provided for the phasing out of type II gratis personnel.

[498] CC/PIS/430-E, 13 August 1999; JL/PIS/421-E, 23 July 1999; CC/PIS/499-E, 15 May 1999; CC/JL/PIS/497-E, 28 April 2000; CC/JL/PIS/490-E, 18 April 2000; CC/PIS/412-E, 15 June 1999; JL/PIS/522-E, 4 August 2000; JL/PIS/527-E, 12 September 2000.

COOPERATION AND JUDICIAL ASSISTANCE WITH INVESTIGATIONS AND AT TRIAL

The OTP carried out most of the functions associated with a national police force: investigation and preparation of cases for trial. However, the Tribunal had no inherent power to compel compliance with subpoenas, to protect witnesses, or to execute arrest warrants. It had to rely on national police and other authorities to fulfil these roles. The Office also had to request help from national authorities to locate potential witnesses residing outside the former Yugoslavia as refugees.

Early on, the OTP set about building relationships with the relevant state authorities and establishing mechanisms for cooperation. On 11 April 1994, the Deputy Prosecutor, Graham Blewitt, wrote to all Member States requesting assistance with the identification and appointment of suitable candidates for investigative positions in the OTP, and requesting any evidence relating to the commission of war crimes.[499] The Senior Legal Adviser to the prosecutor in the Secretariat, Gavin Ruxton, was responsible for establishing mechanisms for cooperation and judicial assistance with States and other international organizations. This was achieved through visits, making personal contacts, and 'a great deal of trial and error'.[500]

Although there existed a binding obligation to comply with all requests originating from the Tribunal, as discussed above, in practice cooperation worked on the basis of voluntary compliance and was best achieved if it was tailored to the particular requirements of the State concerned. The procedures by which requests for assistance were issued, therefore, varied considerably from State to State, from the formal and bureaucratic to the very informal, relying on individual contacts. In some cases, all requests were directed to one central authority, such as the Ministry of Justice (Finland, France, Germany, Italy, Netherlands, Spain, Switzerland, and Turkey), the Attorney General's office (Norway), or the Ministry of Foreign Affairs (Sri Lanka, Sweden, and UK). In other cases, requests were directed via the Embassy in The Hague (US) or direct to the appropriate national authority.[501]

[499] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1994/1007, 29 August 1994, at 161.

[500] Interview with Gavin Ruxton, 27 March 2000.

[501] Ibid. See Report of the International Tribunal, 29 August 1994, at 175.

For example, all requests to the United Kingdom for assistance were directed via the War Crimes Desk in the FCO, and passed from there to the appropriate authority.[502] This procedure facilitated the identification of potential witnesses among UK military personnel and a number testified in cases before the Tribunal. This was not restricted to the military: in March 1998, the former Liberal Democrat leader Paddy Ashdown testified in the Blaškić case. Ashdown was the first Western politician to appear as a witness. His testimony concerned the infamous conversation he had had with Tudjman during a state supper at London's Guildhall on 16 May 1995, when Tudjman, in response to Ashdown's asking him what he thought the territory of the former Yugoslavia would look like in ten years' time, drew a map which sliced Bosnia in two, divided between Serbia and Croatia. The map was admitted into evidence.[503] The possibility of other senior government officials testifying in relation to the ongoing investigation against Tudjman was also discussed, but the initiative was rendered redundant by Tudjman's death in February 2000.

In contrast, serious problems were encountered with regard to some States. The French government, for example, was less than fully cooperative, both in terms of providing evidence and facilitating interviews with potential witnesses, and in terms of obtaining custody of accused. In December 1997, the French Minister of Defence, Alain Richard, criticized the Tribunal as providing 'show justice', and said that no French officials or military officers would testify. The French government insists that even willing witnesses can only be consulted through formal court proceedings. This procedure was not only costly, but also extremely time-consuming.[504]

For the most part, however, the building of institutional relationships made cooperation a routine matter, so that instead of having to submit a request via the Secretariat, investigators initiated requests for assistance themselves.[505] The experience of the ICTY, and the institutional relationships it built, will be a major contribution to future efforts to enforce international humanitarian law, in ad hoc tribunals or in the ICC, since the establishment of these relationships and a level of confidence at the

[502] The United Kingdom provided a great degree of support and assistance, in particular since 1997. Even before this, the United Kingdom assisted with evidence gathering: the MOD Defence Debriefing Team interviewed around 4,500 men and women. This evidence was collated and submitted to the Tribunal. The MOD also facilitates access by Tribunal investigators to potential witnesses who have served with the British contingent of UNPROFOR. Confidential Interview.

[503] 'Blaškić trial', *Tribunal Update,* No. 68, 16–21 March 1998.

[504] Goldstone, R., *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), 93.

[505] Interview with Gavin Ruxton, 27 March 2000.

institutional level will facilitate future attempts to do the same. As time went by investigations became more sophisticated, and resembled more closely what one would expect to find in a national system. The execution of search warrants, in particular, provided access to documentation that the OTP did not expect to see, let alone obtain.[506]

Personal contacts were established early on with representatives of Croatia and the FRY and the authorities in the entities of Bosnia and Hercegovina. Meetings between the Prosecutor and Deputy Prosecutor and the Croatian Deputy Minister of Foreign Affairs, Ivan Simonivic, and Muhamed Sacirbey, formerly representative of Bosnia and Hercegovina to the United Nations and then Minister for Foreign Affairs, during their visit to the region in October 1994.[507] Following talks between the Prosecutor and the Bosnian government on 5 and 6 October 1994, on 3 December 1994 a Memorandum of Understanding was signed between Ifran Ljubijankic, Minister of Foreign Affairs of the Republic of Bosnia and Hercegovina, and the prosecutor, which acknowledged the Bosnian government's commitment to cooperate fully with the Tribunal, and in particular to comply with requests from the prosecutor. The agreement provided specifically for the setting up of a field office in Sarajevo, the facilitation of on-site investigations and seizure of evidence, assistance in locating and identifying potential witnesses, sending of Tribunal observers to trials being held in Bosnia, and the exchange of information of all kinds. Cooperation with the FRY, Croatia, and the Bosnian Serb and Bosnian Croat entities in Bosnia and Hercegovina was extremely difficult to achieve. The specific problems encountered in enforcing compliance with the Tribunal's orders are examined below.

A major obstacle to the willingness of States to provide information to the Tribunal was that, particularly with intelligence information, States have legitimate concerns about national security. Rule 70 was designed with exactly this dilemma in mind. As discussed in Chapter 5, Rule 70 provides for the submission of information to the Tribunal by States in confidence. The information can be used as a lead or pointer by the prosecutor, but is not to be disclosed in court. Notwithstanding this guarantee, the intelligence community and the military were extremely reluctant to hand over evidence to prosecutors in their own domestic legal system, so it was even more difficult for an international tribunal with international staff to convince them that it will not compromise national security.[508] Essentially, the provision of information was on the basis of trust. During

[506] Interview with John Ralston, 27 November 2000.

[507] Goldstone, *For Humanity,* 98–9.

[508] Ibid., 90.

the tenure of Louise Arbour, the OTP built a strong relationship of trust with agencies in the United Kingdom and the United States, because her guarantees of confidentiality were relied upon. The situation changed under the new prosecutor, because guarantees were no longer regarded as ironclad.[509]

Although the Tribunal had no inherent enforcement power, it had the power to issue binding orders to States for the production of documents or to call witnesses. There is a distinction between these and subpoena, which was set out by the Appeals Chamber in the Blaškić case. The prosecutor obtained a subpoena from Judge McDonald in January 1997 against the Government of Croatia and the Croatian Defence Minister, Gojko Sušak, for the production of information. At the same time, subpoenas were issued at the request of the Prosecutor to the Government of Bosnia and Hercegovina and its Defence Minister; and the Defence requested a subpoena compelling the Government of Bosnia and Hercegovina for the production of documents it believed to be exculpatory. The Government of Croatia challenged the legal authority of the Tribunal to issue subpoenas in general, and in particular to a State.[510] The Appeals Chamber finding was that subpoenas cannot be issued to States, because the Tribunal possessed no inherent enforcement power, so the penalty attached to subpoenas would not be enforceable; and subpoenas could not be issued to state officials acting in their official capacity, because they enjoy 'functional immunity'.[511]

It was unclear whether international organizations were to be treated in the same way as States for the purposes of cooperation. The ruling of the Appeals Chamber in the Blaškić case was that subpoenas could not be issued by the Tribunal because it had no inherent enforcement power, and that the sanctions attached were, therefore, meaningless. This should apply to all cases, since it was the nature of subpoenas, not the relationship of the Tribunal to States that was the obstacle. In denying subsequent requests for subpoenas, however, the judges have followed different reasoning, looking instead at the respective status of States versus international organizations, or the utility of the evidence sought. In a decision handed down on 1 July 1998, the Trial Chamber in the Kovačević case denied a Defence request for a subpoena to be issued to the UN Secretariat, and, in stating that the Defence should apply for a binding order should the material not be made available, implied that the UN

[509] See Chapter 8.

[510] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. *Blaškić,* IT-95-14/1, 29 October 1997, at 1.

[511] Ibid., at 38.

Secretariat should be treated in the same way as a State.[512] In an earlier decision in the same case, however, the Trial chamber considered that the Tribunal had no authority to issue such subpoena to the OSCE, 'it being an international organisation and not a State'.[513] A Defence request for the issuing of subpoena was denied on the basis that it was not necessary, since information essentially the same as, or similar to, that sought … is already in the public domain and has been submitted to the International Tribunal in other matters.[514] Similarly, the Trial Chamber denied a request for a subpoena filed by Delalić in the Čelebici case: 'The Trial Chamber does not, and should not, do anything in vain … This application is made too late to be meaningful.'[515]

The Trial Chamber had the power under Rule 98 to order either party to produce additional evidence, or to summon *proprio motu* (on its own volition) witnesses and order their attendance. The Trial Chamber exercised this power in the Blaškić case by ordering the appearance of several witnesses, which it deemed 'absolutely necessary', 'in order to ascertain the truth in respect to the crimes'.[516] Protective measures were requested by the French government for General Morillon 'in order to protect his own safety, and the safety of other French civilian and military personnel in the former Yugoslavia, and the essential security interests of France'. The Trial Chamber granted the request, but held that it was not *obliged* to do so, since only the judges may set limits to the obligations on States set down in Article 29, nor did the conditions laid down by the UN Secretary-General in his authorization for the witness to testify.[517] In addition, the judges held that neither Morillon nor the French or UN authorities could invoke Rule 70, since it was only applicable to information provided to the prosecutor, not to the judges. Morillon was allowed to testify in closed session and specify the topics that to be covered, and questions were

[512] Decision on Defence Motion to Issue Subpoena to the UN Secretariat, *Prosecutor* v. *Kovačević,* IT-97-24, 1 July 1998.

[513] Decision Refusing Defence Motion for Subpoena, *Prosecutor* v. *Kovačević,* IT-97-24, 23 June 1998.

[514] Ibid.

[515] Decision on the alternative Request for Renewed Consideration of Delealić's Motion of ran Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, *Prosecutor* v. *Delalić and others,* IT-96-21, 22 June 1998.

[516] The Chamber ordered the appearance of the following witnesses: General Philippe Morillon; Mr Jean-Pierre Thébault; Colonel Robert Stewart; General Enver Hadšihasonović; General Milivoj Petković; and the successive commanders of the Seventh Muslim Brigade, Colonels šerif Parković, Amir Kubara, and Asim Koričić. CC/PUI/393-E, 6 April 1999.

[517] Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, *Prosecutor* v. *Blaškić,* IT-95-14/1, 12 May 1999. See *Judicial Supplement,* No. 5 (May 1999), 2.

restricted to the content of Morillon's formal statement. Representatives of the French government and the UN Secretary-General were allowed to be present, and to present any reasoned request necessary 'for the protection of the higher interests they have been assigned to protect'.[518]

The 1997 Appeals Chamber ruling in the Blaškić case also found that a State could invoke a national security justification for withholding documents, but that there was no right to do so. The Appeals Chamber pointed out that the consequence of this finding was that implementing legislation passed by Australia and New Zealand, which authorizes national authorities to decline to comply with requests of the Tribunal if such requests prejudice the 'sovereignty, security or national interests' of the State, are not in keeping with the Statute.[519] A high threshold was set by the court, that against the interests of international justice any competing interests must be of considerable weight, such as national security or the ability of peacekeepers, humanitarian agency workers, medical personnel, or diplomats to do their job. For humanitarian relief organizations there was an inherent conflict of interest between cooperation with the Tribunal in terms of providing information relating to violations and whereabouts of victims, witnesses, and accused, and the fulfilment of their own mandate. The provision of humanitarian assistance traditionally relies upon the consent of the State in which these activities are carried out and the establishment and building of trust and confidence. The dilemma was that cooperation with ICTY might compromise the work they were doing on the ground by jeopardizing this trust, and implicitly becoming a party by cooperating with the Tribunal, thereby exposing their personnel to reprisal attacks.

The Tribunal faced a unique dilemma in respect of the International Committee of the Red Cross (ICRC), because that body's strict neutrality and confidentiality is essential to its mission. According to Jean Pictet, 'One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.'[520] The argument put forward by the ICRC was that involvement in war crimes prosecutions would interfere with its ability to carry out its mission, because it would compromise trust. In the Bosanski Šamać case, the Trial Chamber denied a motion to order a former ICRC

[518] Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, *Prosecutor* v. *Blaškić,* IT-95-14/1, 12 May 1999.

[519] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. Blaškić, IT-95-14/1, 29 October 1997, at 66.

[520] Beigbeder, Y., *Judging War Criminals: The Politics of International Justice* (London: Macmillan, 1999), 8.

former employee to testify. In its decision of 27 July 1999, the Trial Chamber considered that the issue was not whether the ICTY has jurisdiction over the ICRC, and whether it has the power to compel the production of documents or witnesses, but whether the ICRC had a genuine confidentiality interest such that the testimony of a witness should not be admitted. It confirmed that the ICRC has a right under the Geneva Conventions and the Additional Protocols to insist upon non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee considered that the ICRC also has a right under customary international law to non-disclosure of certain information.[521]

The Defence challenged this ruling on the basis that is 'illogical to hold a position that while states, even warring states, may be compelled to furnish evidence to this Tribunal, the ICRC may not be so compelled.' In its decision of 7 June 2000, the Trial Chamber denied the motion, determining that it was no more than a 'fishing expedition'.[522] In this context then, the interests of the ICRC, and only the ICRC, are placed above those of national security, since the right to claim national security in order not to have to supply documents is subject to the discretion of the judges, according to the ruling in Blaškić, whereas the immunity accorded to the ICRC is absolute.[523]

SECURITY AND LOGISTICAL SUPPORT

Assistance with war crimes prosecution, in the form of logistical support, provision of security to investigators and exhumations sites, and obtaining custody of accused, were novel and additional tasks imposed on the military in the context of peacekeeping or peace enforcement missions. The last, obtaining custody, is examined in Chapter 6. This section sets out the legal framework for cooperation for international forces engaged in peacekeeping and peace enforcement missions under the auspices of the United Nations and NATO and highlights the inherent dilemmas and compatibilities that arose from the requirement to be at the same time the champions of peace and of justice.

[521] *Judicial Supplement,* No. 16 (June 2000), 3.

[522] Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, *Prosecutor* v. *Todorović,* IT-95-9, 7 June 2000.

[523] *Trial Chamber III rules that ICRC need not testify before the Tribunal,* JL/PIS/439-E, 8 October 1999.

There was a degree of resistance to cooperation with the Tribunal on the basis that with respect to peacekeeping it compromised impartiality, and with respect to peace enforcement it compromised core military tasks, such as separation of forces and disarmament. An article in the *New York Times* on 25 April 1995 suggested that the United Nations was 'torn between its blue helmets and its black robes'.[524] On the other hand, it could be argued that assistance with war crimes investigations was a vital element of peace enforcement, since the mandate of the Tribunal was the same as that of the military in the context of the former Yugoslavia: the restoration and maintenance of international peace and security. Conceptually, the enforcement of international humanitarian law is the impartial application of the mandate, if it is applied to all sides equally. If peacekeepers assist with the prosecution and punishment of war crimes, it must be recognized as legitimate involvement. Greenwood points out that there is no reason why peacekeepers might not be given the mandate to assist in the prosecution and punishment of war crimes, but that, in the absence of such a mandate, while there exists a right to undertake such activities, there is no obligation.[525]

Ultimately, the interpretation of the mandate on the ground depended on the policy of an individual State, and the determination of the individual commander of whether it would compromise security and be a good use of limited resources. William Fenrick, Senior Legal Adviser in the OTP, recalled significantly different approaches taken by different force commanders operating under the same mandate in the former Yugoslavia during his term as a member of the UN Commission between 1992 and 1994.[526] In the period prior to the establishment of the ICTY, the UN Protection Force (UNPROFOR) engaged in some recording, reporting, and protesting, and allegedly some inter-positioning, but lacked a clear and consistent approach. For example, investigations were carried out by UNPROFOR into the incursion by Croatian forces into the Croatian Serb controlled Medak pocket in September 1993, and into an attack by Bosnian Croat forces on the village of Stupni Do on 23 October 1993, but no further investigations were mounted. Fenrick suggested that this might be because UNPROFOR were flooded with information and requests from all of the warring parties, and due to concern about the need to maintain strict impartiality.[527]

[524] Report of the International Tribunal, 23 August 1995, at 182.

[525] Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations', *Yearbook of International Humanitarian Law,* 1 (1998), 32–3.

[526] W. J. Fenrick, 'The Enforcement of International Humanitarian Law by Members of Peacekeeping Forces' [draft] given to this author.

[527] Ibid.

After a peace agreement was concluded, it was possible to conduct on-site investigations and exhumations, for which the OTP relied on the provision of security and assistance by NATO forces. The legal framework for NATO's cooperation with the Tribunal is contained in the General Framework Agreement (GFA) and Security Council Resolution 1031. Annex 1-A of the GFA refers to the military aspects of the Agreement. While there is a clear obligation for Implementation Force (IFOR) to cooperate with the Tribunal, there is no specific guidance in the Peace Agreement or in Resolution 1031 of the ways in which this should be achieved. Under the terms of the Annex, the IFOR Commander had the authority to interpret the agreement on military implementation;[528] and IFOR was reluctant to step outside a clearly specified military role. There was widespread concern among the military, particularly in the United States, that taking on any other 'non-military' tasks, such as providing security for investigators and guarding exhumation sites, would both antagonize Bosnian Serbs and lead IFOR down a 'slippery slope', which would prolong military engagement.[529]

In January 1996, NATO stated that they simply did not have enough forces to provide security for exhumation sites. The focus was on key military tasks in the early phase of deployment to ensure freedom of movement.[530] These key tasks included the cessation of hostilities, the withdrawal of forces and redeployment of heavy weapons, the establishment of a four kilometre wide zone of separation, and enforcing restrictions on placing new minefields and obstacles. Even where IFOR was willing and able to provide support, the main obstacle to establishing a working relationship was that it was not simply a case of asking for support for specific tasks to be carried out by investigators. The methods of working of the OTP and the military were vastly different, and the military were exasperated by the vagueness of the requests for assistance. According to an IFOR commander, 'They were very difficult to work with, because they were not well coordinated in their efforts. They did not know exactly where they wanted to go, they wanted to kind of explore. […] [W]e don't operate on an ad hoc basis, … we needed about 24 hours to brief our soldiers and make a reconnaissance, organize the security, and … coordinate with the local police authorities.'[531]

[528] GFA, Article XI: 'In accordance with Article I, the IFOR Commander is the final authority in theatre regarding interpretation of this agreement on the military aspects of the peace settlement, of which the Appendices constitute an integral part.'

[529] See Holbrooke, *To End a War,* 338. See Chapter 8.

[530] Conclusions of the Peace Implementation Conference held at Lancaster House, London, on 8–9 December 1995, FCO, London, 9 December 1995.

[531] Bass, *Stay the Hand of Vengeance,* 254.

In spite of all this, and in spite of vehement public criticism levelled at NATO by the Prosecutor and President of the Tribunal, a working relationship was established. In January 1996, the Prosecutor, the Deputy Prosecutor, and President met with Admiral Leighton Smith to discuss the provision of security for investigation teams working in Bosnia, other logistic support such as clearing mines from exhumation sites, and the detention and transfer of indictees. In May 1996 a Memorandum of Understanding was agreed between the Prosecutor of the Tribunal and the NATO Supreme Allied Commander for Europe (SACEUR), which set out arrangements to provide local area security and logistical support to the prosecutor's staff.

However, IFOR refused to clear land mines on the exhumation sites in Srebrenica in April 1996 and in Cerska in July 1996. Instead, it was done with the assistance of a private humanitarian minesweeping organization and sniffer dogs from Norwegian People's Aid. When IFOR eventually agreed to provide security for sites, it was only during the daytime, while investigators were on-site. In August 1996, UNTAES swept the grave at Ovcara for mines, but in the process destroyed the gravesite with the use of heavy equipment.[532] Communications improved as time went on and mutual trust and confidence was built through constant interaction on the ground. The increase in credibility of the Tribunal by 1996–97 impacted on NATO's conception of its dealings with OTP. Investigators, in turn, got used to dealing with different layers of military from SHAPE HQ to the local commander on ground. Eventually, the OTP established formal channels of communication with NATO and an SFOR liaison officer.[533]

The introduction of SFOR coincided with an increase in the level of support given to the ICTY; the reasons for this are examined in detail in Chapter 7. This was not only with regard to the detention of indictees, but also involved the provision of security and logistical support to investigative teams and surveillance and ground patrolling of alleged mass grave sites. SFOR also provided assistance with the execution of search warrants in Bosnia.[534] In Kosovo, cooperation with United Nations Mission in Kosovo (UNMIK) was 'unprecedented'. The formal basis for cooperation was Security Council Resolution 1244 of 10 June 1999, which specifically demands full cooperation by all concerned, including UNMIK.[535]

[532] Ibid.

[533] Interview with Gavin Ruxton, 27 March 2000.

[534] Report of the International Tribunal, S/1998/846, 25 August 1999, at 133.

[535] Report of the International Tribunal, S/1998/846, 25 August 1999, at 137.

THE FAILURE OF COOPERATION AND ENFORCEMENT MECHANISMS

Although 'voluntary compliance' works to some extent with the willing, as seen already, it can be circumscribed by various considerations. What of the unwilling? There was a need to innovate new means of effecting 'involuntary compliance' where cooperation is not forthcoming. Ultimately, the Tribunal did not have the power or capability to enforce compliance. It could not, therefore, act on non-compliance by States with their obligations under public international law to comply with orders of the Tribunal. The only available course of action was to refer non-compliance back to the Security Council.

The Rules of Procedure and Evidence (RPE) specify how the obligation derived from Resolution 827 and set out in the Statute is to be carried out in practice. Rule 7*bis* sets out the conditions and mechanism for referral of cases of non-compliance to the Security Council. There are two ways in which this could be done. Either a Trial Chamber or a judge could advise the president of non-compliance with binding orders or with an international arrest warrant; or the prosecutor could refer cases of non-compliance with requests for assistance to the president, who would duly report the matter to the Security Council. In the latter case, there is no need for a binding order, merely the fact of non-compliance with a request issued by the prosecutor. This was confirmed in the Blaškić case:

> The conjoint effect of Rule 7*bis*(B) and Rule 8 is to make reportable to the Security Council a failure by a State to comply with a request by the Prosecutor for certain information. This is so, even though the request would only have been made pursuant to the general requirement to cooperate (*sic*) imposed by Article 29(1) of the Statute and was unsupported by a judicial order made under Article 29(2).[536]

Because the Tribunal was established as a measure for the restoration and maintenance of international peace and security, refusal to cooperate constituted a threat to the peace. Legally, therefore, the Security Council had the authority to act under Chapter VII and take any measure under Article 41, short of the use of force, or Article 42, involving the use of force against a recalcitrant State. Another route to the imposition of sanctions was Resolution 1022, which envisaged the reintroduction of economic sanctions in case of non-compliance with obligations under the GFA, as discussed earlier. In practice, it has not taken such measures. Beyond

[536] Separate Opinion of Judge Shahabuddeen, Order to the Republic of Croatia for the Production of Documents, *Prosecutor* v. *Blaškić,* IT-95-14/1, 21 July 1998.

condemnation, nothing concrete has been done by the Security Council to punish non-compliance. What has been done has been outside the Security Council.

The decision by States whether to provide assistance to the Tribunal is not only a question of accepting some degree of derogation of sovereignty, but is also dependent on local political aspects.[537] At the time of the establishment of the Tribunal, in May 1993, the war in Bosnia was ongoing. Fighting had also broken out between Bosnian Croats, who sought to carve out a 'Croatian Community of Herceg-Bosna' and took over the town of Mostar in October 1992, and Muslims. A peace settlement was finally brokered in Washington in March 1994 between Bosnian Croats and the Bosnian government, which established the framework for a Muslim–Croat Federation. Following the failure of the Vance–Owen peace plan in May 1993, the war in Bosnia lasted another two and a half years, until a peace agreement was finally brokered at Dayton in November 1995. Even after peace had broken out, the situation on the ground meant that it was extremely difficult for the Tribunal to conduct investigations, let alone obtain custody of accused. The FRY consistently refused to cooperate, while Croatia cooperated on some things and stalled on others. In Bosnia, the attitudes of the authorities of the different entities reflected those of their 'parent' Republics.

The FRY was in breach of its obligation to enforce Republika Šrpska obligations under the terms of the Dayton Accords, and consistently refused to comply with its own obligations. On the surface, Belgrade initially adopted a conciliatory tone, and some progress was made shortly after the Dayton agreement was signed; in January 1996, President Cassese obtained the agreement of the Belgrade authorities for the prosecutor to open a field office there. In addition, the Belgrade authorities suggested that they might be willing to arrest and transfer non-nationals to the Tribunal, although they maintained that transfer of nationals was precluded by extradition laws.[538] This contention was wrong from a legal point of view, since the transfer of accused to the custody of the Tribunal should not have been understood as extradition, but as surrender.[539] Notwithstanding this, as Cassese pointed out, the position of Belgrade was in breach of international law: 'a State cannot adduce … its own Constitution with a view to evading obligations incumbent upon it under international law'.[540]

[537] Goldstone, 'Prosecuting International Crimes', 5.

[538] CC/PIO/030-E, 6 February 1996.

[539] See Chapter 7.

[540] CC/PIO/030-E, 6 February 1996.

The failure to arrest Karadžić and Mladić when they visited Belgrade to attend Djukic's funeral on 21 May 1996, and again on 28 May to attend talks with Milošević, was the real evidence of the attitude of the FRY authorities toward the Tribunal.[541] In an interview with *Der Speigel* in July 1996, Milošević stated: 'A funeral is a holy day. Everybody can come and go freely.'[542] From this point forward, the Government of the FRY consistently and publicly refused any form of cooperation with the ICTY. On announcing the first indictment alleging crimes committed against Bosnian Serbs at the Celebici camp in Bosnia in 1994, Goldstone stated that the investigation had been difficult and time-consuming, mainly because of the detrimental impact of the lack of cooperation of the Belgrade and RS authorities.[543] Following a request from the prosecutor for the transmission to the Security Council of the urgent need to impress upon the FRY its obligations, on 8 September 1998 the President of the Tribunal sent a three page letter to the Security Council, which stated that: 'The persistent and continuing rejection of orders to arrest Mile Mrkšić, Miroslav Radić, and Veselin Šljivancčanin is but the most blatant example of the refusal of the FRY to cooperate with the International Tribunal.'[544] Such intransigence formed a consistent pattern until 2000–2001.

In 1998 and 1999, the FRY put an effective halt to investigations being carried out in Kosovo.[545] The justification given by the FRY was that the Tribunal did not have jurisdiction to carry out investigations and would not, therefore, be allowed to do so, and further that such investigations represented a violation of the FRY's sovereignty.[546] This was a direct violation not only of Article 29, but also of Security Council Resolutions 1160, 31 March 1998, and 1199, 23 September 1998.[547] In October 1998, on hearing that the US envoy Richard Holbrooke had failed to obtain any concessions from Milošević, the prosecutor responded unequivocally: 'The jurisdiction of this Tribunal is not conditional upon President Milošević's consent, nor is it dependent on the outcome of any negotiations between

[541] 'Belgrade unwilling to arrest war criminals', *Transition,* 12 July 1996, 35.

[542] Ibid., 36.

[543] International Tribunal issues first indictment dealing with Bosnian-Serb victims, CC/PIO/048-E, 22 March 1996.

[544] CC/PIU/344-E, 9 September 1998.

[545] See Chapter 8.

[546] CC/PIU/351-E, 7 October 1998.

[547] Resolution 1160 '*urges* the Office of the Prosecutor of the International Tribunal … to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and *notes* that the authorities of the FRY have an obligation to co-operate with the Tribunal'. S/RES/1160 (1998), 31 March 1998. Resolution 1199 '*Calls upon* the authorities of the FRY, the leaders of the Kosovo Albanian community and all others concerned to co-operate fully with the Prosecutor'. S/RES/1199 (1998), 23 September 1998.

him and anyone else.'[548] The conclusion of the Holbrooke agreement, in October 1998, led to speculation that the Tribunal had been sacrificed for agreement on OSCE monitors. This was clearly not the case, since the obligation to cooperate reiterated in Resolution 1203, endorsing the Holbrooke agreement,[549] and full cooperation with the Tribunal was clearly set out by the Contact Group as one of the six conditions for compliance with Resolution 1199.[550]

In November 1998, the prosecutor was informed that she, along with the deputy prosecutor, two other members of OTP staff, and two security officers, would be granted seven-day entry visas for the FRY to attend a conference in Belgrade and meet with government officials, instead of visas for herself and ten investigators to enter the FRY to conduct investigations in Kosovo. The Ambassador of the FRY in The Hague stated: 'As you have already been informed, the Federal Republic of Yugoslavia does not accept any investigation of ICTY in Kosovo and Metohija generally, nor during your stay in the FRY.'[551] The consistent pattern on non-compliance by the FRY was referred to the Security Council by President McDonald in November 1998.[552] In response, the Security Council adopted Resolution 1207, on 17 November 1998, which '*deplored* the continued failure of the FRY to co-operate fully with the Tribunal [and] *called upon* the authorities of the FRY and the leaders of the Kosovo Albanian community to co-operate fully with the prosecutor'.[553] Non-compliance with Resolution 1207 was reported to Security Council by the President of the Tribunal on 8 December 1998.[554] Following the Račak massacre in January 1999, the President of the Security Council issued a statement '*deplor[ing]* the decision by the Federal Republic of Yugoslavia to refuse access to the Prosecutor of the International Tribunal and call[ing] upon the Federal Republic of Yugoslavia to co-operate fully with the International Tribunal'.[555]

No further concrete action was taken, which prompted the President of the Tribunal to question whether it was 'worse to condemn behaviour and

[548] CC/PIU/353-E, 15 October 1998.

[549] Resolution 1203 calls for 'full co-operation with the International Tribunal … including compliance with its orders, requests for information and investigations.' S/RES/1203 (1998), 24 October 1998. See *Press Conference by the Foreign Secretary, Robin Cook, NATO HQ, Brussels, 13 October 1998*. http://www.fco.gov.uk/news/newstext.asp?1600 [14/10/98].

[550] Contact Group Discussions on Kosovo, Thursday 8 October 1998. http://www.mod.uk/news/kosovo/archive/fco081098.htm [10/13/98].

[551] CC/PIU/360-E, 5 November 1998.

[552] JL/PIU/359-E, 5 November 1998. See also *Address to the United Nations General Assembly by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia,* 19 November 1998. http://www.un.org/icty/pressreal/speechP.htm [12/2/98].

[553] S/RES/1207 (1999), 17 November 1998.

[554] JL/PIU/371-E, 8 December 1998.

[555] Report of the International Tribunal, 25 August 1999, at 97.

then tolerate it than *not* to condemn it at all?' Not only was this an exercise in hypocrisy, but she feared that the result would be to render the Tribunal nothing more than a 'paper tiger'.[556] During and after the Kosovo campaign and the indictment of Milošević along with senior members of his government, there was no relationship between the FRY and the Tribunal. The Yugoslav Justice Minister, Petar Jojić, called Del Ponte a 'prostitute for the US' in a twenty-five page open letter which was 'laced with obscenities'. He said that the Tribunal was using tricks to obtain custody of accused, and that Del Ponte was 'running [a] dungeon which, like the worst whore, you have sold out to the Amercians and to which you bring innocent Serbs by force, by kidnapping and murder'.[557]

There were high hopes in October 2000 that Milošević would be delivered to The Hague, but Kostunica pledged that he would not pursue Milošević or his family.[558] He adopted a more conciliatory tone a few days later, saying that although Belgrade will cooperate, because 'this is an obligation', it is not the number one priority.[559] The visit made by Del Ponte in January 2001 was a disaster.[560] However, as discussed above, the momentum of internal and external pressure culminated in the transfer of Milošević to The Hague on 28 June 2001. In this context the voluntary surrender of Blagjoe Simic on 13 March 2001 was a highly symbolic act.[561] The prosecutor cautiously welcomed the move as a 'first encouraging sign'.[562]

Croatia, too was 'less than fully co-operative'.[563] In early 1996, the President of the Tribunal issued a press release stating that, although the Croatian authorities in Zagreb had allowed the OTP to set up a field office in Zagreb and to carry out investigations unhindered, the Croatian government had not at that point passed implementing legislation to give effect to the Statute of the Tribunal, nor had they executed arrest warrants.[564] In 1996, one accused was arrested and another surrendered

[556] *Address to the United Nations General Assembly, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia,* 19 November 1998.

[557] 'Yugoslav rails against UN prosecutor', *Boston Globe,* 25 May 2000.

[558] 'West split on new push to get Milošević', *Guardian,* 9 October 2000.

[559] 'Serb leader to co-operate in war trial', *Observer,* 15 October 2000.

[560] 'Kostunica snubs UN call to seize Milošević', *Guardian,* 24 January 2001; 'Snub to Hague prosecutor', *Guardian,* 26 January 2001.

[561] 'Serbian mayor's surrender gives ray of hope to Hague tribunal', *Guardian,* 13 March 2001.

[562] 'Bosnian Serb surrenders to Hague Tribunal', *New York Times,* 13 March 2001.

[563] Harris, M. F., Hitchner, R. B., and Williams, P. R., *Bringing War Criminals to Justice,* 9.

[564] CC/PIO/030-E, 6 February 1996.

voluntarily through the mediation of the Croat authorities.[565] Following this, international pressure was exerted which forced the Croatian government to enter into negotiations resulting in the surrender of ten Bosnian Croats to the custody of the Tribunal on 6 October 1997.[566] In spite of these developments, the Croatian government was almost as intransigent as the FRY in its dealings with the ICTY. The difference was that it professed a desire to cooperate and blamed any lack of cooperation on legal obstacles; whereas the FRY and RS refused point blank on political as well as legal grounds.

In July 1999, the prosecutor visited Zagreb to discuss the poor level of cooperation, in the light of reports that the Croatian Committee for Co-operation was actively devising a strategy to delay or defeat certain key investigations.[567] Three sets of issues were discussed: first, the failure of Croatia to respond to numerous requests (119 in total) for evidence and information; second, the refusal of Croatia to accept the jurisdiction of the Tribunal over crimes committed during Operations Storm and Flash; and third, the failure of Croatia to surrender and transfer two individuals indicted by the Tribunal. At a meeting on 19 July, Minister of Justice Šeparović told the prosecutor that she could not expect an answer to a consolidated list of requests presented on 22 June 1999 for several months; and even then some answers would not be provided because 'They relate to Operation Storm, or involve matters of national security, or would be offensive to the dignity of the Croatian people, or would require turning over all of Croatia's military archives.'[568] The government of Croatia argued that Operation Storm did not fall under the jurisdiction of the Tribunal as it was not an armed conflict, which was the same argument used by the FRY over Kosovo. The prosecutor refuted both: 'In my view, there is no legal merit in either argument. In any event, the issue is one for the Judges of the Tribunal. It cannot simply be asserted unilaterally by Croatia'.[569] As regards the transfer of the two accused, the Croatian government said it would not do so until individuals had served their sentences in Croatia.

The prosecutor filed a request with the president of the Tribunal asking her to report non-compliance to the Security Council on 28 July 1999.[570] On the first issue, the president declined to grant the request because a number of orders directed at Croatia were being challenged before the Tribunal. On

[565] See Chapter 7.

[566] Ibid.

[567] TH/PIS/420-E, 20 July 1999.

[568] Ibid.

[569] Ibid.

[570] Request by the prosecutor under Rule 7*bis* (B) that the president notify the Security Council of the failure of the Republic of Croatia to comply with its obligations under Article 29, 28 July 1999.

the second, she declined to review the appropriateness of the investigation, since it was not within her powers under Rule 7*bis*.[571] She stated, however, that it is not legitimate for a State to thwart investigations on the basis that it does not consider that the Tribunal has jurisdiction; it is a matter for the Trial Chamber. On the third issue, she found non-compliance in respect of Naletilić, but by the time she considered the request the other accused, Vinko Martinović, was transferred to the ICTY on 9 August 1999.[572] Croatia's non-compliance was reported to the Security Council on 25 August 1999, but no enforcement action was taken. At a meeting between the president and Šeparović on 15 September 1999, Šeparović stated that the Croatian government was 'fully committed' to transferring Naletilić but that under Croatian law there may be additional judicial proceedings required so that they were unable to give a specific date. The president informed the Security Council of this development and pointed out that until such time as the transfer takes place, Croatia continued to be in non-compliance.[573] Naletilić remained in custody in Croatia until March 2000, when he was transferred to The Hague.

In December 1999, SFOR reported that Bosnian Croats had been attempting to carry out surveillance of ICTY staff operating in Bosnia. 'This activity demonstrates the lengths to which political and government leaders throughout the former Yugoslavia are prepared to go to avoid investigations.'[574] In addition, Croatia was accused of actively encouraging anti-Tribunal propaganda. In February 1999, the Croatian parliament adopted a Resolution in which it warned that the Tribunal 'has become the place where precisely defined political aims are implemented' and stated that 'the excesses of the Tribunal bring serious imbalance and instability'.[575] It was not only the Serbs who complained of bias. The Croatian Foreign Minister justified the failure of the Croat government to cooperate on the basis that the three Serbs accused over Vukovar had not yet been arrested and tried.[576]

The situation improved following the death of Tudjman in December 2000. The new president, Stipe Mesić, had already given evidence before the Tribunal, in 1998. In February 2000, he said in an interview with the Serbian opposition TV station, Studio B, that he was ready to testify against Milošević.[577] The Prime Minister, Ivica Racan, also pledged cooperation.

[571] Letter from President Gabrielle Kirk McDonald to Justice Louise Arbour, 25 August 1999.

[572] CC/PIS/427-E, 9 August 1999.

[573] JL/PIS/438-E, 27 September 1999.

[574] PR/PIS/455-E, 17 December 1999.

[575] Report of the International Tribunal, 25 August 1999, at 101.

[576] Ibid., at 103.

[577] 'Croat president invites Serb return', BBC News Online, 10 February 2000. http://news.bbc.co.uk/hi/english/world/europe/newsid_637000/637652.stm [10/02/00].

This was indicative of a 'new approach' taken to cooperation with the Tribunal.[578] In November 2000, Del Ponte acknowledged that there had been an improvement in relations 'when compared with the previous policy of obstruction and delay adopted by the former government'; but that 'where Croatia perceives cooperation to be against its political or narrow security interests, a real difficulty still exists'.[579] The Croatian government has to balance the legal and political imperative to cooperate with the possible reaction of Croatian extremists. In April 2000, right-wing factions staged a rally in protest at the arrival of investigators in Gospić, the scene of the alleged execution of hundreds of Serb civilians in June 1991.[580]

Milošević's transfer to The Hague was a watershed, not only in the attitude of the FRY to the Tribunal, but also that of the Bosnian Serb entity and the Croatian government. Both made highly visible demonstrations of cooperation in the days following Milošević's transfer. In Croatia, two members of the Cabinet resigned in protest at the decision to hand over two Croatian Army officers indicted by the Tribunal.[581] Meanwhile, the Bosnian Serb administration pledged that it would make every effort to detain and transfer accused, including making an amendment to the constitution in order to allow for it.[582]

CONCLUSION

The obligation to cooperate and assist the Tribunal stemmed directly from the UN Charter, as discussed below. The legal framework was important, but the nature and extent of cooperation was a product of political will. The Tribunal faced significant practical and political obstacles in its early years. First, investigations had to be conducted in the middle of an ongoing armed conflict or in its immediate aftermath. Second, many of the crimes were committed at the behest, or at least with the tacit approval, of the same state authorities to whom the Tribunal must address requests for cooperation. Third, the Tribunal encountered significant difficulties in

[578] JL/PIS/501-E, The Hague, 17 May 2000. Croatia refused to hand over documents for use as evidence in the Kordić case and material relating to 'Operation Storm'.

[579] JL/PIS/542-E, The Hague, 24 November 2000.

[580] 'Right-wing fury at Hague Cooperation', *BCR,* No. 136, 2 May 2000.

[581] Rahim Ademi surrendered to the custody of the Tribunal on 25 July 2001. His co-accused, Ante Gotovina, a retired Croatian Army General, fled into hiding. GB/PIS/606-e, 26 July 2001.

[582] 'Bosnian Serbs near to handing over fugitives', *Guardian,* 5 July 2001; 'Croats accused of war crimes', *Observer,* 8 July 2001.

obtaining concrete political, diplomatic, and logistic support from the very governments that had voted for its establishment. According to Harris, writing in 1997, 'Western governments have paid rhetorical tribute to the International Tribunal's importance. At the same time, they have not only failed to provide genuine support, but have also enacted broader, contradictory policies that are undermining the International Tribunal's work and condemning it to irrelevance.'[583] However, it should be noted that certain actions, whilst not necessarily directly linked to support for the Tribunal, were far from contradictory to its purposes. Operation Allied Force, in August–September 1995, was expressly aimed at making a forceful response to the violations in international humanitarian law taking place in Bosnia in the summer of 1995.

The situation improved dramatically over time, notably following the conclusion of a peace agreement for Bosnia and the presence of IFOR and then SFOR. The provision of military and logistic support to investigators, coupled with strong support from certain members of the international community, in particular the United Kingdom and the United States, from 1997 onwards was both a result of, and a catalyst for, the increased credibility of the Tribunal. However, the intransigence of the Bosnian Croat and Bosnian Serb entities and their 'parent' States, Croatia and Serbia, continued to hamper the ability of the Tribunal to carry out its mandate even after changes of government in Croatia and the FRY.

Where there was a reciprocal interest, cooperation worked very well. Equally, a reciprocal interest was established through cooperation, because it meant that agencies had a stake in the success or failure of the Tribunal. The United Kingdom set up a War Crimes Desk in the FCO, not only to facilitate cooperation, but to ensure that they had a channel of communication back to the Tribunal to make their voice heard.[584] When it serves the same purpose, States cannot do more. As stated in the 1999 Annual Report, 'an unprecedented level of support has been given to the Tribunal by Member States' in Kosovo.[585] Ultimately, the interests of justice and the interests of States in the restoration and maintenance of international peace and security coincide. The key for the Tribunal was to persuade them of this. This was most clearly demonstrated with regard to obtaining custody of accused, which is the subject of Chapter 7.

[583] Harris, M. F., Hitchner, R. B., and Williams, P. R., *Bringing War Criminals to Justice: Obligations, Options, Recommendations* (Dayton, OH: Center for International Programs, 1997), 10.

[584] Confidential interview.

[585] Report of the International Tribunal, 25 August 1999, at 126.

7 ‘First Catch Your Criminal’: Obtaining Custody of Accused

It is obvious and fundamental that the Tribunal could not function properly until it was able to obtain custody of accused. Before you can put anyone on trial, you must ‘first catch your criminal’.[586] However, the Tribunal did not have a police force able to carry out arrests; it had to rely on States and other bodies to perform that function. In the first place, the obligation was on national governments to comply with orders of the Tribunal, including execution of arrest warrants, and for the most part the national authorities of the Republics of the former Yugoslavia, and the respective authorities of the Serb and Croat entities of Bosnia and Hercegovina, had primary responsibility to detain and transfer accused, since that is where most of the indictees were located. However, with very few exceptions, the record was fairly dire.

As discussed in Chapter 6, the Tribunal may refer non-compliance to the Security Council; but this was not a particularly effective means of enforcing cooperation. More effective was the exertion of diplomatic and political pressure by the president and, more forcefully, the Prosecutor of the Tribunal, but only a handful of accused were surrendered. In order to function, therefore, it was imperative that the Tribunal seek alternative means of obtaining custody, such as transmission of arrest warrants to all States and execution of arrest warrants by other entities such as INTERPOL and SFOR.

The turning point for the Tribunal was in June–July 1997, when the first arrests by international forces took place in the territory of the former Yugoslavia. The practical impact of this was enormous, not only because the Tribunal could start operating, but also because it provided an opportunity to remove troublesome individuals. It was also highly symbolic. It was an important indicator of the international community's commitment

[586] Peter Calvocoressi, ‘A Problem and its Dimensions’, in Nigel S. Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (London: David Davies Memorial Institute, 1992), 7.

to the pursuit of war criminals, and to lasting peace in Bosnia. By the beginning of July 2001, fourteen accused were arrested by national authorities in Germany, Austria, Croatia, Bosnia and Hercegovina, and the Federal Republic of Yugoslavia (FRY), twenty-two were detained by international forces, one by UNTAES and the rest by SFOR, and nineteen surrendered voluntarily to the Tribunal.[587] In addition, three operations to obtain custody resulted in the death of the accused. This chapter examines the legal framework, the politics, and the logistics of obtaining custody of accused, through arrests by national police authorities, detention by international forces, and voluntary surrenders.

ARRESTS BY NATIONAL AUTHORITIES

Under the Tribunal's procedure a number of steps could be taken towards securing an arrest. First, in the course of an investigation, the Tribunal could request a state to arrest a suspect provisionally, under Rule 40. In most cases, however, an indictment was prepared by the prosecutor and submitted to a judge for confirmation, whereupon a warrant for the arrest of the accused was issued. The warrant was then transmitted to the country where the accused was known to be, or where he was likely to be found, and unless an indictment was sealed, the existence of the indictment and warrant of arrest was made public. Details of the warrant were also passed to INTERPOL, even though at this stage it was not an international arrest warrant.[588] As discussed in Chapter 5, if after a reasonable time the accused had not been arrested, the prosecutor could request a hearing under Rule 61; and if the judges determined that there were reasonable grounds for believing that the accused had committed all or any of the crimes charged in the indictment, the Trial Chamber was empowered to issue an international arrest warrant.

[587] For a full and up-to-date list of current and former detainees, see the ICTY's website at www.un.org/icty/glance/detainees-e.htm (06/04/2003).

[588] The distinction between an ordinary warrant of arrest and an international arrest warrant for INTERPOL purposes was somewhat artificial, but in practice it meant that if an accused was located on a Red Notice in a country where the authorities did not already hold a warrant for him, the prosecutor will immediately obtain a warrant addressed to those authorities. In the intervening period the Red Notice provided a sufficient basis for detaining the accused. Where an international arrest warrant was already in existence, a person detained under a Red Notice could be detained and transferred to the Tribunal without any further procedure: the state's obligation is to comply promptly with the terms of the international warrant. INTERPOL circular No. 27.95/D.3/RELCO/960, 18 August 1995, to all National Centre Bureaux.

The latter strategy was a very public means of advertising the arrest warrant in order to encourage compliance. From 1996 onwards, and almost exclusively since 1997, indictments were sealed, and warrants of arrest were, therefore, also confidential. For the most part, with respect to indictees on the territory of Bosnia and Hercegovina, this meant that the warrant was transmitted to SFOR, and this proved to be most successful, as discussed below. The method was also used to facilitate an arrest by Austrian national authorities.[589] The move from public to sealed indictments was evidence of a shift in attitude of the prosecutor, with the changeover from Goldstone to Arbour in September 1996. As discussed in Chapter 8, whereas Goldstone stressed the moral authority of the Tribunal in order to force States into action, Arbour made maximum use of the legal and practical means at her disposal. Part of this was the creation of the Fugitive Intelligence Support Team in the Office of the Prosecutor (OTP), which worked with national police and investigative entities, such as domestic war crime units, organized crime squads, immigration offices, custom services, and INTERPOL, to locate and track the whereabouts of accused.[590]

In the early days, when all indictments were made public, warrants of arrest were transmitted to the national authority in charge of the territory in which the accused was believed to be residing. This proved to be a 'delicate and difficult task', not least because the entities that make up the Republic of Bosnia and Hercegovina were not in themselves States, even though they had separate and distinct bureaucratic apparatus.[591] The Rules of Procedure and Evidence (RPE) were amended in order to be able to transmit to bodies other than States (Rule 59*bis*), such as the Serb administration in Pale, and international organizations to get over this obstacle. However, the situation continued to be problematic, since it was impossible to communicate with an entity when it was not willing to establish proper channels of communication, as was the case with regard to Republika Srpska. The Registry asked the United Nations Protection Force (UNPROFOR) to deliver the warrants, since they had already established working relationships and channels of communication, but UNPROFOR refused.[592]

[589] General Talić was arrested on the basis of a sealed indictment when he travelled to Vienna to attend talks with the OSCE in August 1999.

[590] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1996/665, 16 August 1996, at 85.

[591] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1995/728, 23 August 1995, at 91.

[592] Ibid., at 92.

The obligation to comply with orders of the Tribunal meant that the question should not have been viewed in terms of procedures for extradition, even though States were wont to interpret their obligations in terms of extradition law. The extradition of indicted persons to be tried in foreign domestic courts is normally dependent on the existence of a bilateral or multilateral treaty, which sets out rules to regulate and protect the handing over of fugitives. However, with respect to the International Criminal Tribunal for Former Yugoslavia (ICTY), the obligation to comply with orders of the Tribunal, including arrest warrants, prevailed over any existing legal obligation.[593] This explicitly included extradition treaties. Rule 58 of the ICTY's RPE provided that 'The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.'

The position adopted by the FRY, that the constitution expressly forbade the extradition of Yugoslav nationals to a foreign state, was legally unfounded. The United States helped to reinforce this interpretation by implication; the United States implemented its own mechanisms for surrender, which approximate closely to agreements on extradition, except that the agreement concluded with the ICTY on 5 October 1994 is one-way.[594] It was wrong for the simple reason that the ICTY was not a State, and 'extradition' was not referred to in the Statute or RPE. Instead, reference was made, in these documents and in the Secretary-General's report, to the process by which detained persons will be 'transferred' or 'surrendered' to the custody of the Tribunal. The distinction is crucial on a conceptual and a practical level. Furthermore, there was a binding obligation to comply, which is non-derogable.[595]

The failure of Yugoslav authorities to carry out arrests meant that the FRY was a safe haven for those wanted in the Bosnian Serb entity of Bosnia, who were fearful of SFOR picking them up after July 1997. The situation was referred to the Security Council by the prosecutor and president on a number of occasions, as discussed in Chapter 6. In May 1996, President Cassese reported the failure to arrest two suspects present at the funeral of General Djordje Djukić in Belgrade.[596] Following this, the authorities in

[593] See Chapter 6.

[594] Pavel Dolenc, 'A Slovenian Perspective on the Statute and rules of the International Tribunal for the Former Yugoslavia', in Clark, R., and Sann, M. (eds.), *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick: Transaction Publishers, 1996), 455–6.

[595] See Chapter 6.

[596] CC/PIO/075-E, 23 May 1996.

Belgrade handed over two accused for questioning, Dražen Erdemović and Radoslav Kremenović. At the time, neither one had been indicted by the Tribunal, so it did not set an uncomfortable precedent for the FRY in terms of its objection to 'extradition'.

The RS authorities were equally intransigent on this point. On behalf of the Bosnian Serb entity, Biljina Plavšić stated in a letter to the Secretary-General and all members of the Security Council on 2 January 1997 that 'we are unwilling to hand over Dr. Karadžić and General Mladić for trial in The Hague as we believe that any such trial now falls outside the scope of the Tribunal's constitutional framework'. The reason given was that the situation in Bosnia and Hercegovina following the Dayton peace agreement no longer constituted a threat to international peace and security.[597] She also warned that the arrest of suspects 'would cause massive civil and military unrest', and in any case 'extradition' was contrary to the Bosnian Serb constitution.[598]

The Bosnian government was more cooperative, but was unable to make many arrests for the simple reason that there were very few indictees residing in the territory it controlled. However, in early 1996, General Djukić and Colonel Krsmanović were arrested by Bosnian authorities on suspicion of having committed war crimes, although neither one had yet been indicted by the Tribunal. The prosecutor requested deferral of the case, and the two accused were transferred to The Hague with the assistance of IFOR.[599] Krsmanović was detained as a witness under Rule 90*bis,* and subsequently returned to Bosnia and Hercegovina.[600] Djukić was indicted, but in April 1996 the prosecutor sought leave to withdraw the indictment on the grounds that Djukić's health was rapidly deteriorating. The request was denied, and the indictment upheld, but Djukić

[597] Letter from Republika Srpska President Biljana Plavšic to the UN Secretary-General Kofi Annan, 2 January 1997. Reproduced in Human Rights Watch, *Bosnia and Hercegovina. The Unindicted: Reaping the Rewards of 'Ethnic Cleansing',* vol. 9, no. 1 (D), January 1997, Appendix B. See also Report of the International Tribunal, 18 September 1997, at 185.

[598] This was restated by Plavšic at the Ministerial Meeting of the Steering Board of the Peace Implementation Council, in Sintra at the end of May 1997. Ibid., at 186.

[599] CC/PIO/031-E, 7 February 1996. French IFOR troops removed Djukić and Kršmanović from a jail in Sarajevo and put them on American helicopters bound for The Hague. Holbrooke, R., *To End a War* (New York: Random House, 1998), 332. Djukić filed a motion challenging the legality of his arrest, which the Trial Chamber denied on the basis that, at that stage, it was not competent to rule on the legality of a decision taken by a national court or the orders given by a Judge under Rule 90*bis.* See King, F. P., and La Rosa, A. M., 'International Criminal Tribunal for the Former Yugoslavia: Current Survey', *European Journal of International Law;* 1 (1997), 169.

[600] Decision of Trial Chamber I to Remand Colonel Krsmanović back to Bosnia and Herzegovina not later than 3 April at midnight, 29 March 1996.

was provisionally released on grounds of ill-health on 24 April 1996. He died in May 1996.[601]

This incident gave rise to negotiations with the Government of Bosnia and Hercegovina resulting in the 'Rules of the Road' agreement.[602] The arrests were followed by a series of arbitrary detentions by all opposing forces, and programmes of prisoner exchange had been frozen. Holbrooke blames Goldstone for insisting on their transfer to The Hague, which 'disrupted the implementation process and set a bad precedent for the future'.[603] Because of concern that this was causing mutual confidence and trust to be eroded, which it was feared would destabilize the fragile peace process, it was agreed in Rome, on 18 February 1996, by the parties to the Dayton accord that persons may only be arrested and detained for serious violations of international humanitarian law pursuant to a previously issued indictment that had been reviewed by the Tribunal.[604] The reasoning was that, if prosecution was to go ahead in national courts, some form of international involvement was required to safeguard the impartiality of the proceedings and to engender confidence on all sides. Since then, Bosnian government authorities carried out two arrests of Bosnian Muslims accused of violations of international humanitarian law committed in the Celebici camp against Serbs: Hazim Delić and Esad Landšo were both arrested on 2 May 1996 and transferred to The Hague on 13 June 1996.

Three arrests were been carried out by the Croatian authorities: the first, Zlatko Aleksovski, was arrested on 8 June 1996 and transferred to The Hague at the end of April 1997, following international diplomatic pressure.[605] The other two, Martinović and Naletilić, known as 'Tuta' and 'Stela', were arrested in Croatia in early 1997, but the Croatian government refused to transfer them to The Hague until August 1999 and March 2000, respectively, and only after non-compliance on this issue had been reported to the President of the Tribunal by the prosecutor, as a prelude to referral to the Security Council.[606]

Several arrests were carried out by national authorities outside the former Yugoslavia. The first was Tadić, in Germany in February 1994.

[601] The Tribunal protested to the Security Council when Karadžić and Mladić were seen in public attending the funeral in Belgrade. See Chapter 6.

[602] Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of 18 February 1996 'The Rules of the Road'.

[603] Holbrooke, *To End a War,* 332.

[604] Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of 18 February 1996 'The Rules of the Road'.

[605] See Chapter 6.

[606] Ibid.

Lajić was also arrested in Germany on 22 March 1996 on the basis of the transmission of an alert-notice by INTERPOL.[607] A third accused, Delalić, was arrested in Germany on 18 March 1996. Mucić was arrested in Austria on the same day, and finally, and most dramatically, Momir Talić was arrested in Austria on 25 August 1999. His arrest caused some degree of consternation, not least among others who feared that the same fate was in store for them, following the example of this and Pinochet's arrest in London in October 1998.[608] Acting on information that Talić was travelling to Vienna to attend a meeting of the OSCE, on 24 August 1999 the prosecutor arranged for a warrant of arrests to be delivered to the Austrian authorities.[609] Talić was called out of the meeting and came face to face with Austrian police armed with a warrant for his arrest.

Other states have not been quite so helpful. The Russian failure to arrest the former FRY Minister of Defence Dragoljub Ojdanic when he visited Moscow in May 2000 was, according to the Russian Ambassador to the Netherlands, Khodakov, the result of an 'internal dysfunction within various services of the Federation'.[610] The Russian government apologized, but at the same time attacked ICTY as a 'politicised court'.[611]

The unwillingness and inability of national authorities to carry out arrests in the territory of the former Yugoslavia meant that the Tribunal had to rely on other entities and mechanisms in order to be able to carry out its mandate. Since 1996, the Tribunal relied on NATO forces to execute arrest warrants in Bosnia, as well as provide logistic and security support, as discussed in Chapter 6. The first SFOR detention was carried out in July 1997, and although a degree of momentum was built up so that detention of accused became a regular occurrence in Bosnia, SFOR's mandate did not extend to the FRY, which remained a safe haven for fugitives until 2001.

[607] CC/PIO/047, 22 March 1996. Lajić was subsequently released at the request of the Prosecutor on the basis that this Goran Lajić was not the Goran Lajić named in the indictment. CC/PIO/090-E, 18 June 1996.

[608] According to Goldstone, Issat Ibrahim al-Duri, second in command to Saddam Hussein, was also in Vienna in hospital in August 1999 and made a hasty exit when Peter Pilz, a member of Vienna's city council, lodged a criminal complaint citing the mass murder of Kurds in 1988 and the murder and torture of other Iraqi citizens. Goldstone, *For Humanity,* 136. According to press reports, these developments also prompted former President Suharto of Indonesia to forgo medical treatment in Germany. 'Tyrants on their travels: "Remember Pinochet" is the watchword', *Guardian,* 25 August 1999.

[609] JL/PIS/432-E, 25 August 1999.

[610] SB/PIS/504-E, The Hague, 25 May 2000.

[611] 'Moscow sorry for "war crimes" visit', BBC Online, 24 May 2000. See also the comments by the Russian representative to the Security Council cited in Chapter 1.

DETENTION BY INTERNATIONAL FORCES

The majority of the defendants incarcerated in the UN Detention Centre in Scheveningen were detained by SFOR in Bosnia. The legal authority for this was Annex 1(A) of the GFA and Security Council Resolution 1031, of 15 December 1995. The mechanisms by which an accused would be arrested and transferred to The Hague were agreed in the May 1996 Memorandum of Understanding between the Prosecutor of the Tribunal and the NATO Supreme Allied Commander for Europe (SACEUR).[612] However, although the authority to detain accused was in the Implementation Force's (IFOR's) mandate from the beginning, the forces did not begin acting on it until 1997. The North Atlantic Council (NAC), by its decision of 16 December 1995, specified that IFOR personnel should detain any Persons Indicted For War Crimes (PIFWC) with whom they come into contact in the execution of their duties. This left it wide open for action or inaction. The dramatic shift in 1997 was in the interpretation of the mandate, rather than any change in the legal position, or indeed to the mandate.

The legal stance relied on by NATO was that the obligation contained in Article 29 is incumbent on States, and not intergovernmental organizations.[613] There is merit to this view. Even though States contributing forces to the multinational force were all bound by an individual obligation to cooperate, States were bound to carry out their obligations under international law within their own territory, and not in the territory of other States. The NATO force was not the sovereign authority in the territory of Bosnia, so it was not obliged to cooperate on that basis. The onus was on the national authorities of Bosnia and Hercegovina; but those authorities were either unwilling, in the case of the Bosnian Serb and Bosnian Croat authorities, or unable, in the case of the Government of Bosnia and Hercegovina, to comply with request to execute arrest warrants. The question was whether the failure of national authorities to carry out obligations meant that the obligation fell on IFOR. Given that the Tribunal was created as an instrument of international peace and security, and that IFOR was also a tool of peace implementation, it followed that action taken in support of the Tribunal was entirely within the mandate of the

[612] Report of the International Tribunal, 16 August 1996, at 76.

[613] M. S. Johnson, Jr., 'NATO's Detention Policy Concerning Persons Indicted for War Crimes by the International Criminal Tribunal for the Former Yugoslavia', Paper Presented at Partnership for Peace (PfP) Status of Forces Agreement (SOFA) Implementation, International Humanitarian Law/Law of War and War Crimes Conference, Garmisch-Partenkirchen, Germany, 10–13 September 1996.

force. However, the wording of the mandate was such that it could be acted on or not, without obviously failing to fulfil any legal responsibility, even if the obligation was binding. This was precisely the intention. The military would not accept an obligation, and only grudgingly accepted the authority.[614]

The difficulty was in persuading IFOR that there were positive benefits to be reaped from the detention of accused. Holbrooke pointed out that without the backing of IFOR the civilian parts of the peace process could not be carried out—and until they were, IFOR would have to remain. The military were engaged in a self-defeating cycle—the narrower their role, the longer they would need to stay.[615] However, IFOR's mission was limited 'in scope, in location and in time'. The mandate was to provide a 'security umbrella' for the implementation of the civilian aspects of the GFA; and obtaining custody of accused was viewed as a civilian, not a military aspect of the GFA.[616]

According to Goldstone, 'From the information at my disposal, it was clear that the stumbling block was the Pentagon'.[617] The US military were concerned not so much with possible injuries incurred in the course of arrests, but with reprisals. They were, according to Akhavan, anxious to avoid a repeat of the debacle in Somalia where UN troops became entangled in an unsuccessful hunt for the warlord General Mohamed Farrah Aidid, which prompted bloody reprisals from his supporters.[618] According to Holbrooke, the military emphasized that the president and members of his civilian staff who were urging arrests (i.e. Madeleine Albright, David Scheffer, and John Shattuck) would shoulder the burden of responsibility if there were casualties as a consequence of Serb retaliation.[619] The statement by Klaus Naumann, Chairman of NATO's Military Committee, sums up the attitude of many in the military: 'Soldiers never make good policemen. If politicians ask us to take action against war criminals, they should realize the operative risks might last a long time. We do not know what the

[614] Holbrooke, *To End a War,* 222.

[615] Ibid., 338.

[616] SACEUR's Speaking Brief, London Peace Implementation Conference, 8–9 December 1995, 1500/CRC/WK/95.

[617] This view was based on discussions between Goldstone and David Scheffer, William Perry, Secretary of State for Defence, Anthony Lake, the President's security adviser, and John Deutch, Director of the CIA. Goldstone, *For Humanity,* 116. It was confirmed in Holbrooke's memoirs. Holbrooke, *To End a War,* 219.

[618] Payam Akhavan, 'The Yugoslav Tribunal at a Crossroads: the Dayton Peace Agreement and Beyond', *Human Rights Quarterly,* 18:2 (1996), 261.

[619] Holbrooke, *To End a War,* 221, 339. Goldstone opines that it was the same deference to the military that resulted in the refusal of the US government to sign the Rome Treaty establishing the ICC in July 1998. Goldstone, *For Humanity,* 128–9.

aftermath would be because many people regard these criminals as heroes worth defending.'[620]

There was little in the way of overt support from the European members of NATO until late 1996, and Russia was vehemently opposed.[621] The Hague was viewed by the Russian government as primarily an American show, and resented. On 11 December 1995, the Russian Foreign Minister, Andrei Kozyrev, called for the indictments against Karadžić and Mladić to be frozen.[622] Meanwhile, a senior British Ministry of Defence official was quoted as saying that, since both Karadžić and Mladić were very important political players, their arrest would have been interpreted as IFOR acting partially.[623] This was mistaken. Even-handedness did not preclude arrests; rather, it demanded arrests on all sides. It was partial in terms of coming down on the side of the Tribunal, whose mandate was the same as that of the military—international peace and security—but not in terms of making distinctions between the parties on the ground. The arrests of Karadžić and Mladić were urged by people like Holbrooke precisely because they were important political players, and because it was calculated that their removal from the political arena would enable full implementation of Dayton: 'While the arrest of Karadžić would not have solved all the problems the international community faced in Bosnia, his removal from Bosnia was a necessary, although not sufficient, condition for success'.[624]

In the media, stories abounded of indictees sitting in cafés next door to IFOR troops throughout 1996; and the 'apparent freedom from arrest by NATO troops and civilian police', of Karadžić and Mladić, was viewed as a 'symptom of the international community's ambivalence towards the Tribunal.'[625] According to one author, hanging around at checkpoints or in cafes and bars to take photographs of indictees was a popular media sport.[626] There were numerous sightings of indicted accused reported in the media and by human rights groups. Human Rights Watch, the Coalition for International Justice, and Amnesty International published maps with the locations of indicted accused and IFOR bases, to ram home

[620] 'NATO rejects hunting Bosnia crimes suspects', *International Herald Tribune,* 14 June 1997, cited in Harris, M. F., Hitchner, R. B., and Williams, P. R., *Bringing War Criminals to Justice: Obligations, Options, Recommendations* (Dayton, OH: Center for International Programs, 1997), 11.

[621] Bass, G. J., *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 249.

[622] Ibid., 249.

[623] Ibid.

[624] Holbrooke, *To End a War,* 315–6, 338.

[625] Schrag, M., 'Assessing the War Crimes Tribunal', *Transition,* 2/14 (1996), 53.

[626] Off, C., *The Lion, the Fox and the Eagle: a Story of Generals and Justice in Yugoslavia and Rwanda* (Toronto: Random House, 2000), 296. See, for example, 'The most wanted man on earth', *Guardian,* 13 July 1996.

the point that IFOR were encountering indictees on a daily basis and failing to arrest.[627] In some cases, it was alleged that IFOR troops were going out of their way to avoid encountering high-profile accused.[628] For example, Milan Martić lived only 100 metres away from a British post in the Prijedor district;[629] and Bass alleged that IFOR troops were making a concerted effort to keep away from Han Pijesak, Mladić's mountain HQ. However, even if the accused were sighted there the day before, and were officially residing there, it did not follow that they would be there the next day, if at all. A major obstacle to carrying out detention of accused for the military was logistic, not political. In addition, there was a very real concern that carrying out arrests before the peace in Bosnia had achieved at least some measure of stability might provoke a recommencement of the war. The question was not one of willingness in principle, but of timing so as not to disturb the fragile peace.

The President and the Prosecutor of the Tribunal embarked on a public relations campaign in 1996, pressing IFOR to take a more proactive stance. The series of Rule 61 hearings held in 1996 were an important element of this strategy. The purpose of these hearings was as much to encourage NATO to take action as to provide a forum for the victims.[630] According to Goldstone, it was not enough to accept their exclusion from the political process, which was a consequence of indictment by the ICTY: 'It is really like saying … if murderers keep quiet and don't get in the way of the political process, well, we will get on with our work and leave them as free men and women.'[631] Goldstone, speaking in London in 1996 asked his audience:

> Imagine a serial rapist wanted for trial in England being informed that because he is a dangerous killer the police will not seek him out but will wait until they come across him in the ordinary course of their duties. Imagine public reaction to that? Yet, that is the policy, which is now in operation in respect of persons wanted by

[627] See, for example, Human Rights Watch, *Bosnia and Hercegovina: Location of SFOR Bases and Indicted War Crimes Suspects,* 25 June 1998; Amnesty International, *Bosnia and Herzegovina: the duty to search for war crimes suspects,* EUR 63/08/96, 1 March 1996; *Bosnia and Herzegovina: Amnesty International renews calls for IFOR to comply with international law,* EUR 63/11/96 April 1996; *An open letter from Amnesty International to all participants at the London Peace Implementation Conference, 4–5 December 1996,* EUR 63/30/96, 3 December 1996; *Bosnia and Herzegovina : From Promise to Reality,* EUR 63/10/97, 12 June 1997; *Bosnia and Herzegovina: Arrest Now,* 11 July 1997.

[628] Bass, *To Stay the Hand of Vengeance,* 252.

[629] Off, *The Lion, the Fox and the Eagle,* 297.

[630] According to Goldstone, the hearing was intended to 'create a climate which would encourage political leaders to adopt a more robust policy in relation to war crimes'. Mirko Klarin, 'Appointment in The Hague', *Tribunal,* No. 5 (September/October 1996), 1.

[631] Goldstone, R., 'Prosecuting International Crimes: An Inside View', *Transnational Law and Contemporary Problems,* 7 (1997), 8.

> the international community for the worst crimes known to humankind. And, it is not a police force that is being protected from danger. It is a military force of 60,000 of the most sophisticated troops in the world, with the most sophisticated arms in the world and the most efficient intelligence capability in the world.[632]

Cassese was also highly critical of the failure to detain indictees. In June 1996, he made a speech at a conference in Florence, urging arrests, which upset NATO member states, especially the United States.[633] In October he was reported to have threatened to 'pack up and go home', and request that the Security Council close down the Tribunal, if the West did not arrest indicted leaders.[634]

The increase in pressure levied by Goldstone and Cassese coincided with the realization among some Western politicians that Karadžić's removal might actually be an essential component for the successful implementation of Dayton.[635] Holbrooke stated: 'Of all the things necessary to achieve our goals in Bosnia, the most important was still the arrest of Radovan Karadžić.'[636] The United States, as early as July 1996, were looking into ways of removing him without involving US troops in his arrest.[637] One means of doing this was to enforce his exclusion from the political scene. On 18 July 1996, an agreement was reached between Holbrooke, Milošević, Buha, and Krajisnik that Karadžić 'immediately and permanently [be removed from] all public and private activities'.[638] Biljana Plavšić was named President of RS the next day, and Buha became acting head of the SDS. Karadžić faded out of sight for the rest of the year, thereby taking the wind out of calls for his arrest. As Holbrooke states, it was 'just enough to allow elections with SDS participation, and just enough to relieve the pressure for the rest of the year for a military operation against Karadžić', which was exactly what Washington wanted.[639]

Several factors accounted for the change in policy toward detaining indictees in late 1996 to early 1997. The first was the change of personalities

[632] Address by the Honourable Justice Richard Goldstone to the David Davies Memorial Institute of International Studies—Institute of Directors, London, 6 June 1996.

[633] Address by President Antonio Cassese at the Dayton implementation conference, Florence, 13–14 June 1996.

[634] 'Judge urges West to arrest war criminals', *Guardian,* 22 October 1996. 'Cassese scores the lack of indictments', *Tribunal Update,* No. 1, 28 October–1 November 1996.

[635] Off, *The Lion, the Fox and the Eagle,* 298.

[636] Holbrooke, *To End a War,* 338.

[637] According to Bass, a senior American diplomat admitted: '[W]e were looking into a number of alternatives to our troops making arrests. […] [W]e were looking at getting other folks to do it. Bass, *Stay the Hand of Vengeance,* 256.

[638] Holbrooke, *To End a War,* 343.

[639] Official Statement of Mr Karadžić, Mr Krajišnik, Mr Buha, and Madame Plavsic, 18 July 1996, in Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly,* 20/4 (1998), 789. For an account of the meeting, see Holbrooke, *To End a War,* 340.

in The Hague. In October 1996, Louise Arbour took up the post of the prosecutor. The crucial difference between her and Goldstone was in perspective: Rather than complaining about the lack of arrests and other support, Arbour asserted the authority of the Tribunal in order to make it happen. Her view was that the Tribunal should exert its unique position of strength as a Chapter VII enforcement measure.[640] One way of using the mechanisms at her disposal was to start issuing sealed indictments. Public indictments and Rule 61 hearings served Goldstone's purpose of making the work highly visible, whereas sealed indictments were more suited to a functioning prosecutorial body.[641] This gave an opportunity to SFOR to arrange for the encounter with the indicted accused to occur on SFOR's terms and not just wait for a chance encounter. Arbour said, 'It is a pretty simplistic proposition … that an encounter leading to an apprehension will be somewhat facilitated if the target is unsuspecting of the possible intervention.'[642] Not only this, according to Bass, it impressed NATO because it 'suggested seriousness'.[643] In the early days, the military were wary of the Tribunal and considered it to be inept and unworthy of support. For example, the 'Wanted' posters distributed by the OTP only had photographs of seventeen of the fifty-two suspects, many of which were indistinct, which made it difficult to identify indictees. The fact that ICTY investigators had been working alongside and interacting with NATO troops in Bosnia increased mutual understanding and respect.

Second, Arbour rammed home to NATO that the apprehension of indictees was a priority precisely because of the contribution it would make to the overall implementation of Dayton.[644] In November 1996, the International Crisis Group warned that the continued freedom and impunity of indictees 'hangs like a sword of Damocles above the peace process'.[645] Human Rights Watch produced a report in January 1997 detailing the network of criminal activity and profiteering among indicted criminals and former warlords, and calling for conditionality to be placed on the provision of aid and for the arrest of indicted accused.[646] The report argued that 'the failure of the international community to detain war

[640] Interview with Louise Arbour, 23 January 2001.

[641] See Chapter 5.

[642] Louise Arbour, 'The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results', *Hofstra Law and Policy Symposium,* 3, 503.

[643] Bass, *Stay the Hand of Vengeance,* 261.

[644] Arbour, 'The Status of the International Criminal Tribunals', 508.

[645] 'Pressure grows for arrests', *Tribunal Update,* No. 3, 11–15 November 1996.

[646] Human Rights Watch, *Bosnia and Hercegovina. The Unindicted: Reaping the Rewards of "Ethnic Cleansing",* vol. 9, no. 1 (D), January 1997.

criminals has combined with the donation of aid to enrich and empower many of the very people most responsible for genocide and ethnic cleansing'.[647] In late 1997, a House of Commons report identified the presence of indicted persons as a 'matter of grave concern'. In particular, Karadžić, who it was alleged 'continues to influence decision-making' in the RS.[648] It was seen as invidious that those at the lower levels were facing the full force of international justice, while Karadžić and Mladić were free and were, in the case of Karadžić, profiting from the situation.[649]

Externally, the shift in attitudes of the UK and US governments was crucial, as was the situation on the ground in Bosnia. Several authors point to the role played by US Secretary of State, Madeleine Albright. Bass recounts the history of the ongoing clash between Albright, who was firmly committed to the policy of actively pursuing war criminals, and the Secretary for Defence, William Cohen.[650] Cohen, a Republican, took office at the same time as IFOR was replaced by SFOR, at the end of 1996.[651] The initial term of deployment was eighteen months, and Cohen wanted to extract US troops at the end of this period. At a meeting at the White House in May 1997, Cohen conceded that, while he still wanted US troops out by July 1998, they could be more active in the interim, including arresting some indictees, although he took a step back from this position later in May on the basis that arresting war criminals would put NATO forces 'at great risk'.[652] At around the same time, the State Department created a new post of Ambassador at Large for War Crimes Issues, and appointed David Scheffer. Albright continued her campaign, visiting the Tribunal on 28 May and calling for bolder steps on the issue of war criminals at a summit in Portugal at the end of May 1997.[653] This was also reflected in changes at NATO HQ in Brussels. General Wesley Clark, a 'young hotshot from The Pentagon', took over as Supreme Allied Commander for Europe (SACEUR), and was considered by Arbour to be potentially a more

[647] Human Rights Watch, *Bosnia and Hercegovina. The Unindicted: Reaping the Rewards of "Ethnic Cleansing",* vol. 9, no. 1 (D), January 1997, 3.

[648] International Affairs and Defence Section, House of Commons Library, *Bosnia: The Dayton Agreement—Two Years On,* Research Paper 97/110, 31 October 1997, 22.

[649] 'Bloodlust of Bosnia faces the reckoning', *Observer,* 12 May 1996.

[650] Bass, *Stay the Hand of Vengeance,* 263–6.

[651] SFOR, the successor of IFOR on 20 December 1996, was authorized by UN Security Council Resolution 1088, on 12 December 1996. SFOR's mandate was to ensure a secure environment for the consolidation of peace; specifically, to deter or prevent a resumption of hostilities or new threats to peace, to consolidate IFOR's achievements and promote a climate in which the peace process can continue to move forward, and to provide selective support to civilian organizations within its capabilities.

[652] Bass, *Stay the Hand of Vengeance,* 265.

[653] Ibid.

receptive audience, able to appreciate the importance of arresting indictees and with 'the guts to act'.[654]

Most important, however, is the fact that the UK government took a lead role. The change in policy was widely attributed to the coming to power of the new Labour government in May 1997, although in fact there were signs of a shift in policy in late 1996. In December 1996, at the end of the London Peace Implementation Conference, the Foreign Secretary, Malcolm Rifkind, issued what could be interpreted as a warning to indicted accused that the military were about to adopt a more proactive stance, promising 'additional help to the Tribunal'.[655] This was brought to fruition under the new government, and war crimes issues were certainly given more space and time under the new foreign secretary Robin Cook, evinced by increased financial contributions and diplomatic support in 1997.

Planning for operations to detain accused began in earnest in early 1997,[656] but there remained serious concern that any operation would be followed by reprisal attacks. As part of their preparation before being deployed in Bosnia, the British contingent of SFOR underwent training in how to handle the security situation, and particularly how to handle the fallout expected after operations to detain accused.[657] The other obstacle was logistic: as mentioned above, it was extremely difficult to obtain information regarding the whereabouts of accused enough days in advance to plan an operation. The logjam was broken by the Dokmanović arrest in June 1997 and the secret indictment of Simo Drjlaća and Milan Kovacević in March 1997.[658] Slavko Dokmanović was arrested by UNTAES soldiers and OTP officials in eastern Slavonia in June 1997. This operation, carried out by the OTP with the support of UNTAES forces, provided a precedent for the detention of accused by SFOR; and, crucially, the worst fears of reprisal attacks were not realized. The move from public to sealed indictments was crucial, as discussed earlier. In this case, there was a direct convergence of interests between the Tribunal and NATO. Drjlaća was chief of police in Prijedor during the war, and according to one SFOR official, although he was no longer officially in charge, he was causing a great

[654] Off, *The Lion, the Fox and the Eagle,* 303.

[655] Press Conference: The Secretary of State for Foreign and Commonwealth Affairs, the Rt. Hon. Malcolm Rifkind QC, MP, and the High Representative, Mr Carl Bildt, London, 5 December 1996. http://www.ohr.int:81/press/p961205a.htm [24/05/01].

[656] '"Snatch squads" to seize Bosnia war criminals', *Daily Telegraph,* 10 February 1997.

[657] Confidential interview.

[658] Milan Kovacević and Simo Drljaca, 'Prijedor', IT-97-24, 13 March 1997. Both were accused of genocide for their roles in running the Omarska camp in the Prijedor region between April 1992 and January 1993.

deal of trouble.[659] An investigator was told that it would be good to have him removed.[660]

The detentions were carried out separately, both by UK forces. Kovacević, who was the Director of Prijedor hospital, was in his office when NATO forces turned up. He immediately surrendered and was transferred to The Hague.[661] Drjlaća was fishing in a lake not far from Omarska when SFOR struck. He opened fire, hitting one soldier in the leg, and was immediately shot dead.[662] This operation served the purposes of both the Tribunal and SFOR. As one State Department official pointed out, Drjlaća's death sent a strong message that SFOR would kill if challenged.[663] It also demonstrated the practical advantages to be drawn from cooperation with the Tribunal in terms of indicting and removing troublesome individuals. According to Gow, as well as removing indicted war criminals from the political process, thus, creating space for a new system of governance, the apprehension of indictees strengthened the credibility of SFOR, since it was the only area, in 1997, where 'highly visible success was possible'.[664] Furthermore, although it was condemned by Krajišnik and Plavšic, and by the Russian Foreign Ministry, it was not followed by widespread unrest or reprisals.[665]

Initially, SFOR stuck to 'low-hanging fruit'—easy pickings whose detention was not going to cause too many ripples.[666] UK forces took a lead role in the majority of operations;[667] but other countries also took a more proactive stance. On 18 December, Dutch SFOR troops detained two Bosnian Croats accused of committing atrocities at Ahmići in 1993, and on 22 January 1998, US troops detained Goran Jelišić, accused of genocide for his alleged role in atrocities in Brčko in 1992. Divergent outcomes have

[659] This was confirmed in the January 1997 Human Rights Watch Report, which details a confrontation between Drjlaca and IFOR soldiers in September 1996, in which Drjlaca shot over the heads of the soldiers in an attempt to prevent them confiscating his weapon. Human Rights Watch, *Bosnia and Hercegovina. The Unindicted: Reaping the Rewards of "Ethnic Cleansing",* Vol. 9, No. 1 (D), January 1997, 36.

[660] Interview with Graham Blewitt, 27 November 2000.

[661] CC/PIO/225-E, 10 July 1997.

[662] Bass, *Stay the Hand of Vengeance,* 266–7.

[663] Ibid., 267.

[664] James Gow, 'From Implementation to Partnership: Post-SFOR Options in Bosnia', *East European Studies,* (1997), 5.

[665] There were only a handful of small-scale anti-Western attacks in the days following the raid. One US soldier was lightly wounded by a man with a sickle, another suffered minor injuries from a bomb. Bass, *Stay the Hand of Vengeance,* 267.

[666] Bass, *Stay the Hand of Vengeance,* 268.

[667] Confidential Interview. See also 'Joint statement by the Foreign Secretary, Robin Cook, and the Defence Secretary, Geoff Hoon, 25 June 2000. http://www.fco.gov.uk/news/newstext.asp?3855 [26/06/00].

resulted from these developments: one consequence was that a number of accused residing in Bosnia voluntarily surrendered to the Tribunal in 1998, including, on one occasion, someone who was not even on the list of indictees.[668] The other consequence was that many accused fled to the FRY where they knew they would not be arrested and transported to The Hague.

The fact that a number of accused were alleged to be residing in the FRY, including Mladić and the three JNA Officers indicted in respect of the takeover of Vukovar in November 1991, had two consequences. One was that the failure of the FRY to detain and transfer accused to the custody of the Tribunal was reported to the Security Council on a number of separate occasions, as discussed in the previous chapter.[669] The other was that serious consideration was given to the legal and political ramifications of NATO forces carrying out operations to detain accused within the borders of the FRY. The main obstacle was legal. UK Foreign Office and Ministry of Defence lawyers considered that there was too great a risk of a successful challenge of unlawful arrest, resulting in the return of the accused to the FRY, for it to be worthwhile.[670] Although there is a strong argument to be made that the status of the Tribunal as a Chapter VII measure, coupled with the wording of Article 29, provides sufficient basis for legality, the FCO and MOD lawyers would not countenance it unless they had a cast iron guarantee, which could not be given. There is some precedent in the Dokamanović and Todorović cases, but even then not enough for it to be cast iron, since in neither case was the accused apprehended by international forces in the territory of the FRY. Dokamanović was arrested by UNTAES forces in eastern Slavonia, having left the territory of the FRY of his own free will, and Todorović was allegedly snatched by bounty hunters and delivered to SFOR troops inside Bosnia.

In a preliminary motion Dokmanović challenged the legality of his arrest on the basis that he had been guaranteed safe conduct, so his arrest amounted to kidnapping, and that the arrest violated the sovereignty of Federal Republic of Yugoslavia because he was arrested in the territory of the Federal Republic of Yugoslavia without the knowledge of the competent State authorities. Dokmanović, unaware that there was a warrant for his arrest, contacted the OTP's Belgrade office in December 1996 about giving evidence on crimes committed by Croats against Serbs in Vukovar. On 24 June 1997, a meeting took place at Dokmanović's home in Sombor.

[668] Confidential interview. The person was turned away by SFOR troops because he was not on their list.

[669] See Chapter 6.

[670] Confidential interview.

During this meeting, Dokmanović asked about compensation for property in Croatia and was told to contact Transitional Administrator, General Jacques Klein. On 25 June Klein's executive assistant, Michael Hryschchyn, arranged to meet Dokmanović at 3.30 p.m. on 27 June in Vukovar. Hryschchyn said he would send an UNTAES vehicle to collect Dokmanović from the bridge over the Danube at the Croatian/FRY border at the UNTAES checkpoint. Dokmanović entered the UNTAES vehicle with a companion shortly before 3 p.m. and was taken across the bridge towards the UNTAES base at Erdut. On arrival, Dokmanović and his companion were removed from the vehicle at gunpoint and searched. Dokmanović was handcuffed and advised by OTP official of his rights and the nature of the charges against him (the defence denies that the contents of the indictment were read or told to Dokmanović until after his arrival at the Detention Unit, but videotape evidence contradicts this claim). He had a hood placed over his head and was driven to the Čepin airfield, examined by a medical officer, and taken on board an UNTAES airplane and then flown to The Hague.[671] The prosecutor freely conceded that it used trickery, but this was not held to be unlawful, since 'There is nothing tricky about arresting people without giving them advance warning. That's the way police forces operate all over the world'.[672] The judges' decision was that

> The means used to accomplish the arrest of Mr. Dokmanović neither violated principles of international law nor the sovereignty of the Federal Republic of Yugoslavia. To the contrary, UNTAES, in discharging its obligation to cooperate with the International Tribunal and enforcing its Chapter VII mandate, is assuring the effectiveness of the Tribunal and thus contributing to the maintenance of international peace and security, as it is intended to do.[673]

The court held that Article 29 was a statement of obligation, not of exclusivity. This finding was important, since it implied that the obligation set out in Article 29(1) to 'co-operate with the International Tribunal in the investigation and prosecution of violations of international humanitarian law', could be interpreted to mean that the obligation was not only incumbent with respect to one's own territory and nationals, but also to be exerted in respect of other States' jurisdiction. Importantly, the Trial

[671] Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a, 22 October 1997; 'The Dokmanović case', *Tribunal Update,* No. 43, 8–13 September 1997.

[672] 'Dokmanovic case', *Tribunal Update,* No. 35, 30 June–5 July 1997.

[673] Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a, 22 October 1997, at 88.

Chamber followed the ruling in the Eichmann case that the method or legality of arrest does not affect the jurisdiction of the court to try a case.[674]

This dilemma was raised again in the Todorović case.[675] Stevan Todorović was detained by SFOR in Bosnia and Hercegovina on 27 September 1998. At his initial appearance on 30 September 1998, Todorović claimed he was hit over the head and kidnapped from the FRY. The Defence alleged that the accused was illegally kidnapped by four unknown individuals in the FRY; that this raised the issue of the Prosecution's involvement in an illegal abduction; and that the prosecutor, acting independently or with others, cannot deprive the accused of his 'right not to be illegally kidnapped'.[676] It was alleged that Todorović was in fact snatched from his hideout in a cottage in the mountains in south-east Serbia by a team of bounty hunters led by a former Bosnian Serb commander, transported across the Drina River, and handed over to US troops for delivery to The Hague.[677] Conflicting sources say he was arrested by British SAS troops inside Serbia, but this seems extremely unlikely given FCO and MoD opposition to such an operation on legal grounds.[678] In the end, Todorović entered a motion to change his plea to guilty and withdraw all motions pending relating to the hearing on the circumstances of his arrest, on 29 November 2000, so the question was not resolved.[679]

It was alleged that the detention of Dragan Nikolić in April 2000 was a further example of a more creative approach, as called for by Del Ponte.[680] The question was raised a third time in relation to Dragan Nikolić in April 2000. According to NATO, Nikolić was detained at an unspecified location in northern Bosnia on 21 April 2000. Nikolić claims that he was

[674] Ibid., at 78. President McDonald also took this view, citing a US Supreme Court case in which the accused had been kidnapped in Mexico and brought to California. The court held that it would not look at how a person is brought before it. 'McDonald "not angry, but saddened" by UN Security Council', *Tribunal Update,* No. 152, 15–20 November 1999.

[675] 'Bounties offered for Bosnian war crimes suspects', *Washington Post,* 5 December 1998.

[676] Decision Stating Reasons For Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, *Prosecutor* v. *Todorović,* IT-95–9, 25 March 1999.

[677] 'Serb snatched by rogue NATO bounty hunter', *The Times,* 23 July 2000. The men who captured him told Todorović that they had been paid DM20,000. 'Todorović challenges the legality of his detention', *Tribunal Update,* No. 153, 22–27 November 1999.

[678] Tom Walker of *The Times* cited 'senior Western diplomatic sources' as saying that Todorović was actually seized by SAS troops inside Serbia. 'SAS carried out Serbia raid', *The Times,* 11 November 1998. See also 'Todorović case: rejected defence motion for "evidentiary hearing" ', *Tribunal Update,* No. 115, 1–6 March 1999.

[679] XT/PIS/556-E, The Hague, 19 January 2001.

[680] 'Dragan Nikolić case: a case of "creative" arrest?', *Tribunal Update,* No. 173, 24–29 April 2000; 'Bounty-hunters hound Serbia's most wanted', *BCR,* No. 140, 16 May 2000.

seized at his home in Smederevo in eastern Serbia, forty kilometres from Belgrade and transported by river to Bosnia. Although *Tribunal Update* speculated that SAS forces snatched him from inside Serbia, other sources say that he was captured by bounty hunters for a reward of around DM30,000. The latter was the most likely scenario, for the reasons outlined above—that FCO/MoD lawyers consistently maintained opposition to UK forces carrying out operations in the territory of the FRY. Nikolić did not institute formal proceedings challenging the legality of his arrest, so it remained a matter for speculation. The arrest of Todorović and Nikolić engendered fear among those who thought they were safe in Belgrade. This fear was exacerbated by signs of increased co-operation on the part of the authorities in Serbia. The arrest and transfer of Milomir Stakić, former President of the Municipal Assembly in Prijedor and Member of the Crisis Staff, on 23 March 2001 was a watershed event in this regard,[681] followed by the transfer of Milošević himself on 28 June 2001.

One example of the success of the policy of sealed indictments was in relation to General Krstić. Krstić was Chief of Staff/Deputy Commander Drina Corps (responsible for the attack on Srebrenica in July 1995) from January–July 1995. His direct superior was Ratko Mladić. In April 1998, Krstić was promoted to the rank of Lieutenant-Colonel-General, and was Commander of the VRS 5th Corps in Sokolac at the time of his arrest. His indictment was put together in a hurry in November 1998, as it was thought that Krstić, having got wind of the investigation, would flee into the FRY and out of reach of SFOR. The indictment was confirmed on 2 November 1998, sealed, and transmitted to SFOR, who detained him one month later, on 2 December 1998.[682] The rate of operations carried out in all sectors accelerated in 1998 and reached its peak during the NATO bombing campaign over Kosovo in Spring 1999. On 3 April 2000, French troops detained the biggest fish thus far, Momčilo Krajišnik.[683]

Three accused have been killed by SFOR troops in the course of an operation. The first was Drjlaća in July 1997; and in December 1999, in the first raid carried out by French SFOR forces, a second suspect, Dragan Gagović, was shot dead. Most recently, in October 2000, Janko Janjić, named on the same indictment as Gagović, detonated a hand grenade and killed himself as German SFOR troops were attempting to detain him.

[681] JL/FH/PIS/581-E, The Hague, 23 March 2001.

[682] Confidential interview. Alarm was raised during the course of the operation, when Krstić lost his leg. Fortunately, it was artificial and could be screwed back on.

[683] Del Ponte handed Chirac an arrest warrant when he visited the Tribunal in February 2000, and ten days later the suspect arrived. 'Carla's court', *G2,* 1 May 2000.

Several soldiers were injured during a shoot out at the time of the attempted detention. This incident has had serious consequences since it could be possible that it was a contributory factor to the slowing down of momentum on securing custody in 2000–1.[684] No public statements have been made by NATO to explain that fact that, whilst at the beginning of 2000 detentions were occurring at a rate of one per month, only one successful detention has been carried out since June 2000. There are several possible explanations for this. The first is that NATO forces have become more cautious following the Janjić and Gagović incidents, as discussed above. The second is that SFOR are reluctant to have their methods hung out to dry in the courtroom, which was almost the case with respect to Todorović, as a consequence his challenge to the legality of his arrest. On 24 November 1998, Todorović filed a motion seeking an order from the Trial Chamber requesting the assistance of SFOR to provide documents and witnesses for a hearing on the legality of his arrest. On 18 October 2000, the court granted the motion, and issued a binding order to SFOR to provide the following documents: copies of all correspondence and all reports by SFOR relating to the apprehension of the accused; the original or a copy of all audio and video tapes made by SFOR on 27 September 1998 of the detention and arrest of the accused; copies of all SFOR pre- and post-arrest operations reports relating to the accused; the identity, if known, of the individuals who transported the accused to the Tuzla Air Force base on 26 or 27 September; and the identity of the individuals who served the arrest warrant on 28 September 1998. NATO, the United States, Canada, the United Kingdom, Germany, the Netherlands, and Norway appealed against this decision on 2 November 2000. Todorović pleaded guilty on 29 November 2000 and withdrew the motion, so the matter was not resolved.[685] The third element is the 'Carla factor', discussed in Chapter 8.[686]

A constant refrain repeated in the media and among some politicians and Tribunal officials was: why not Karadžić?; why not Mladić? After the first operation was carried out in July 1997, the noose appeared to be tightening around Karadžić's neck, especially since he was openly violating the 18 July 1996 agreement.[687] NATO officials even kept leaking that Karadžić would soon be in The Hague.[688] However, a major obstacle was that Karadžić was alleged to be residing in the French sector with impunity.

[684] 'Bosnian Serb blows himself up to evade law', *Guardian,* 14 October 2000; 'War crime suspect killed', *BBC News Online,* 13 October 2000. http://news.bbc.co.uk/hi/english/world/europe/newsid_970000/970317.stm [13/10/00].

[685] XT/PIS/536-E, The Hague, 20 October 2000.

[686] See Chapter 8.

[687] Note 57, earlier.

[688] Bass, *Stay the Hand of Vengeance,* 268.

A group of men accused for sexual assault and rape crimes in the Foča region were also alleged to still be in the town, which was in the French sector. A French TV station broadcast footage of French SFOR troops drinking with Janko Janjić, who spent the time boasting of his crimes. All of this was damaging to both the French government and the credibility of the Tribunal.[689]

The French attitude toward the Tribunal in 1996–7 was ambivalent, if not overtly hostile. In December 1997, the French Minister of Defence, Alain Richard, criticized the Tribunal as providing 'show justice', and said that no French officials or military officers would testify. Arbour travelled to Paris a few days later with the goal of shaming the French government into action. On the other hand, however, there is evidence that the French government was prepared to take a more proactive stance, with the assistance of the United States. According to one report, three attempts to capture Karadžić were called off; in one instance, only thirty seconds before it was to have been launched.[690] In November 1997, a joint US–French operation was called off at the last minute because Karadžić had been tipped off by a French intelligence officer,[691] although officials in Washington denied that there had ever been a specific plan.[692] After this, Karadžić retreated into hiding, so that it became much more difficult, if not impossible.

In April 1998, rumours surfaced that he was about to hand himself in to the Tribunal, although they were denied by members of his family. One report speculated that he was deliberately encouraging these rumours in order to encourage Milošević to offer him asylum in Serbia, but if so it was a dangerous game, since he could just have easily have ended up in a ditch.[693] Arbour pressed again for the arrest of the two leaders, and the rest of the names on the list of indictees, during the NATO bombing campaign over Kosovo, arguing that the arrests would send a strong message to the leadership in Belgrade.[694] Although the rate of operations increased, Karadžić and Mladić remained at large.

There was speculation that Karadžić was in Montenegro with his mother—a place Holbrooke had suggested he might scuttle off to in July 1996 if he was not going to be surrendered to The Hague, although others believed that he was in hiding near Pale.[695] There were also reports that

[689] Off, *The Lion, the Fox and the Eagle,* 307.

[690] 'Karadžić looks for a bolthole in Belgrade', *The Times,* 23 July 2000.

[691] See also Off, *The Lion, the Fox and the Eagle,* 308–9.

[692] 'French said to hurt plan to capture Karadžić', *New York Times,* 23 April 1998.

[693] 'Karadžić plays the supergrass', *Observer,* 19 April 1998.

[694] Off, *The Lion, the Fox and the Eagle,* 347.

[695] Holbrooke, *To End a War,* 343. 'NATO fears Karadžić is about to escape', *Guardian,* 14 August 2000.

he was looking to flee into Serbia in Summer 2000, but that is no longer a realistic option.[696] Jacques Klein, head of the UN mission in Bosnia, said in January 2000 that the lack of political will to arrest Karadžić has been an impediment to the peace process, and that it 'as long as he is free it is an albatross around our necks'.[697] In October 1999, Carl Bildt said that he was astonished to learn that Karadžić's whereabouts were widely known, and observed that 'If there [was] a real manhunt to catch Karadžić, I did not notice it'.[698] In early 2001, it was alleged that he was in hiding in the Vucevo mountains in Bosnia, near the town of Foca.[699] According to Maggie O'Kane, he was kept under surveillance by American intelligence. O'Kane cites a Tribunal investigator as saying that 'everyone is getting the impression that the gears are being shifted down'.[700] The problem, however, was always logistic—knowing where Karadžić would be two days in advance, rather than where he was yesterday, was crucial.

VOLUNTARY SURRENDERS

The other means of obtaining custody of accused was voluntary surrender. The first to do this was General Tihomir Blaškić, a high-ranking official in the Bosnian Croat army. According to Galbraith, 'a great deal of diplomatic pressure was brought to bear on the Blaškić case', so it cannot be described as wholly voluntary,[701] although it was not coercive in the sense of an arrest by SFOR or the national police force. Subsequently, intense diplomatic pressure on Croatia, including making membership of the European Council conditional upon cooperation with the ICTY, resulted in the surrender of ten former members of the political and military bodies of the Croatian community of Herceg-Bošna to the custody of the Tribunal on 6 October 1997. This pressure was exerted on behalf of, and not by, the Tribunal. The prosecutor emphasized that she

[696] 'NATO fears Karadžić is about to escape', *Guardian,* 14 August 2000.

[697] 'Bosnian Serb leader's arrest sought', *BBC News Online,* 6 January 2000. http://news.bbc.co.uk/hi/english/world/europe/newsid_592000/592556.stm [7/1/00]; 'Political will needed for Karadžić arrest—UN Envoy', *Central Europe Online,* 6 January 2000. wysiwyg://5/http://www.centraleurope.com/news.php3?id=123202 [7/1/00].

[698] 'Karadžić "safely at home" ', *Daily Telegraph,* 30 October 1999.

[699] 'Hunting Radovan', *G2,* 20 February 2001.

[700] Ibid.

[701] Before the handover, the Croatian authorities maintained that they did not know the whereabouts of two of the accused in particular, Ivica Rajić and Dario Kordić. Whilst the cases against the other eight accused were flimsy, the cases against Kordić and Rajić were strong, so there was greater reluctance. Croatia was forced into a corner when the British Embassy in Zagreb said that they could help to locate the suspects, and already knew Kordić's whereabouts. Confidential Interview. See Bass, *Stay the Hand of Vengeance,* 256.

was not involved in any negotiations but expressed her delight and her gratitude to 'all those who have been involved in the events which have resulted in this significant development'; and called on the Bosnian Serb and FRY authorities to play 'a similar role in assuring the surrender to the Tribunal, of indicted accused on their territory'.[702]

In late 1997 and early 1998, several Bosnian Serbs residing in RS surrendered voluntarily to the Tribunal. There are two obvious explanations for their willingness to surrender. Fear of detention by SFOR is one possible explanation, given that the operation in July 1997 had resulted in Drjlaća's death. Major Peter Clark, an SFOR spokesman, said that after the operation to detain Kupreškic and Furundžija by Dutch forces in December 1997, in which Kupreškic was injured, it was acknowledged that: 'SFOR at the door … may be bad for your health'.[703] In contrast, the accused expressed their gratitude to US diplomats and to NATO, 'who made it possible to come here without any coercion', and to the Dutch police and personnel of the Detention Unit, the UN security guards, and entire staff of the Tribunal 'whose correct treatment was a pleasant surprise'.[704] The other consequence of SFOR's more robust policy is that many accused fled to seek asylum in the FRY and are now beyond reach.[705]

The second factor was the change of political environment in Bosnia and pressure from the international community. According to Arbour, 'The combination of diplomatic efforts and operations conducted over the past months by SFOR forces have sent a clear signal that indicted accused will not be able to obstruct the course of justice by hiding behind an apparent unwillingness of their national authorities to comply with their international obligations. Accordingly, it is in the interest of indicted persons to surrender themselves to answer the charges laid against them. To the extent possible, I will undertake to seek recognition in court of the fact that an accused has surrendered himself.'[706]

[702] CC/PIO/246-E, 6 October 1997.

[703] 'NATO arrests two Bosnian Croat Indictees', *Tribunal Update,* No. 57, 15–20 December 1997.

[704] 'An Unusual Initial Appearance', *Tribunal Update,* No. 64, 16–21 February 1998. This also helped to contribute to the public image of the Tribunal. See Chapter 5.

[705] It was not only SFOR that inspired fear. Miljković told *Dnevni Telegraf* in 1996 that he was not afraid of The Hague, but of assassination When Miljković was shot in Belgrade in August 1998, there was speculation in the media that his shooting was linked to the fact that he had evidence against Milošević that he was going to take to The Hague. After he was killed, his lawyer gave a statement to the press that Miljković was killed by Serbian secret police. 'Miljković was afraid of assassination', *Dnevni Telegraf,* 10 August 1998; 'Lawyer says Lugar "Knew too much"', *Dnevni Telegraf,* 10 August 1998.

[706] CC/PI/290-E, 14 February 1998.

There were no further voluntary surrenders until Biljana Plavišic and Blagjoe Simić in January and March 2001, respectively. Indictees have been discouraged from surrendering partly because of the length of time that they would have to be in custody in The Hague before their case even came to trial. This point was recognized and lamented by Arbour: 'Until we have financial resources that will allow us to move these cases through our court more expeditiously, the courtroom staff is depriving itself of a non-violent method of bringing the accused to trial, that is by their voluntary surrender'.[707]

On 10 January 2001, Bijlana Plavišic arrived in The Hague for talks with the prosecutor, and having been informed of the existence of an indictment against her, handed herself over to the Tribunal.[708] Plavišic, co-founder of the SDS with Karadžić and a hard line nationalist during the war, had fallen out with the leadership in Pale, and had started to cooperate with the international community.[709] Plavišic was the subject of a sealed indictment, confirmed on 7 April 2000, in which she was accused of genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches.[710] It was an important signal of the credibility of the Tribunal that such a high-ranking official was prepared to subject herself to justice at The Hague. Her surrender was dramatic volte-face from the position she had taken in January 1997, when she had written to the Secretary-General to inform him that the RS would not cooperate with the Tribunal and did not recognize it to be a legitimate body. It is likely that she was encouraged to surrender following the arrest of Krajišnik in April 2000, which must have raised questions in her mind concerning her own position vis-à-vis the Tribunal.[711]

Her surrender sparked media speculation that a deal had been struck, with the assistance of the UK and US governments, but the prosecutor

[707] Arbour, 'The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 505.

[708] GR/PIS/552-E, The Hague, 10 January 2001. 'Bosnian Serb in talks at Hague tribunal', *Guardian,* 10 January 2001; 'Serb Iron Lady in war crimes trial', *Guardian,* 11 January 2001.

[709] Plavšic, with the full support of the international community, dissolved the Serb National Assembly on 3 July and called for new elections. She was expelled from the SDS on 19 July 1997 and established a new party, the Serb National Alliance (SNS), on 15 August 1997. In September 1997, in talks mediated by Milošević, Plavšic and Krajišnik agreed that elections would take place in November. *Bosnia: The Dayton Agreement—Two Years On,* International Affairs and Defence Section, House of Commons Library, Research paper 97/110, 31 October 1997, 29–30.

[710] *Prosecutor* v. *Biljana Plavsić,* IT-00–40, 3 April 2000.

[711] 'Top Serb seized in NATO raid', *Guardian,* 4 April 2000.

maintained that no compromise had been reached, although she did not rule out a plea bargain arrangement in the future.[712] The question of political interference was raised on a previous occasion, but in a different context, in relation to Biljana Plavišic. In January 1998, there were reports in the Austrian, Bosnian, and Croatian press that Plavišic had been arrested in Vienna on 6 May 1998 in respect of a warrant issued by the ICTY on 10 August 1995; and further that pressure was exerted on the Tribunal to cancel the warrant in January 1998, 'after she began cooperating with the international community and recommended Milorad Dodik as Prime Minister of RS'.[713] The Deputy Prosecutor, Graham Blewitt, issued the following statement in response: 'I wish to make the clearest possible statement that Biljana Plavišic has never been indicted by this tribunal nor has any warrant of arrest ever been issued by this Tribunal for her arrest'; and, furthermore, 'any attempt to exert any political influence on the prosecutor would not be tolerated and would be publicly condemned.'[714] In January 2001 there was no suggestion of pressure being exerted on the prosecutor to drop charges. Rather, any involvement was aimed at facilitating Plavišic's surrender to The Hague in order to stand trial. Once she knew that she was indicted, she really had little choice. The only alternative was 'undignified' detention by SFOR, since she had lost the sympathy of those allies of Karadžić that might have been able to protect her, and flight into Serbia was not an option, since it was likely that she would have been handed over by the new regime.[715]

CONCLUSION

The apprehension of suspects had political as well as judicial consequences. The judicial consequence was that it allowed trials to go ahead. The political consequences concern the implementation of peace, which was the ultimate goal of the Tribunal as a Chapter VII enforcement

[712] 'Serb Iron Lady in war crimes trial', *Guardian,* 11 January 2001. The US is alleged to have given Plavšic a 'signal' that she was indicted. According to the same sources, cited in *Tribunal Update,* the US and UK governments and representatives from the OTP subsequently communicated with Plavšic and her lawyer. 'Biljana Plavšic surrenders', *Tribunal Update,* No. 204a, 8–13 January 2001.

[713] CC/PIU/315-E, 13 May 1998. Even if a deal were reached, the Prosecutor would not be able to offer immunity from prosecution, since the indictment is already confirmed. She could only argue for mitigation in sentencing, which, given the high-level of responsibility and the nature of the crimes, could not amount to much.

[714] Ibid.

[715] 'Biljana Plavšic surrenders', *Tribunal Update,* No. 204a, 8–13 January 2001.

measure. Exclusion from the political process as a consequence of indictment may have been unintended and irrelevant to the lawyer, but the ICTY had a clear political purpose, so the political consequences mattered a great deal to the fulfilment of the mandate. Pragmatically, the effect of indictment and prosecution, if successful, was to remove perpetrators. This was crucial, as it was difficult to envisage a stable and lasting peace built on the assurances of those that planned and prosecuted the war.[716] On this basis, it was 'politically unworkable' not to prosecute.[717] Goldstone pointed out in 1996 that the failure to carry out arrests would lead to 'a further erosion of confidence in the resolve of the international community to follow through on its promises'. In response to the argument that arresting war criminals would lead to violence because of the popularity of people like Karadžić and Mladić, he asked: 'If [war criminals] are left free to flout international agreements and international law is there really less likelihood of further violence in the former Yugoslavia and in particular in Bosnia?'[718] This was the most tangible short-term impact of the Tribunal.

The arrest of Dokmanović by UNTAES forces and ICTY investigators in eastern Slavonia in June 1997, and the operation by British SFOR troops to secure custody of Drjlaca and Kovacević in July 1997, marked a sea change in the perception of the Tribunal and in its ability to fulfil its mandate. The decision to carry out operations to obtain custody of accused was not the result of any change in the legal position. Rather, it was based on the establishment of a working relationship with the OTP under Arbour as prosecutor. In addition, the situation on the ground after one year of deployment was such that the military could concentrate on 'secondary' tasks, such as the apprehension of indictees. At the same time the process was facilitated by the prosecutor, by issuing sealed instead of public indictments and building trust between the OTP and SFOR. Arbour played a central role in this: 'If I may use the colourful image used by President Cassese in describing the Tribunal, which he called a giant without arms and legs, I am determined to put these limbs in place.'[719] She strove to assert the power and authority of the Tribunal as a Chapter VII enforcement measure, and to persuade NATO that removing accused to The Hague was in their interest as well as that of the Tribunal. The result

[716] Zoran Pajić, 'Peace Through Justice', *Tribunal,* No. 2 (January/February 2000), 1.

[717] Ibid., 1.

[718] Commencement Address by Justice Richard J. Goldstone at the European Division of the University of Maryland University College at Mannheim, Germany, 26 May 1996.

[719] Louise Arbour, 'The Status of the International Criminal Tribunals', 502.

was credibility, which led to arrests, which enabled it to function, which in turn enhanced its credibility.

In order to do this, the prosecutor had to play political and diplomatic roles. Thornberry considered that both Goldstone and Cassese were stretching the limits of their judicial role in calling for arrests.[720] In Cassese's view, exerting political pressure on NATO for the purpose of obtaining custody of accused and thereby ensuring the effective functioning of the Tribunal was appropriate for the President of the Tribunal.[721] The political and diplomatic functions of the prosecutor were not set out specifically in the Statute and the Rules of Procedure and Evidence. Without playing that role, however, there was no way that the prosecutor could carry out the judicial function. In the absence of its own capability to obtain custody of accused, it was reliant on States and, in the case of Bosnia and Hercegovina, IFOR/SFOR. The diplomatic engagement necessary to secure this assistance was by its nature highly politicized, but it had to be conducted in a way that did not allow politics to encroach on the judicial function. The balancing act inherent in this task is examined with regard to the performance of the prosecutor in Chapter 8.

[720] Cedric Thornberry, 'Saving the War crimes Tribunal', *Foreign Policy,* 104 (1996), 84–5.

[721] Antonio Cassese, *International Criminal Justice Mechanism: Are They Really so Needed in the Present World Community?* Lecture organized by the Centre for the Study of Human Rights, London School of Economics, 13 November 2000.

8 An Apolitical or a Political Institution? The Exercise of Prosecutorial Discretion

As discussed in Chapter 2, the Government of the Federal Republic of Yugoslavia (FRY) raised fundamental objections to the establishment of an ad hoc tribunal;[722] and the legality of its establishment was challenged in the first case to come before the Tribunal, in 1995.[723] One of the grounds for questioning the judicial status of the Tribunal was that its method of creation was not appropriate for an international criminal court, and that it should have been created by treaty or by resolution of the General Assembly. Slobodan Milošević stated in 1996 that the Tribunal was a political not a judicial body, and more recently that it was no more than a tool of NATO policy and, therefore, anti-Serb.[724] Even among supporters of the Tribunal it was argued that the main drawback of ad hoc tribunals is that they are inherently political and selective by virtue of their method of establishment, even if in themselves they are legitimate judicial bodies.[725] More vehement critics point to the fact that the International Criminal Tribunal for Former Yugoslavia (ICTY) was established by political process—Security Council resolution—and was endowed with a political mandate—the restoration and maintenance of international peace and security—as a measure of its 'politicization'.[726]

[722] Letter dated 19 May 1993 from the Chargé D'Affaires A. I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations addressed to the Secretary-General, S/25801. See Chapter 2.

[723] The Defence in the Tadić case argued that the ICTY was not lawfully established, and that the Security Council did not have the power to create a judicial organ. See Chapter 4.

[724] Interview with Serbian President Slobodan Milošević in *Der Spiegel,* tr. in *Transition,* 12 July 1996, 70.

[725] '[I]t is clearly inappropriate for a political organ to be given authority to decide that in some countries of the world international humanitarian law should be enforced and not in others. Justice should never be undertaken on an ad hoc or political basis.' Justice Richard Goldstone, 'Conference Luncheon Address at Symposium: Prosecuting War Crimes: An Inside View', *Transnational Law and Contemporary Problems,* 7/1 (1997), 3.

[726] Hazel Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', *International and Comparative Law Quarterly,* 46 (1997), 434–42. See Chapter 1.

In the domestic setting judicial bodies should not only be apolitical in and of themselves, that is, established by legal process and be solely concerned with the application of law; they must stand entirely apart from the political arena. However, as the foregoing chapters on the process of establishment, jurisdiction, procedure, state cooperation, and obtaining custody of accused have shown, an international tribunal such as the ICTY could not stand wholly apart from politics. In this sense at least, the enforcement of law was a political question. Nevertheless, in the exercise of its judicial function, the Tribunal had to be apolitical—that is, not susceptible to external political influence.

There was a delicate balancing act that had to be performed at the nexus of international law and international politics, which was manifest in the role and function of the chief prosecutor. In order to manage competing imperatives imposed by politics and law, as Slaughter and Hefner argue, an international judge should have a degree of political and diplomatic acumen to be able to manipulate factors within their control to maximize their impact, and this is even more the case for an international prosecutor.[727] This chapter examines how well this role was managed by the three prosecutors in the exercise of prosecutorial discretion—that is, *who, when,* and, crucially, *how* to investigate and prosecute violations of international humanitarian law committed in the territory of the former Yugoslavia.

The interpretation of the role and function of the prosecutor by each of the three incumbents of the post, Justice Richard Goldstone (1994–6), Justice Louise Arbour (1996–9), and Madame Carla Del Ponte (1999 onwards), had a significant impact on the way in which the Tribunal evolved, and on the way in which it was perceived. In a wider context, the role of the prosecutor informed debate about the appropriate powers and authority of an international prosecutor. This is particularly important with respect to the International Criminal Court (ICC). US objections, in particular, centre on misgivings about the possibility of politically motivated prosecutions of US citizens, particularly US military forces undertaking peacekeeping operations.[728] According to Louise Arbour, 'The greatest

[727] Helfer, L. R., and Slaughter, A. M., 'Toward a Theory of Effective Supranational Adjudication', *Yale Law Journal,* 107 (1997), 308.

[728] For discussion of the US view, see Ruth Wedgewood, 'The International Criminal Court: An American View', *European Journal of International Law,* 10 (1999), 93–107; Gerhard Hafner *et al.* , 'A Response to the American View as Presented by Ruth Wedgewood', *European Journal of International Law,* 10 (1999), 108–23; and Marten Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?', *European Journal of International Law,* 10 (1999), 124–43.

stumbling block to the establishment of a permanent mechanism of international criminal justice is the perception that the criminal process will be manipulated for political ends.'[729] Instead, what was required was the manipulation of the political environment in order to serve the criminal process, so that it could function and thereby contribute to the ultimate political goal, peace and security, but without compromising judicial integrity and with proper consideration for the external political mandate.

This was an extremely difficult balance to strike. It meant, on the one hand, securing the cooperation and assistance of states in order to obtain evidence and custody of accused, in particular; whilst at the same time maintaining independence and impartiality in determining investigative and prosecutorial strategy, and a degree of sensitivity toward the ultimate political purpose for which the Tribunal was established. Crucial to this was the distinction between the internal and external mandate of the Tribunal, but this delineation was not always clear-cut because the internal mandate was a core requirement for the fulfilment of the external mandate. Conversely, in carrying out its internal function, the Tribunal had to take into consideration the impact on the fulfilment of its external mandate. It could not do either without entering into diplomatic relations with States and international organizations, and thereby becoming a political actor in itself.

THE ROLE AND FUNCTION OF THE PROSECUTOR

The role and function of the prosecutor was set out in Article 16 of the Statute of the Tribunal, which set out the responsibility of the prosecutor for 'the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991'.[730] Article 16 also iterated the independence of the prosecutor from the other organs of the Tribunal, from the rest of the United Nations, and from States: 'The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.' The emphasis on the independence of the prosecutor in Article 16 was crucial. Arbour: 'Our mandate is extremely explicit. We were not told by the Security Council to investigate and then go and

[729] Louise Arbour, *War Crimes and the International Criminal Court,* International Bar Association Seminar on the Alleged Transnational Criminal, Vienna, 22–25 May 1998.

[730] Territorial, temporal, and subject matter jurisdiction was examined in Chapter 5.

consult with various governments to see if it suits their political agenda for us to move forward.'[731]

Article 6 of the Statute conferred jurisdiction over individuals, but, as discussed in Chapter 4, the Statute did not specify which individuals should be prosecuted. It was entirely at the discretion of the prosecutor. It is also worth noting that, although the prosecutor had the *authority* to investigate any person, that does not mean that he or she was *obliged* to bring charges against every person suspected of the commission of the crimes within the jurisdiction of the court. Some degree of selectivity was required, but there was an important distinction between the exercise of prosecutorial discretion and 'selective prosecution'. 'Selective prosecution' is understood in this context to mean partiality or bias on the part of the prosecutor, rather than the exercise of discretion based on fixed criteria. In the domestic setting the prosecutor is never called upon to be selective in the prosecution of serious crimes, as long as there is sufficient evidence. In contrast, the prosecutor of the ICTY had to be highly selective before committing resources to an investigation.[732] Selectivity was not only determined by the availability of evidence, but by the mandate of the Tribunal and the political context in which it operated. The Tribunal could not realistically address all of the crimes alleged to have been committed, so the prosecutor had to determine those that were sufficiently grave to warrant prosecution in an international tribunal. In order to make this determination, the prosecutor had to apply political as well as legal criteria, but in the application of political criteria he or she had to maintain independence and impartiality in order not to become 'politicized'.

Helfer and Slaughter drew a crucial distinction between decision-making premised on principle, which is entirely in keeping with the function of an international legal actor, and that premised on power, which is not.[733] The point was made in a different way by Arbour:

> An independent Prosecutor must be able to stand apart from national politics, the interests of individual States and the goals of any particular foreign policy. Indeed, not only must the Prosecutor stand *apart* from such considerations, he or she must stand *above* them, and be fully prepared without fear or favour to contradict them or to challenge political pressures which may seek to influence the course of justice.'[734]

[731] 'Arbour, Milošević and "Yesterday's Men"', *Tribunal Update,* No. 128, 31 May–5 June 1999.

[732] Arbour, L., 'Progress and Challenges in International Criminal Justice', *Fordham International Law Journal,* 21/2 (1997), 534.

[733] Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 314.

[734] *Keynote Speech by Justice Louise Arbour,* The International Conference on War Crimes Trials, Belgrade, 7–8 November 1998.

This did not mean that the prosecutor is not accountable, but accountability was judicial, not political. The prosecutor acted within strict legal constraints and subject to judicial supervision.

Goldstone argued that the prosecutor should act without regard to the external political situation, although he conceded that this 'may well cause problems and might interfere, for example, with a peace process'. Nevertheless, Goldstone found this 'preferable to having politicians dictate to a prosecutor who should or should not be indicted and when indictments should be issued.'[735] In reality there was a balance to be struck, whereby the prosecutor was fully cognizant of the political context in which decisions are taken, and acted with regard to political considerations, in as far as it concerns the mandate of the Tribunal, but did not take instruction from any source. This presents a serious dilemma, which is that if the prosecutor was seen to be acting in any way politically, the credibility of the Tribunal as a judicial body would have been severely damaged. But the prosecutor had to engage in politics and diplomacy in order to secure state cooperation, as discussed in Chapters 6 and 7, without which the judicial function could be performed.

The following sections examine the interpretation of Article 16 by Goldstone and Arbour during their tenure as Chief Prosecutor, and how the evolution of prosecutorial strategy was taken forward under Del Ponte. The discussion centres on how the exercise of prosecutorial discretion manifested itself in three ways: decisions on what to investigate and who to indict; decisions as to the most appropriate method of proceeding with an indictment, namely, publicly or on a confidential basis; and the means of obtaining state cooperation.

EARLY (PUBLIC) INDICTMENTS: GOLDSTONE 1994–6

Justice Richard Goldstone was appointed by the Security Council in July 1994 and took up office in August 1994, at which point the Tribunal was able to begin to get off the ground.[736] Goldstone's professional reputation meant that attached to him was a great deal of confidence, not only in his ability as a judge and experience as an investigator, but also in his independence and impartiality. Goldstone viewed the appointment as a

[735] Goldstone, R., *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), 132.

[736] See Chapter 3.

professional legal position, not a political role,[737] but his performance showed a great deal of aptitude for the political arena. His main contribution was in promoting the image and credibility of the Tribunal, and he was an outspoken critic of the international community's failure to guarantee real support for the work of the Tribunal.

From the start the Tribunal was perceived as politically motivated by the Serbs, because they considered themselves to be unfairly targeted and viewed the Tribunal as an instrument of Western anti-Serb policy, rather than as an instrument for the maintenance of peace. It is clear from even a cursory glance at the early public indictments that the vast majority of indictees were Serbs. Only one public indictment was issued against Bosnian Muslims, in March 1996.[738] However, it was never the intention to target a particular ethnic group. According to Goldstone:

> The Prosecutor is at pains to point out that his policy is to investigate and prosecute persons who may be responsible for war crimes irrespective of the political or ethnic group to which they belong. His investigations are evidence-driven and he welcomes information from all informed sources about all crimes and all persons who may be responsible.[739]

The distribution of the early indictments was the result of a number of factors. First, the Office of the Prosecutor (OTP) had limited manpower and resources, so a choice had to be made; and second, in 1994 and 1995, the prosecutor was under intense pressure from both the media and the judges to issue indictments.[740] Consequently, the investigators took as starting point the Commission of Experts' Report.[741] They were aware that the strategy would be open to allegations of bias, but determined that decisions about which cases to bring should be based on available evidence, and not on a notion of 'moral equivalence among the warring groups'.[742] Rather, it was considered to be an accurate reflection of the relative criminal responsibility of the warring parties.[743] Although serious

[737] Interview with Richard Goldstone, 25 February 2001.

[738] In March 1996, four Bosnian Muslims were accused of grave breaches and violations of the laws and customs of war committed against Bosnian Serbs at the Celebici camp in 1992. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo 'Čelebići Camp', IT-96-21, 21 March 1996.

[739] CC/PIO/033-E, 14 February 1996.

[740] See Chapter 3.

[741] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, 27 May 1994.

[742] Schrag, M., 'The Yugoslav War Crimes Tribunal: An Interim Assessment', *Transnational Law and Contemporary Problems,* 7 (1997), 20.

[743] Helsinki Watch stated that, although all parties are guilty of abuses, 'the chief offenders have been the Serbian military and paramilitary forces.' Helsinki Watch, *War Crimes in Bosnia and Hercegovina,* vol. II (New York: Human Rights Watch, 1993), 7.

violations were committed by all sides to the conflict, the evidence gathered by the UN Commission of Experts indicated that the majority of crimes were committed by Serbs.[744] 'Ethnic cleansing' was a deliberate strategy carried out by Serb military and paramilitary forces against Muslims and Croats.

The first indictments were against Bosnian Serbs. On 4 November 1994, Dragan Nikolić was charged with grave breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity, allegedly committed at the Sušica Camp in eastern Bosnia in the summer of 1992.[745] Following the judges' complaint that they had nothing to do, in February 1995 nineteen Bosnian Serbs were indicted for atrocities allegedly committed in the summer of 1992 against civilians held at the Omarska camp, in the Prijedor municipality in north-western Bosnia.[746] At the same time, Dusko Tadić and Goran Borovnica were indicted for alleged crimes committed against civilians within and around the Omarska camp.[747]

On 21 July 1995, indictments were confirmed against thirteen accused for alleged atrocities at the Keraterm camp, also in the Prijedor municipality.[748] Some of the same accused were indicted twice on the Ormarska and Keraterm indictments. At the same time, indictments were confirmed against six accused for atrocities at Bosanski Samac, against Goran Jelisić and Ranko Česić for atrocities at the Luka camp in Brčko in northeastern Bosnia, and against Milan Martić, President of the Croatian Serb administration, in connection with the firing of cluster bombs into the central part of Zagreb on 2 and 3 May 1995. Four days later, on 25 July 1995, indictments were confirmed against Radovan Karadžić and Ratko Mladić, the President and Commander of the army of the Bosnian Serb administration in Pale, in connection with atrocities perpetrated against the civilian population throughout Bosnia, the sniping campaign against civilians

[744] The commission found that 'it is clear that there is no factual basis for arguing that there is a "moral equivalence" between the warring factions'. Final Report of the Commission of Experts, 27 May 1994, vol. 1, at 149.

[745] Dragan Nikolić 'Susica Camp', IT-94-2, 4 November 1994. The timing of the indictment was to precede the forthcoming ACABQ meeting on the Tribunal's budget. Goldstone, *For Humanity,* 105.

[746] Željko Meakić, Miroslav KvoČka, Dragoljub Pracać, Mladen Radić, Milojica Kos, MomČilo Gruban, Dušan Knežević, Zoran Žigić 'Omarska Camp', IT-95-4, 13 February 1995.

[747] Dusko Tadić and Goran Borovnica 'Prijedor', IT-94-1, 13 February 1995. The Tadić indictment was opportunistic, since the accused was already in custody and facing trial in Germany and the Tribunal, desperate for cases, requested deferral of the case in April 1995. See Chapter 4.

[748] Duško Sikirica, Damir Došen, Dragan Fuštar, Dragan Kolundžija, Nenad Banović, Predrag Banović, Dušan Knežević, Zoran Žigić 'Keraterm Camp', IT-95-8, 21 July 1995.

in Sarajevo, and for the taking of UN peacekeepers as hostages and their use as human shields.[749] In November 1995, Radovan Karadžić and Ratko Mladić were the subject of a second indictment, for crimes committed in connection with the takeover of Srebrenica in eastern Bosnia in July 1995.[750]

The next batch of indictments, confirmed in November 1995, were against three JNA officers accused of the killing of 261 men forcibly removed from the Vukovar Hospital in November 1991. The last two in the list of early indictments were issued in the first half of 1996. In February 1996 General Djorde Djukić was indicted in connection with the shelling of civilian targets during the Bosnian Serb siege of Sarajevo between May 1992 and December 1995.[751] In May 1996, Erdemović, who had been handed over to the Tribunal by the FRY, was charged with violations of the laws of war and crimes against humanity for his participation in the attack on Srebrenica in July 1995. In June 1996 indictments were confirmed against eight accused for rape and sexual assault of Muslim women in the Foča region.[752] This was the last in the list of public indictments against Serbs, until the indictment of Milošević along with four members of his government in May 1999 for crimes committed in Kosovo.

A number of Bosnian Croats were publicly indicted in the early stages. In August 1995, Ivica Rajić was indicted for grave breaches and violations of the laws and customs of war in relation to the attack by the Croatian Defence Council (HVO) against the village of Stupni Do in northern Bosnia in October 1993.[753] On 10 November 1995, indictments were issued against senior Bosnian Croats for grave breaches, violations of the laws and customs of war, and crimes against humanity committed in the Lašva Valley in central Bosnia between May 1992 and January 1994;[754] and against Bosnian Croat soldiers for violations of the laws and customs of

[749] Slobodan Miljković, Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić 'Bosanski Samac', IT-95-9, 21 July 1995; Goran Jelisić & Ranko Česić 'Brcko', IT-95-10, 21 July 1995; Milan Martić 'Zagreb Bombing', IT-95-11, 25 July 1995; Radovan KaradŽić and Ratko Mladić 'Bosnia and Hercegovina', IT-95-5, 25 July 1995.

[750] Radovan KaradŽić and Ratko Mladić 'Srebrenica', IT-95-18, 16 November 1995.

[751] Djukić and Krsmanović had been arrested by Bosnian government authorities in January 1996, and Goldstone requested that they both be transferred to The Hague. The incident led to the 'Rules of the Road' agreement. See Chapter 7.

[752] Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovać, Zoran Vuković, Dragan Zelenović, Dragoljub Kunarac, Radovan Stanković 'Foca', IT-96-23, 26 June 1996.

[753] Ivica Rajić 'Stupni Do', IT-95-12, 29 August 1995.

[754] Tihomir Blaškić 'Lašva Valley', IT-95-14, 10 November 1995; Dario Kordić & Mario Čerkez 'Lašva Valley', IT-95-14/2, 10 November 1995; Zlatko Aleksovski 'Lašva Valley', IT-95-14/1, 10 November 1995.

war and crimes against humanity in Ahmići in April 1993.[755] Finally, in the round of public indictments, Vinko Martinović and Mladen Naletilić were charged with grave breaches, violations of the laws and customs of war, and crimes against humanity in connection with attacks on villages of Sovići and Doljani in the municipality of Jablanica in April 1993, the arrest of prominent Bosnian Muslims in Stolac, Čapljina, and Mostar, and a large-scale offensive against the Bosnian Muslim population of Mostar on 9 May 1998.[756]

Under Arbour, a number of indictments were made public as soon as the accused was taken into custody: Drjlaća and Kovacević were indicted in March 1997; Krnolejac in June 1997; General Galić in March 1999 for the siege of Sarajevo; Mitar Vašiljevic, member of a Serb paramilitary unit in Visegrad, was indicted in August 1998; General Krstić was indicted in November 1998 for Srebrenica, and arrested one month later; Radoslav Brdjanin, former President of the Autonomous Region of Krajina (ARK) Crisis Staff, and General Momir Talic, Commander of 5th Corps and 1st Krajina Corps and a member of the ARK Crisis staff, were indicted on 14 March 1999. Finally, Momcilo Krajišnik, President of the Bosnain Serb Assembly, and Biljana Plavišić, Member of the Presidency of the RS, were indicted on 21 March 2000 and 7 April 2000, respectively. The Prosecutor revealed in March 1999 that Zeljko Ražnjatović (Arkan) was indicted, but he was shot in Belgrade in January 2000. It is apparent from the list of later indictments that Arbour, as well as shifting to a policy of issuing sealed indictments, focused on those higher up the chain of responsibility.

The strategy pursued by Goldstone was dictated by circumstance. Essentially, in 1994–5, Goldstone was forced into a corner by the judges and the need for an improved public image to issue indictments; while at the same time he faced enormous difficulties in the investigation of alleged crimes because the conflict was ongoing in Bosnia. These early indictments had to be public, because they were a concrete signal that the Tribunal was operating. Similarly, the Rule 61 proceedings in 1995–6 were an integral part of Goldstone's strategy for raising the public profile of the Tribunal.[757]

[755] Kupreškić & Others 'Ahmici', IT-95-16, 10 November 1995. Anto FurundŽija, who had been a local commander in the HVO special unit named the 'Jokers', was charged with violations of the laws and customs of war on the same day, but his indictment remained sealed until he was arrested by SFOR in December 1997. Anto FurundŽija 'Lašva Valley', IT-95-17/1, 10 November 1995.

[756] Mladen Naletilić and Vinko Martinović "Tuta & Stela", IT-98-34, 21 December 1998.

[757] See Chapter 5.

AN EXERCISE IN FUTILITY?: THE FISH DEBATE

One of the main criticisms of the Tribunal was that it was an 'exercise in futility' since it could not hope to bring all those responsible to justice; and that it would only succeed in trying the 'small-fry' and not those responsible for the direction of the war. The defence in the Tadić case challenged the fairness of the trial on the basis that the criteria for prosecution appeared to be entirely arbitrary and based on the availability of data and suspects.[758] He was right, but this was not a reason to challenge fairness. It was unfortunate for Tadić that he was arrested in Germany in February 1994, when the Tribunal was desperate for cases. In the Čelebici case, one of the accused, Esad Landžo, raised the objection that the trial was unfair because numerous others have not been, and are not likely to be, put on trial for similar offences. The judges denied the motion, stating that 'It is preposterous to suggest that unless all potential indictees are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial.'[759]

The importance of holding those at the highest levels of responsibility was clear. The judges in the Kupreškić case lamented that 'At the end of the trial, we have come to the conclusion that, with the possible exception of one of the accused, this Trial Chamber has not tried the major culprits, those who are most responsible for the massacre of 16 April 1993, those who ordered and planned, and those who carried out the very worst of the atrocities—against innocent civilians.'[760] However, this consideration did not mean that the direct perpetrators should not be tried. The judges in the Čelebici case affirmed that from Article 7(1) it is clear that the ICTY was not solely intended for those in positions of authority.[761] In the Erdemović case, the Trial Chamber considered that individual responsibility, based on Articles 1 and 7(1) of the Statute, grants the International tribunal 'full jurisdiction not only over "great criminals" like in Nuremberg … but also over executors.'[762]

The rationale behind the investigations was to establish a crime base from which they would be able to make links to the people in positions of military and political responsibility. It was never Goldstone's intention to issue indictments against 'small-fry' like camp guards. Goldstone: 'It is

[758] Opening Statement of the Defence in the Case of Duško Tadić, *Prosecutor* v. *Tadić,* IT-94-1, 7 May 1996, at 2.

[759] Judgement, *Prosecutor* v. *Delalić and others,* IT-96-21, 16 November 1998, at 180.

[760] Judgement, *Prosecutor* v. *Kupreskić and others,* IT-95-16, 14 January 2000 at 757.

[761] Judgement, *Prosecutor* v. *Delalić and others,* IT-96-21, 16 November 1998, at 176.

[762] Sentencing judgement, *Prosecutor* v. *Erdemović,* IT-96-22, 29 November 1996, at 83.

highly unsatisfactory that people at the level of Dusan Tadić should face trial and that those who facilitated such conduct should escape justice and remain unaccountable.'[763] Especially in view of the fact that 'The practices of "ethnic cleansing", sexual assault and rape have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy.'[764] The military and political leaders were always at the top of the list, but it was a case of working with what was available. As discussed in Chapters 3 and 6, it was difficult to obtain evidence, let alone custody of accused, and there was mounting political pressure to issue the first indictments, especially from the judges. Allegations of cynicism and lack of resolve centred on the failure to provide the Tribunal with adequate resources for it to be effective, and in turn created pressure for the Tribunal to start work, to at least be seen to be doing something constructive.[765]

From 1996 onwards, investigations were more honed and able to concentrate on the higher levels. Investigators were helped by the fact that there was, contrary to expectations, a 'paper trail', and the signing of a peace agreement and presence of NATO forces made it possible to get hold of documentary evidence linking those in power at the time to the crimes. The OTP were not expecting to find specific evidence of command responsibility, but Ralstone suggested that there was a perception that if something is properly documented and agreed upon, it cannot be a crime, so that is why official documents exist.[766] One example of this was the so-called 'variant A, variant B' document, which was introduced as evidence in the Karadžić and Mladić Rule 61 hearing and in the Jelešić trial. The document outlined the plan for taking control in Bosnia: In those municipalities where Bosnian Serbs were numerically superior, variant A applied; and in municipalities where they were not in the majority, variant B applied. It also outlined how to take control. It does not specifically detail mechanisms for ethnic cleansing, but in comparison to what happened, the intention is clear. Variant B was ethnic cleansing. The plans for military operations were more specific and, although directions to paramilitaries were sometimes more obtuse or tangential, the meaning was clear. The documents testify to the degree of command and control and coordination between the JNA and the Bosnian Serb Army and paramilitaries.[767]

[763] 'Serb war criminals flaunt their freedom', *Sunday Times,* 23 June 1996.

[764] Final Report of the Commission of Experts, 27 May 1994, at 313.

[765] See, for example, Human Rights Watch/Helsinki, *Prosecute Now! Helsinki Watch Releases Eight Cases for War Crimes Tribunal on Former Yugoslavia,* vol. 5, issue 12, 1 August 1993; and Helsinki Watch, *War Crimes in Bosnia and Hercegovina,* vols I and II (New York: Human Rights Watch, 1992, 1993).

[766] Interview with John Ralston, 27 November 2000.

[767] Ibid.

PEACE VERSUS JUSTICE OR PEACE AND JUSTICE?

A further criticism of the Tribunal was that, far from contributing as a mechanism for the restoration and maintenance of peace, the process would be detrimental to the peace process. There was an inherent dilemma for the Prosecutor of the ICTY. On the one hand, the prosecutor should remain aloof from politics, and therefore remain unconcerned with the external political impact of prosecutorial decisions. Yet, on the other hand, the Tribunal and particularly the prosecutor was dependent on external political will in order to be able to fulfil its judicial function. In order to retain the goodwill of those States on whom it relied, the Tribunal had to act in accordance with its political mandate, which was the restoration of peace.

The dilemma was acute with regard to the indictment of the Bosnian Serb leaders, and later on in respect of Milošević. Goldstone was criticized by the UN Secretary-General, among others, for the timing of the Karadžić and Mladić indictments, in July and November 1995. Boutros-Ghali said afterwards that he should have been consulted and would have advised not to indict until after a ceasefire had been brokered.[768] The second indictment, concerning Srebrenica, was issued during the Dayton negotiations. It was alleged that it was politically motivated. Goldstone maintained that it was not. Although the investigation was given preference because of the scale and magnitude of the crimes, and hastened when it was announced that Dayton talks were to take place, he maintained that the indictment was not timed to coincide with Dayton.[769] Goldstone pointed out that anything they did would be interpreted in one way or another: 'had the indictment been issued before Dayton, we would doubtless have been accused of trying to influence the outcome of the meeting; had we issued it after the agreement, the allegation would have been that we were pressured to delay it so as not to interfere with the outcome.'[770]

Goldstone's policy was to build cases 'regardless of the political consequences'.[771] This stance was questionable if the political consequences would have been a return to war: 'The pursuit of justice for yesterday's

[768] Goldstone, *For Humanity,* 102–3. This was in spite of the fact that Goldstone warned senior officials of organizations working on the ground in Bosnia that an indictment was imminent, including Akashi (special representative of the Secretary-General) and Sadaka Ogata (UN High Commissioner for Refugees) and Cornelio Sommaruga (President of ICRC), since he was aware that it might have provoked retaliation on UN and ICRC personnel.

[769] Goldstone, *For Humanity,* 107–8.

[770] Ibid., 109.

[771] Cited in Anonymous, 'Human Rights in Peace Negotiations', *Human Rights Quarterly,* 18 (1996), 257.

victims should not be pursued in such a manner that it makes today's living the dead of tomorrow.'[772] Justice is not the end, but a means to achieve the end, among others. On the other hand, although peace could be achieved through other means, sacrificing justice would guarantee only a temporary peace. This point was made by US Secretary of State, Madeleine Albright in December 1995:

> And let us remember that democracy and justice will not co-exist in Bosnia if the stench of genocide and war crimes is not removed. That is why we must insist that all parties co-operate with the War Crimes Tribunal. […] For if we cannot expunge collective guilt and assign individual responsibility, then the wounds of war will not heal.[773]

The indictment of Karadžić and Mladić and their exclusion from formal peace negotiations at Dayton did not preclude the conclusion of a settlement. In fact, it facilitated the process.[774] Goldstone opines that without the indictment, the Dayton accords would not have been brokered for the simple reason that, especially after Srebrenica, Izetbegović would not have attended a meeting at which Karadžić was present, and the indictment meant that he could not be.[775] Incidentally, it also served Milošević's purposes, since he was distancing himself from the Pale leadership, and was happy to negotiate on their behalf.

Goldstone's main contribution was in setting up the OTP and increasing the visibility and credibility of the Tribunal, in the former Yugoslavia and elsewhere. When he left in September 1996, the Tribunal had begun to function: the Tadić case opened in May 1996. He made his first trip to the former Yugoslavia in October 1994, and held meetings with the ministers of foreign affairs and justice in Croatia, Bosnia and Hercegovina, and the FRY.[776] He was adept at dealing with journalists and responding to criticism time after time that the Tribunal was no more than a 'fig-leaf for inaction', that he had not indicted leaders such as Karadžić and Mladić, and then when he did, that he had not indicted Milošević. His first appointment on taking up office was with Mike Wallace of *60 Minutes* for a programme entitled 'An Exercise in Hypocrisy', castigating the UN and the international community for the manner in which it was treating the Tribunal.[777]

[772] Ibid., 258.

[773] Statement by Ambassador Madeleine K. Albright, US Representative to the United Nations Bosnia Peace Implementation Conference, London, 9 December 1995.

[774] Holbrooke, R., *To End a War* (New York: Random House, 1998), 338.

[775] Goldstone, *For Humanity,* 103.

[776] He declined to meet with the respective Heads of State as had no wish to be photographed shaking hands with Milošević or Tudjman, who were the subjects of investigations. Goldstone, *For Humanity,* 62.

[777] Goldstone, *For Humanity,* 81.

As discussed in the previous chapter, Goldstone and Cassese were both criticized for their outspoken criticism of NATO's stance on arrests and the failure of the Security Council to impose sanctions against the FRY for non-compliance.[778] Goldstone maintained that his outspoken criticism did not compromise the procedural level of cooperation with IFOR personnel at various levels and the building of mutual respect between the Tribunal and the military.[779] The key contribution made by his successor was to consolidate this relationship.

THE SOUL OF PROSECUTORIAL DISCRETION: ARBOUR 1996–9

Justice Louise Arbour took over from Goldstone at the beginning of October 1996 and stayed for three years. She was Goldstone's choice to succeed him, but she was not a popular choice among human rights activists.[780] Yet, Arbour proved her critics wrong. She had an enormous impact on the development of the Tribunal. Her aim was to turn the OTP into a modern and efficient law enforcement office, and in this she was successful. By the time she left in September 1999, the Tribunal was functioning as a credible and effective international criminal court. This was the result of a combination of factors: a shift in prosecutorial strategy, the exertion of the authority of the Tribunal with respect to non-cooperation of States, and the breaking of the logjam on arrests, which meant that the Tribunal could go about its judicial business.

When Arbour took over in September 1996, she instituted a markedly different approach to the issuing of indictments. One of the first things she did was to review existing indictments and investigations. As discussed

[778] Thornberry considered that both Goldstone and Cassese were stretching the limits of their judicial role in calling for arrests. Cedric Thornberry, 'Saving the War crimes Tribunal', *Foreign Policy,* 104 (1996), 84–5.

[779] Interview with Richard Goldstone, 25 February 2001.

[780] This was because as a Judge on the Appeals Court in Canada, she acquitted a Hungarian, Imre Finta, accused of war crimes during the Second World War; and because in her report on violations of human rights in a women's prison in Kingston, Ontario, she had declined to name the culprits. The result of the ruling in the *Finta Case* was that it was difficult, if not impossible, from that point on to prosecute Nazi war crimes in Canada. She also met with some opposition among feminists, because she had opposed the controversial rape shield law in Canada, and was, therefore, not viewed as someone who would champion women's rights as victims of rape and sexual assault. For a full account of Arbour's meeting with Goldstone, and the process leading to her appointment, see Off, C., *The Lion, the Fox and the Eagle: a Story of Generals and Justice in Yugoslavia and Rwanda* (Toronto: Random House, 2000), 281–3.

in Chapter 3, the standard of the early indictments was reasonably low, although they met the requirement of a prima facie case as set out in Rule 47.[781] In December 1997, she sought leave to withdraw indictments against four accused, three of whom had voluntarily surrendered in October 1997,[782] on the basis that she was not satisfied that the charges could be proven 'beyond reasonable doubt' and that 'there is insufficient basis to justify proceeding to trial'.[783] This decision was justified by the prosecutor as the 'proper exercise of prosecutorial discretion'.[784]

Following this, on 8 May 1998, charges were withdrawn against fourteen accused in the Omarska and Keraterm indictments.[785] The prosecutor stressed that this was not the result of any lack of evidence with respect to these cases, but rather was in the light of her re-evaluation of all existing indictments with reference to the strategy pursued by the office of maintaining a focus on persons holding high levels of responsibility or those personally responsible for exceptionally brutal or otherwise extremely serious offences.[786] It was later alleged in reports in the Austrian, Bosnian, and Croatian press that the withdrawal of indictments indicated that 'indictments from 1995 were issued without considerable and reliable evidence'. There was some criticism levelled at the OTP that the indictments were not of sufficient standard.[787] This criticism was purportedly also made by US Ambassador Robert Gelbard in February 1998, when he stated that 'a significant number of indictments will not stand up in court'. Arbour refuted this criticism on the basis that those without access to the evidence were not qualified to comment on the strength of indictments.[788]

There was a constant refrain in the media and among public opinion of: 'Why not Milošević?'; 'Why not Tudjman?' According to Arbour: 'Our worst enemy is the alleged "public knowledge". I am told constantly, "Why have you not indicted X or Y? Everybody knows that he is guilty!"'[789]

[781] The consequence of issuing indictments before they were trial ready was demonstrated in the Blaškić case. The trial commenced on 24 June 1997 and lasted for over two years, closing on 30 July 1999. Blewitt blames the Judges for bringing about this situation by insisting that the Prosecutor bring indictments and then complaining when the cases came to trial that they were not sufficiently prepared. Interview with Graham Blewitt, 28 March 2000.

[782] On 6 October 1997 Marinko Katàva, Ivan Santić, and Pero Škopljak surrendered with seven other Bosnian Croats indicted for crimes committed against Bosnian Muslims in the Lašva Valley region in 1993. See Chapter 7.

[783] CC/PIO/279-E, 19 December 1997.

[784] Ibid.

[785] Charges were withdrawn against eleven accused in the Omarska indictment and three in the Keraterm indictment. CC/PIO/314-E, 8 May 1998.[65] Ibid.

[786] Ibid.

[787] CC/PIU/315-E, 13 May 1998. These allegations were in connection with a report that the Prosecutor had also dropped charges against Biljana Plavšić in early 1998. See Chapter 7.

[788] CC/PIO/296-E, 27 February 1998.

[789] 'Preview: Interview with Louise Arbour', *Tribunal Update,* No. 13, 27 January to 1 February 1997.

In response, she stressed that the burden of proof was high: 'we are in the business of bringing indictments supported by evidence that will sustain scrutiny beyond reasonable doubt'. Arbour consistently refused to disclose any details of ongoing investigations. The policy of issuing sealed indictments derailed some of this criticism, since the prosecutor was able to maintain a position of confidentiality—and refuse any comment.

In a handful of cases, Arbour was forced to make public statements concerning an investigation or indictment. For the most part, the work of the OTP was extremely secretive under her leadership—a strategy that facilitated the detention of accused by SFOR as discussed in Chapter 7. There were no more Rule 61 hearings after Summer 1996 and the staff of the OTP including the prosecutor firmly refused to comment on ongoing investigations. In January 1998, however, the silence was breached. In response to allegations that charges had been dropped against Plavšić, Blewitt confirmed that 'Biljana Plavšić has never been indicted by this tribunal nor has any warrant of arrest ever been issued by this Tribunal for her arrest.'[790] The second occasion on which comment was made was in relation to Tudjman, after his death. Blewitt confirmed that he had been under investigation, and envisaged that both might be named as co-offenders in new indictments.[791]

In March 1999, Arbour revealed that an indictment had been confirmed against Arkan on 30 September 1997. Details were kept confidential, but the unsealing was politically motivated, in order to 'put on notice those who might be inclined to retain his services, or to obey his orders, that they too will be tainted by their association with an indicted war criminal.'[792] Arkan was known to be operating in Kosovo alongside Serbian and FRY security forces, just as he had done in Croatia and in Bosnia.[793] In May 1997, Arkan's lawyer, Giovanni Di Stafano, asked for confirmation that Arkan was not indicted following the CNN broadcast, *Wanted,* which portrayed him as a war criminal. The assurance given by the Tribunal's press

[790] This was before the indictment was issued. Plavšić was under investigation at this time. See Chapter 7.

[791] 'Bulatović was under investigation', *Tribunal Update,* No. 163, 7–12 February 2000.

[792] 'Arkan indicted', *Tribunal Update,* No. 119, 29 March to 3 April 1999. The effort to keep details confidential was undermined by the then UK Minister of Defence, George Robertson, who revealed that he was charged with taking part in the massacre at Vukovar/OvČara in November 1991. 'Arkan Case: inappropriate disclosure', *Tribunal Update,* No. 121, 12–17 April 1999. Del Ponte confirmed this in January 2000. PR/PIS/463-E, The Hague, 17 January 2000. The indictment was made public a year later, in January 2001. 'Arkan indictment unsealed', *Tribunal Update,* No. 206, 22–27 January 2000.

[793] Arkan was operating near MitroviČa with other paramilitaries experienced in ethnic cleansing. Malcolm, N., *Kosovo: A Short History* (London: Macmillan, 1998), p. xxxvi.

spokesman, Christian Chartier, that 'the name Raznatović is not on the list of persons indicted to date by the ICTY' turned out to be worthless, since he was indicted six months later. However, the indictment was sealed, and in May 1997 few were aware of the existence of sealed indictments. Otherwise, the assurances given might not have been accepted so readily, especially as Chartier finished by making it clear he was referring to the list of public indictments: 'This list is a public document and I attach … a copy of it.'[794]

Arbour's building of a working relationship with NATO, and the move from public to sealed indictments, were crucial factors. She was determined not to tolerate inaction and threatened to expose publicly the fact that SFOR failed to arrest certain accused with whom they came into daily contact.[795] At the same time, she engaged in private discussions with foreign ministries, ministers of justice, and representatives of the European Union in order to encourage bilateral and multilateral intervention to solve problem of lack of arrests.[796] In doing so, she asserted the coercive powers of the Tribunal as a criminal law enforcement body, which was a dramatic shift in attitude from the perception of dependency that had prevailed. Whereas Goldstone had emphasized the moral obligation to cooperate, Arbour demanded compliance.[797] She maintained that the Tribunal had not fully exploited its own strength.[798] In her address to the London PIC conference, in December 1996, having listened to two days of debate about the issue of arresting war criminals, Arbour stated unequivocally: 'This is not a matter of debate. This is the law!'[799] Instead of stressing the moral and political importance of the Tribunal, she emphasized its legal powers of coercion and exploited its capabilities.

This, along with her stance over Kosovo, was her key contribution. In her resignation speech, she lamented: 'The decision to accept this appointment has been a very difficult one for me to make. It has been made easier, however, by the confidence that I have that the two Tribunals are now successful mature institutions, and that they are considerably greater than

[794] 'Arkan's "certificate"', *Tribunal Update,* No. 31, 2–7 June 1997.

[795] Interview with Louise Arbour, 23 January 2001.

[796] Louise Arbour, 'Progress and Challenges in International Criminal Justice', 537.

[797] This shift in attitude is also evident in the speeches of President McDonald, who emphasized compliance rather than cooperation, as compared to President Cassese who, with Goldstone, asserted moral obligations. See, for example: Address to the United Nations General Assembly by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, 19 November 1998.

[798] Interview with Louise Arbour, 23 January 2001.

[799] 'Judges protest the "degradation" of the ICTY', *Tribunal Update,* No. 6, 2–4 December 1996.

the sum of their parts.'[800] The perception of the Tribunal had shifted from being in the "'soft" human rights, monitoring, NGO community, into a criminal law enforcement military culture, which is where we belong.'[801] Her departure in September 1999 was a severe blow to the Tribunal. The appointment to the Canadian Supreme Court was not unexpected, but it came at a difficult time: it was announced just two weeks after she had announced the indictment of Milošević, on 27 May 1999.[802]

The statement on the Arkan indictment and the public indictment of Milošević were key examples of the ways in which the Tribunal could be deliberately deployed by the Prosecutor for symbolic impact. According to Arbour, Kosovo demonstrated the ability of the Tribunal to function as a law enforcement operation in real time.[803] It was also a watershed in terms of the West's dealings with Milošević.

REAL-TIME LAW ENFORCEMENT: KOSOVO 1999

It had long been feared that the political confrontation in Kosovo would lead to armed conflict.[804] In late 1997 and early 1998 sporadic acts of revolt by Albanians met with a severe response from Serb security forces, which in turn fuelled the growth of the Kosovo Liberation Army (KLA).[805] The government in Belgrade characterized the KLA as a terrorist organization and embarked on a campaign of destruction against Albanian villages in Summer 1998, in order, presumably, to flush out the fish in the sea of Albanians. It sparked a massive refugee crisis as displaced persons forced from their homes flooded across the border with Macedonia and Albania.[806] The international community condemned the policy pursued by Belgrade, and in June 1998 Milošević undertook to prevent repressive action against the civilian population. By late July, however, the VJ and the Ministry of Interior Police had embarked upon 'a widespread campaign

[800] PR/PIS/408-E, The Hague, 11 June 1999.

[801] 'Louise Arbour—farewell interview', *Tribunal Update,* No. 141, 30 August to 5 September 1999.

[802] The indictment was confirmed on 24 May 1999 and made public on 27 May 1999. It was kept sealed in order to protect the safety of Tribunal staff, other UN personnel, and other agencies working in the field. JL/PIU/403-E, The Hague, 27 May 1999.

[803] JL/PIU/404-E, The Hague, 27 November 1999.

[804] Malcolm, *Kosovo,* p. xxvii.

[805] Malcolm asserts that 'Milošević's policy acted as the recruiting master for the KLA'; Malcolm, *Kosovo,* p. xxx.

[806] Aid agencies estimated that between 250,000 and 300,000 people were driven from their homes between April and September 1998. Malcolm, *Kosovo,* p. xxxii.

of repression throughout Kosovo'.[807] In September 1998, the discovery of the massacre of sixteen Albanians, including ten women, children, and old men, near the village of Obrinje provoked outrage and reaction. In October 1998 NATO authorized air strikes on Serb military targets unless Milošević undertook to comply with Security Council resolution 1199, of 23 September 1998, which demanded that Milošević call a ceasefire, withdraw all security forces, allow refugees to return, and start negotiations for self-rule for Kosovo.[808] The following day, 16 October, Holbrooke brokered an agreement with Milošević that provided for a political framework to deliver self-government for Kosovo, including free and fair elections, and for Organization for Security and Cooperation in Europe (OSCE) monitors to enter Kosovo in order to verify compliance.

There was a brief respite, but OSCE verifiers warned that Serb forces were preparing for a renewed offensive against the KLA, which had also been rearming and training since October. In January 1999, Milošević launched a full-scale attack. The discovery of the massacre of forty-five Albanian civilians at Račak spurred the international community into action once again.[809] The Contact Group summoned the Serbian and Albanian leaderships to a conference at Rambouillet on 6 February 1999.[810] The KLA grudgingly and conditionally agreed to the plan put forward by the Contact Group on 18 March, but the Serbian delegation remained opposed. Meanwhile, the build-up of Serbian military forces intensified. Finally, after the failure of a last-ditch attempt at negotiation by Holbrooke, on 20 March OSCE personnel were withdrawn from Kosovo, and on 24 March 1999 NATO launched a campaign of air strikes against strategic targets inside Yugoslavia. While NATO bombed, Serb military and police forces embarked on a massive and coordinated campaign of ethnic cleansing.[811]

As early as 9 March 1998, the Contact Group urged the Prosecutor to begin investigations in Kosovo. On 10 March the Prosecutor made the first statement of many regarding jurisdiction over Kosovo.[812] Her assertion of

[807] Statement by the Foreign Secretary, Robin Cook, in the House of Commons, London, 19 October 1998. http://www.fco.gov.uk/news/newstext.asp?1622 [20/10/98].

[808] S/RES/1199 (1998), 23 September 1998.

[809] See, for example, 'The West looks on while Recak [sic.] weeps', *Guardian,* 18 January 1999; 'Serbs intensify torture activities', *Guardian,* 1 February 1999.

[810] Statement issued by the Contact Group, London, Friday 29 January 1999. http://www.fco.gov.uk/news/newstext.asp?1955 [29/01/99].

[811] Malcolm, *Kosovo,* p. xxxviii.

[812] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/1998/737, 10 August 1998, at 284. See also: CC/PIO/302-E, 10 March 1998.

jurisdiction to investigate and prosecute alleged atrocities committed by both sides in Kosovo was confirmed in July 1998 in a communication to the Contact Group,[813] and again in November 1998:

> There has been protracted armed violence, between Yugoslav authorities and organized armed groups in Kosovo throughout most of the year. It is my position that an internal armed conflict has existed in Kosovo during 1998 and that the ICTY has jurisdiction over persons committing serious violations of international humanitarian law during that conflict.[814]

In March 1999, the prosecutor was criticized for not having brought any charges for crimes committed in Kosovo. A report in the *New York Times* alleges that the prosecutor was taking an overly cautious line.[815] However, investigations had been underway since Spring/Summer 1998, but the Government of the FRY consistently refused to recognize the authority of the prosecutor to investigate alleged crimes in Kosovo, and effectively stymied any attempts to do so. As discussed in Chapter 6, Belgrade refused to grant visas to the prosecutor and her team of investigators through the summer and autumn of 1998.[816] This was, as Arbour acknowledged, a 'very direct example of a Government seeking to determine, by a political decision, that the prosecutor of the Tribunal shall not investigate a particular matter.'[817] In October 1998, on hearing that the US envoy Richard Holbrooke had failed to obtain any concessions from Milošević, the prosecutor responded unequivocally: 'The jurisdiction of this Tribunal is not conditional upon President Milošević's consent, nor is it dependent on the outcome of any negotiations between him and anyone else.'[818]

[813] CC/PIU/329-E, 7 July 1998.

[814] CC/PIU/358-E, 4 November 1998.

[815] 'Crimes court not ready to punish Kosovo violence', *New York Times,* 31 March 1999.

[816] In support of her arguments, the Prosecutor cited Security Council resolutions 1160, 1199, and 1203. Resolution 1160 '*Urges* the Office of the Prosecutor of the International Tribunal…to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and *notes* that the authorities of the FRY have an obligation to co-operate with the Tribunal'. S/RES/1160 (1998), 31 March 1998. Resolution 1199 '*Calls upon* the authorities of the FRY, the leaders of the Kosovo Albanian community and all others concerned to co-operate fully with the Prosecutor'. S/RES/1199 (1998), 23 September 1998. Resolution 1203 calls for 'full co-operation with the International Tribunal…including compliance with its orders, requests for information and investigations.' S/RES/1203 (1998), 24 October 1998. The obligation was reiterated by the Contact Group in is statement on 29 January 1999, *Contact Group Conclusions on Kosovo: Statement Issued by the Contact Group, London, Friday 29 January 1999.* http://www.fco.gov.uk/news/newstext.asp?1955 [29/01/99].

[817] *Keynote Speech by Justice Louise Arbour,* The International Conference on War Crimes Trials, Belgrade, 7–8 November 1998. The transcript of the speech was sent in place of the Prosecutor. She had been refused visas for herself and several of her investigators to go on to Kosovo to resume on-site investigations, and allowed only single-entry visas for herself, three other members of the OTP, and two security officers for a seven-day period.

[818] CC/PIU/353-E, 15 October 1998.

In November 1998, the prosecutor was informed that she, along with the deputy prosecutor, two other members of OTP staff, and two security officers, would be granted seven-day entry visas for the FRY to attend a conference in Belgrade and meet with government officials, instead of visas for herself and ten investigators to enter the FRY to conduct investigations in Kosovo. The Ambassador of the FRY in The Hague stated: 'As you have already been informed, the Federal Republic of Yugoslavia does not accept any investigation of ICTY in Kosovo and Metohija generally, nor during your stay in the FRY.'[819] She declined to attend the conference and sent a paper to be read out on her behalf.

Days after the massacre at Račak, the prosecutor arrived at the Macedonian border demanding access to investigate. She was refused, on the basis that she did not have a visa, even though she was brandishing her UN laissez-passer. Weller argues that the dramatic footage of the prosecutor attempting and being refused entry into Kosovo to investigate the highly publicized Račak massacre in January 1999 'led to a climate making possible the more determined attitude of the Contact Group and NATO, leading to the summons of the parties to Rambouillet.'[820] Whether or not this is the case, Arbour recalls that at least 'Račak focused public attention on our work'.[821] The image was on the front page of the *New York Times*.

The President of the Tribunal issued a clear warning to Milošević in March 1999: 'I would also remind President Milošević and the Government of the Federal Republic of Yugoslavia that just eight months ago, the International Criminal Tribunal for Rwanda convicted the former Prime Minister of Rwanda of genocide.'[822] Milošević was indicted along with four senior members of his government on 24 May 1999. He was charged with crimes against humanity (murder, persecution, and deportation) and violations of the laws and customs of war (murder) committed by forces under his control in Kosovo, specifically the murder of 340 persons, identified in the Annex to the indictment. The indictment was filed on 22 May 1999 and confirmed by Judge David Hunt on 24 May 1999. The indictment and warrants of arrests were sealed in order to ensure the safety of personnel on the ground in Kosovo, and made public on 27 May 1999. The other four accused are Milan Milutinović, President of Serbia;

[819] CC/PIU/360-E, 5 November 1998.

[820] Marc Weller, *The Crisis in Kosovo 1989–99: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities,* International Documents and Analysis, vol. 1 (Cambridge: Documents & Analysis Publishing, 1999), 240.

[821] Off, *The Lion, the Fox and the Eagle,* 345.

[822] CC/PIU/392-E, 31 March 1999.

Nikola Sainović, Deputy Prime Minister of the FRY; Dragoljub Odjanić, Chief of Staff of the Yugoslav Army; and Vlajko Stojilković, Minister of Internal Affairs of Serbia.[823]

The Milošević indictment was a result of a convergence of political circumstances and satisfaction of legal criteria. The legal rationale was that the prosecutor simply had sufficient evidence to link them to the crimes that were being committed in Kosovo. Milošević was already under investigation, but there were huge gaps in the evidence relating to crimes committed in Croatia and in Bosnia. There was a wealth of evidence that crimes had been committed, but little to establish the chain of command or actual personal knowledge or involvement in the commission of crimes.[824] It was easier to establish this in Kosovo, since there was a clear chain of command. Arbour was reluctant to issue an indictment on anything other than firm evidence and on serious charges.[825] In addition, she wanted to ensure Milošević was charged with direct rather than indirect command responsibility—that is, he not only should have known and failed to prevent or punish, but he gave the orders.[826] The political aspect was that, on the one hand, NATO member states were falling over themselves to provide evidence and assist the Tribunal; but at the same time, there was ambivalence about actually indicting Milošević. There was a very real possiblity that Milošević might be offered a form of amnesty in return for peace.[827] The timing of the indictment forestalled this possibility. Arbour maintains that it was the former legal considerations that drove her decision, although she was aware of the political consequences; but others have suggested that in fact Arbour deliberately outwitted Western governments who were trying to forestall the indictment.[828]

Following the launch of *Operation Allied Force* on 24 March 1999, the OTP was able to capitalize on the coincidence of interests between the OTP and NATO Member States, who had some important material to hand over and were now more than willing. In April 1999, the United States was reporting that it had satellite images of many newly dug mass graves.[829] The *Daily Telegraph* reported that the SAS had compiled a dossier of execution sites and mass graves in Kosovo which was passed

[823] Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Vlajko Stojiljković "Kosovo", IT-99-37, 24 May 1999; JL/PIU/403-E, The Hague, 27 May 1999.

[824] 'Hi-tech spying aids war crime investigators', *Sunday Times,* 14 May 1999.

[825] It was not considered necessary that MiloŠević be charged with genocide, the gravest of the crimes before the court, but it was necessary for the charges to be 'meaty'. Interview with Louise Arbour, 23 January 2001.

[826] Off, *The Lion, the Fox and the Eagle,* 349.

[827] Mirko Klarin, 'Arbour's pre-emptive strike', *BCR,* 29 May 1999.

[828] *James Gow, The Serbian Project and its Adversaries: A Strategy of War Crimes* (London: Hurst & Co., 2003), 295.

[829] Malcolm, *Kosovo,* p. xxxviii.

to Cook, and some of it was made available to the Prosecutor.[830] The German government handed over crucial details of Operation Horseshoe, alleged to have been intercepted by US intelligence.[831] Arbour ensured that the public pledges to provide evidence to the Tribunal were not empty rhetoric, and took them up, travelling to Bonn, London, Washington, Paris, and Brussels. During these visits Arbour stressed three points. First, that now was the time to pick up the rest of the indictees at large in Bosnia, including Karadžić and Mladić, since it would have a sobering effect on the leadership in Belgrade. Second, hand over what you have been promising. Third, she reminded them that they were carrying out the bombing campaign under her jurisdiction.

Cook acknowledged the influential role that the United Kingdom among others played in providing information, including intelligence material, to the Tribunal.[832] Some of this was provided publicly, and the rest in confidence.[833] It could be argued that the provision of evidence is a way of influencing the policy of the prosecutor, thereby detracting from her independence and impartiality.[834] Goldstone: 'One must question whether the information now being offered wasn't available two, three, or four years ago.'[835] Cigar considered that 'The fact that NATO has indicated in public statements that it no longer views Milošević as the only interlocutor may … have made it easier for Chief Prosecutor Louise Arbour to decide to issue the indictment.'[836] A crucial element in respect of Kosovo, however, was independent of political circumstances, and that was that there was a much clearer and straightforward chain of command from the security forces committing atrocities and Milošević, as President of the FRY.

However, in spite of public statements and the provision of evidence, Arbour sensed ambivalence.[837] According to one source, she was fielding phone calls from Cook and Albright urging her not to indict Milošević at this time.[838] She ignored them, and the indictment was presented to Judge Hunt for confirmation on 24 May 1999. The indictment was sealed in order to allow time for interested parties to oppose its release if there were 'legitimate security concerns'. Arbour admits that this was a deliberate

[830] 'SAS gathers evidence of mass graves and execution sites', *Daily Telegraph,* 2 May 1999.

[831] 'Hi-tech spying aids war crime investigators', *Sunday Times,* 14 May 1999.

[832] Statement by the Foreign Secretary, Robin Cook, London, 27 May 1999. http://www.fco.gov.uk/news/newstext.asp?2482 [27/5/99].

[833] Confidential interview.

[834] Goldstone, 'One must question whether the information now being offered wasn't available two, three, or four years ago.' Cited in 'Crimes Court Not Ready to Punish Kosovo Violence', *New York Times,* 31 March 1999. http://www.nytimes.com/library/world/europe [05/12/99].

[835] Ibid.

[836] 'Comment: a watershed in Balkan policy', *BCR,* 29 May 1999.

[837] Off, *The Lion, the Fox and the Eagle,* 350.

[838] Confidential interview.

decision to present the international community with a fait accompli.[839] Even if it had to remain sealed, there was no ignoring it, and no going back.

In terms of its impact on the political arena, the indictment was a clear signal to Milošević that he was no longer considered a 'necessary evil' by the international community. The indictment was viewed as 'less an instrument of justice than a tailpiece to a political process'.[840] This assessment misses the point that the Tribunal is an instrument of justice deployed for a political purpose; and, therefore, it is entirely appropriate that it should exert its judicial powers in tandem with the political process, if the political process has the same objective: the restoration and maintenance of international peace and security.

The indictment did not prevent NATO negotiating with Milošević. According to Robin Cook: 'NATO must have channels to the authority in Belgrade that has the power to implement its objectives. So long as Milošević retains that power in Belgrade it would be irresponsible of us not to talk to him…'[841] Albright: 'I think that one can separate his alleged actions form the necessity at some stage that one might have to speak to him. "Negotiate" is a different word.'[842] In April 1999, Arbour divided the question into political, ethical, and legal dimensions:

> I have to say that I don't know of any legal impediment to talks of any kind. There may be political considerations as to … the value of a settlement reached in these kind of circumstances. But if the question is one of ethics, frankly I'm not sure that the existence or non-existence of an indictment is particularly significant. I believe that those who may have ethical reservations are probably in possession of information now that could cause them to reflect on whether they want to embark on that either before or after an indictment'.[843]

It was the end of the line for Milošević. As such, it was 'a watershed in the international approach to the Yugoslav wars'.[844] Arbour forced NATO's hand on this by issuing the indictment, with a close eye on political developments, not so much to influence politics but to pre-empt the interference of politics in the judicial function. The indictment 'struck Milošević like lightning'.[845] It was a major factor forcing his decision to

[839] Off, *The Lion, the Fox and the Eagle,* 351.

[840] 'War crime can pay', *Guardian,* 15 June 1999.

[841] Statement by the Foreign Secretary, Robin Cook, London, 27 May 1999. http://www.fco.gov.uk/news/newstext.asp?2482 [27/5/99].

[842] 'The prosecutor takes on Kosovo', *Tribunal Update,* No. 123, 26–30 April 1999.

[843] Ibid.

[844] Norman Cigar, 'Comment: A Watershed in Balkan Policy', *BCR,* 29 May 1999.

[845] 'Arbour, MiloŠević and "Yesterday's Men"', *Tribunal Update,* No. 128, 31 May to 5 June 1999.

capitulate to NATO demands in June 1999, believing that he could negotiate his way out; but the way was blocked, because once issued, the indictment could not be withdrawn. According to Robertson, the indictment was too little, too late: 'Had he been arrested at peace talks over the previous seven years and sent to the Hague for trial, the language of his indictment might have spoken more convincingly to his people than NATO explosions.'[846] Certainly, the indictment was a factor not only in preventing the West from continuing to court Milošević as the guarantor of peace, albeit an uneasy one, in the Balkans, but also in persuading the majority of Serbs that it was time for him to go.

The Kosovo investigation and the indictment of Milošević in the middle of the NATO bombing campaign fuelled suspicion that the court was being manipulated and used for propaganda purposes by NATO. One commentator said that 'The timing of the West's new found commitment to war crimes investigations suggests a selective approach to international justice. It seems the West is only promoting justice when it suits its political needs.'[847] The allegation that Arbour was no more than a 'NATO pawn' was fuelled by the fact that the Tribunal declined to launch a formal investigation into alleged NATO war crimes committed during the bombing campaign.[848] Although both questions were highly politically charged, neither represented the 'politicization' of the Tribunal. The prosecutor benefited from the convergence of interests between NATO in publicizing criminal activity and the ICTY in prosecuting such activity. However, the timing of the Milošević indictment, far from being dictated by NATO, was issued in spite of attempts to exert influence on the prosecutor not to do so at that moment. The decision not to launch an investigation into alleged NATO crimes was purely because it was deemed that no serious violations had been committed by NATO in the course of the bombing campaign, as discussed below.

INVESTIGATING NATO AND THE 'CARLA FACTOR'

The handling of the question of whether to launch investigations into alleged violations of international humanitarian law perpetrated by NATO during the bombing campaign against Serbia by Arbour and her successor, Madame Carla Del Ponte, revealed markedly different approaches.

[846] Robertson, G., *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 1999), 299.

[847] Fred Abrahams, 'Comment: investigating war crimes', *BCR,* 18 June 1999.

[848] See, for example, Fatić, A., *Reconciliation Via the War Crimes Tribunal* (Aldershot: Ashgate, 2000).

Early on, Arbour announced that there was no formal inquiry underway.[849] On 13 May 1999 she stated: 'I accept the assurances given by NATO leaders that they intend to conduct their operations in the FRY in full compliance with international humanitarian law. I have reminded many of them, when the occasion presented itself, of their obligation to conduct fair and open-minded investigations of any possible deviance from that policy'.[850] Arbour pointed out that NATO had knowingly and voluntarily submitted to the jurisdiction of the ICTY, and in doing so had 'affirmed their confidence in an international forum that, even in its short history, has demonstrated its competence, its integrity, and its transparency'.[851]

Subsequently, however, and in response to pressure exerted by various NGOs, groups of international lawyers, and Russia, Arbour established a committee to assess the allegations and accompanying material that had been provided to her, but the existence of this committee was kept confidential by Arbour.[852] The material reviewed by the committee included the dossier submitted on 19 November 1999 by Michael Mandel, Professor of Law at York University, and Toronto lawyer, David Jacobs. This consisted of documents compiled by people from Greece, France, the United Kingdom, and Norway, as well as Canada, with a view to initiating action against NATO leaders. They also reviewed public documents made available by NATO, the US Department of Defence, and the British Ministry of Defence; the response to a letter addressed to NATO by the OTP containing a number of questions; documents filed by the FRY before the ICJ and a large number of other FRY documents, including *NATO Crimes in Yugoslavia (White Book)*; documents submitted by the Russian Parliamentary Commission; two studies by a German, Ekehard Wenz, concerning the bombing of a train at Grdelica Gorge and the bombing of the Djakovica Refugee convoy; and Human Rights Watch, Amnesty, and UNEP/UNCHS reports.[853]

The committee submitted its report on 13 June 2000, which concluded that an in-depth investigation relating to the bombing campaign as a

[849] PR/PIS/459-E, 30 December 1999.

[850] JL/PIU/401-E, 13 May 1999.

[851] Ibid.

[852] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, at 6. http://www.un.org/icty/pressreal/nato061300.htm [05/09/00].

[853] *Ticking Time Bombs: NATO's Use of Cluster Munitions in Yugoslavia,* vol. 11, no. 6(D), June 1999; and *Civilian Deaths in the NATO Air Campaign,* vol. 12, no. 1(D), February 2000; Amnesty International, 'NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force', EUR 70/018/2000, 6 June 2000; *The Kosovo Conflict: Consequences for the Environment and Human Settlements* (Switzerland: UNEP, 1999).

whole, or to specific incidents, was not justified: 'In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.'[854]

The committee applied the same threshold test of 'credible evidence' as had been applied in relation to the investigation of alleged crimes being committed by Yugoslav forces in Kosovo. The basis for the allegations was the catalogue of NATO 'blunders' caused either by collateral damage or by deliberate targeting. NATO was also accused of causing widespread environmental damage following its attack on the Novi Sad oil refinery, which left 'thick clouds of black smoke all over parts of the city' and, according to Tanjug, 'two large mushroom clouds'.[855] The Serbian State news agency, Tanjug, also cited a number of cultural and historical buildings that had been attacked.[856]

The question of legality depends on whether the extent of damage that resulted from *Operation Allied Force,* either as a result of stray bombs or mistakes or as a result of deliberate targeting decisions, was justified by military necessity. For example, the bridge at Luzane, twelve miles north of Pristina, was a key target lying on a north–south supply route used by Serb forces.[857] The passenger train was not deliberately targeted; it was an accident that the electro-optically guided bomb homed in on the bridge, which was a target, at the exact point at which the train began to cross, and the pilot did not see it until a second too late.[858] The committee's report confirms that the fact that civilians were killed does not in itself mean that crimes were committed.[859] After this incident, and the Djakovica incident, General Short (Combined Forces Air Component Commander) issued specific guidance that if military vehicles were intermingled with civilian vehicles, they were not to be attacked.[860] The problem was that NATO were operating at a high altitude so it was difficult to see properly. This is not illegal; Reisman points out that 'No rule requires a combatant otherwise in compliance with the law of armed conflict to

[854] Final Report to the Prosecutor, 13 June 2000, at 90.

[855] 'History damaged by bombs', 25 May 1999, http://news.bbc.co.uk/hi/english/world/europe/newsid%5F352000/352743.stm [05/10/99].

[856] Ibid.

[857] 'NATO regret for bus deaths', 2 May 1999, http://news.bbc.co.uk/hi/english/world/europe/newsid_333000/333651.stm [05/10/99].

[858] Final Report to the Prosecutor, 13 June 2000, at 59.

[859] Ibid., at 51.

[860] Press Conference on the Kosovo Strike Assessment by General Wesley Clark, SACEUR and Brigadier General John Corley, Chief, Kosovo Mission Effectiveness Assessment Team, NATO HQ, Brussels, 16 September 1999.

choose a course of conduct that is more, rather than less, dangerous to itself';[861] even if it may be amoral, and politically unpalatable.[862]

As for the media, the committee found that it was debatable whether it is a legitimate target. If, as in Rwanda, the media is used to incite crimes, it is a legitimate target; if it is merely disseminating propaganda to generate support for the war effort, it is not.[863] In the case of the RTS in Belgrade, the committee considered that the attack must be viewed as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were 'essential to Milošević's ability to direct and control the repressive activities of his army and special police forces in Kosovo', and which comprised a 'key element in the Yugoslav air-defence network.'[864]

In contrast to Arbour's refusal to confirm or deny an investigation, Del Ponte issued a very public statement on 30 December 1999 which stated categorically that NATO was not under investigation.[865] In an interview with the *Sunday Times,* she stated that this was merely because it was not a priority when she had more serious allegations of genocide and mass graves to investigate.[866] It was interpreted in a different way by Jesse Helms. In a speech in the Security Council on 20 January 2000, Helms alleged that the prosecutor had 'back-pedalled' from her original decision to investigate when news of her report had 'leaked', realizing that any attempt to indict NATO commanders would be the 'death-knell' of the ICC.[867] The impact of the decision on the debate surrounding the appropriate powers and authority of the prosecutor of the ICC was important, although for different reasons than those elaborated by Helms.

Adam Roberts points out the irony of the situation where the United States, having devoted considerable effort in 1998–9 to opposing certain provisions of the 1998 Rome Statute on the grounds that the prosecutor of

[861] Reisman, W. M., 'NATO's Kosovo Intervention', *American Journal of International Law,* 93 (1999), 861.

[862] According to Falk, 'the humanitarian rationale is…sustained or undermined by the extent to which the tactics of warfare exhibit sensitivity to civilian harm and the degree to which the interveners avoid unduly shifting the risks of war to the supposed beneficiaries of the action so as to avoid harm to themselves.' Richard A. Falk, 'Kosovo, World Order and the Future of International Law', *American Journal of International Law,* 93 (1999), 856.

[863] Final Report to the Prosecutor, 13 June 2000, at 47.

[864] NATO Press Release, 1 May 1999, cited in Final Report to the Prosecutor, 13 June 2000, at 78.

[865] PR/PIS/459-E, The Hague, 30 December 1999.

[866] 'NATO not under OTP investigation', *Tribunal Update,* No. 158, 27–31 December 1999.

[867] Cited in *UN Law Reports,* vol. 34, no. 6, 1 February 2000.

such a court might have the power to scrutinize American military actions, proceeded to go to war in one of the only areas of the world where an international prosecutor does have jurisdiction. Helms is wrong to state that 'no U.N. institution—not the Security Council, not the Yugoslav tribunal, not the future ICC—is competent to judge the foreign policy and national security decisions of the United States of America.[868] In fact, as Roberts points out, 'The Kosovo campaign may yet teach NATO member states that they can live with the existence of an international criminal tribunal capable of considering their actions as well as those of their adversaries.'[869] The decision of the Prosecutor of the ICTY to publicly set aside unsubstantiated allegations could bolster the case for the ICC against its opponents, particularly in the United States, whose opposition is based on fear of politically motivated and false allegations against its own military or civilian personnel. The only protection against this is a strong, credible, and impartial prosecutor.

The report itself stressed the legal reasons for the decision not to launch any prosecutions. It was not necessary to go into such detail in order to justify the decision. A convincing interpretation was offered by Goldstone, who said that the decision would have been more effectively justified with reference to the political mandate of the Tribunal, as Del Ponte herself did in December 1999.[870] The mandate required that the OTP concentrate on serious violations of international humanitarian law, and if indeed NATO had committed war crimes, they were certainly not anywhere near the gravity and extent and of the crimes committed by Serb security forces and paramilitaries in Kosovo.[871] The investigation was not warranted on the basis that it did not fall within the mandate, even if it fell within the jurisdiction of the Tribunal.

The decision not to launch a full-scale investigation prompted allegations that the Tribunal was pursuing a form of victor's justice. Cassese publicly criticized the decision not to investigate, on the basis that launching investigations would have given the Tribunal more credibility in the eyes of the Serbs.[872] It was also suggested that the decision not to investigate NATO was based on political and practical considerations, rather than purely legal ones. Clearly, investigating and prosecuting individual

[868] Ibid.

[869] Adam Roberts, 'NATO's Humanitarian War over Kosovo', *Survival,* 41/3 (1999), 116. See also my comments in *UN Law Reports,* vol. 34, no. 6, 1 February 2000.

[870] Note 147, earlier.

[871] Interview with Justice Goldstone, 25 February 2001.

[872] Antonio Cassese, *International Criminal Justice Mechanism: Are They Really so Needed in the Present World Community?* Lecture organised by the Centre for the Study of Human Rights, London School of Economics, 13 November 2000.

citizens of NATO countries for alleged crimes committed during the war over Kosovo would have incurred hostility on the part of the governments responsible. This would have been extremely damaging for the ability of the prosecutor to conduct the rest of its investigations and prosecutions. As discussed in Chapters 6 and 7, the ICTY is reliant on those same states for the safety and security of its investigators on the ground in Bosnia and Kosovo, to assist in gaining access to evidence and witnesses, and in the enforcement of its orders, notably in obtaining custody of accused. Without this cooperation, the Tribunal would cease to be able to function. If issuing of a binding order to SFOR in the Todorović case was an example of the Tribunal shooting itself in the foot, the issuing of an indictment against Western political leaders or NATO personnel would be the Prosecutor shooting itself in the head.

The damage in the Tribunal's relationship with NATO as a result of the inquiry was compounded by the appointment of Madame Carla Del Ponte as Chief Prosecutor on 12 August 1999; she took up the post on 15 September 1999. She was formerly (from 1994) Swiss Attorney-General. Prior to that, she worked as an investigating magistrate and later became a public prosecutor working with the office of the Lugano District Attorney. Her ICTY biography states that, since 1981, she has been involved in various high profile cases, including organized crime, financial and economic crimes, terrorism, drug trafficking, money laundering, and illegal trafficking in arms, as well as international legal assistance.[873] Although in some quarters she was warmly welcomed—she was lauded in the press for her tough and uncompromising stance—in others she was seen as a 'disaster', even within her own office.[874]

Within the OTP, there was a great deal of concern about her managerial and prosecutorial style. Unlike Goldstone and Arbour, who had experience of common law practice prior to their tenure at the ICTY, Del Ponte was from a civil law background. This should not have been an impediment, except Del Ponte perceived some procedural questions as resolvable through discussion of whether to take the common or civil law approach, whereas ICTY law is a unique hybrid amalgamation of a variety of different legal systems, both common and civil law. A second source of difficulty was that English is not her first or even her second language. In theory, this should not be an obstacle, since the Tribunal operates in

[873] JL/P.I.S./429-E, The Hague, 12 August 1999.

[874] See, for example, 'Carla's court', *G2,* 1 May 2000; 'Avenging angel', *Observer,* 4 March 2001.

both English and French, but in reality the OTP operated for the most part in English, even under Arbour who was French-Canadian.

The other major criticism was more serious in terms of the credibility of the Tribunal and prospects for future state cooperation. Del Ponte was not a political animal, which would not in itself have been too disastrous, except that she was sufficiently undiplomatic to have been labelled 'crass'.[875] She was proud of the fact that she has 'never served anyone or anything but the law'.[876] A lack of diplomatic and political acumen is not an impediment to a prosecutor, or indeed a judge in a domestic legal system, but, as discussed above, it was a crucial attribute for the Prosecutor of the ICTY.

The basis for this criticism is that she did not display the same sense of judgement and degree of integrity as Arbour. For the United Kingdom, as with other governments, giving sensitive information to the Tribunal was difficult, and although the provisions in the Statute and Rules of Procedural Evidence (RPE) are strong, they are not enough. It was not only the difficulty in terms of national security interests; the personal safety of potential witnesses was also at stake.[877] In the end, it was the fact that they had Arbour's word that swung the balance.[878] Government officials did not have the same confidence in Del Ponte, especially in view of the fact that she had been known to reveal sensitive information relating to the list of sealed indictments.[879]

Whilst Arbour had a reputation for 'feistiness and robust speaking',[880] Del Ponte's style is bombastic, which might have a devastating effect on the Tribunal. In Serbia she is referred to as 'the new Gestapo'.[881] She took sides with Croatia on the issue of the FRY's lack of cooperation with the Tribunal. In November 2000, she stated that 'Croatia is quite right to point to unequal treatment.'[882] This fuelled perceptions of the Tribunal as inherently anti-Serb. In January 2000, she travelled to Brussels to exert pressure on NATO to 'make sure they give down instructions to be more pro-active

875 Confidential interview.

876 'Avenging angel', *Observer,* 4 March 2001.

877 The UK government were engaged in negotiations with the OTP about the testimony of an FCO official if the case came to trial. The official was the recipient of numerous death threats because of his knowledge. Confidential interview.

878 Confidential interview.

879 The former Chief of Investigations, John Ralston, who had a strong working relationship with SFOR personnel, crucial for successful operations to detain accused, left the Tribunal in June 2001.

880 'Chief war crimes prosecutor quits at a crucial time', *Guardian,* 12 June 1999.

881 'Avenging angel', *Observer,* 4 March 2001.

882 'Croatia "Right" to complain of unequal treatment—Chief Prosecutor backs Zagreb's criticism of Western leniency towards Belgrade over war crimes', *Tribunal Update,* No. 200, 26 November to 2 December 2000.

for the arrest of fugitives'.[883] Where discretion was required, she revealed all. After her visit to Montenegro, she made a public statement to the press that she had obtained a commitment from the Government of Montenegro that they would have Karadžić arrested should he ever set foot in Montenegro. The consequence of this was that he never would. As discussed in the previous chapter, the rate of detentions carried out by SFOR in Bosnia dropped off after Del Ponte took up office.[884] This was damaging both to the credibility of the Tribunal, since detentions were highly visible symbols of success, and to its ability to fulfil its mandate, since it could only proceed against those in custody.

CONCLUSION

As far as the exercise of prosecutorial discretion is concerned, there were legal and political conditions: The legal condition was the requirement of a prima facie case, and in this sense the prosecutor was accountable in court. Politically, he or she had to take account of the external mandate. This impacted in two main ways: the contribution to international peace and security and the perception of the equal application of the law, which did not mean equal numbers of each ethnic group; rather, it required that persons be prosecuted for the same gravity of offences regardless of ethnic group or nationality. It was the gravity that matters, because of the mandate.

The Goldstone era was characterized by very public indictments and Rule 61 proceedings because of the need to raise the profile of the Tribunal and be seen to be operating and transforming from a 'nebulous idea' to a living reality. Arbour deployed the legal force of the Tribunal to manipulate the political context in which it operated in order to ensure that it was a fully functioning criminal court by the time she departed, able to respond in real time to events in Kosovo. The move from public to sealed indictments was a crucial element of this. The Del Ponte era was marked by a more public and open approach to discussing ongoing investigations. In March 2001, Del Ponte announced that an indictment had been issued in relation to crimes committed during the attack on the city and surrounding areas of Dubrovnik in 1991.[885] Although the names of the indictees remained sealed, it is inconceivable that they do not know who

[883] 'War-crimes prosecutor raises heat', *Christian Science Monitor,* 19 January 2000. http://www.csmonitor.com/durable/2000/01/19/pIs3.htm [19/01/00].

[884] See Chapter 7.

[885] FH/PIS/569-E, The Hague, 1 March 2001.

they are. The rationale for revealing the existence of the indictment is clear, but misplaced. It was a significant departure from the highly secretive era of Arbour's tenure, and perhaps signalled a return to the 'symbolic gestures' of the Goldstone era.

It was stated at the beginning of this chapter that it was vital to be able to maintain good working relations in order to ensure state cooperation, while at the same time holding true to impartiality and independence in the performance of the judicial role. This required a degree of political acumen not usually called for in a legal actor such as a prosecutor or judge. It does not require the actor in question to become involved in external political considerations, but to be able to engage in politics and diplomacy as an equal and independent actor.

For every one of the three incumbents of the post, engagement in politics and diplomacy was in order to influence politics in favour of justice, and not a measure of the interference of politics in the administration of justice. Although they had different approaches, the performance of political and diplomatic functions by the respective prosecutors was always for the purpose of facilitating the judicial work of the Tribunal. The difference was in the ability of Goldstone and Arbour to engage in politics and diplomacy in order to further the interests of the Tribunal, as compared to Del Ponte who did not display the same degree of political acumen. There was a delicate balance to be struck so that engaging in politics and diplomacy extracted the maximum advantage for the Tribunal, whilst at the same time ensuring that it did not damage the credibility of the Tribunal as a judicial institution. Whilst it was in itself apolitical as far as its internal mandate is concerned, it was a tool of politics and operated in a highly politicized context. The key to success was in the performance of the prosecutor in maintaining this balancing act.

9 Conclusion

The Tribunal was the most obvious manifestation of an explicit link between politics and law by virtue of its method of creation as a mechanism for international peace and security, and because of the nature of its operation. Normally, in the domestic arena, judicial bodies are not only be apolitical in and of themselves, that is, established by legal process and solely concerned with the application of law, but in normal circumstances they stand entirely apart from the political arena. The crucial difference between international law and politics and domestic law and politics is that there is no formal separation between law and politics in international society, particularly in the area of international peace and security, where the Security Council's powers and responsibilities derive from law, and the exercise of those powers creates law in the form of binding obligations. The activation of those powers is, however, a political determination. In the international arena, law and politics are inextricably intertwined. This was reflected in the establishment of the Tribunal and in its operation.

The question posed in the introduction to this book was whether the 'politicization' of the function of the Tribunal undermined its impartial judicial status?[886] The answer to this is that, first, the dependency of the Tribunal on external bodies and the close linkage between the Tribunal and the political process for the restoration of peace did not amount to 'politicization'. The Tribunal had a political function, as a mechanism for the restoration and maintenance of international peace and security, and engaged in politics and diplomacy in order to function, but 'politicization' is the manipulation of the judicial process by politics, not the manipulation of politics to serve the judicial process. It was imperative that the Tribunal, as a judicial institution, delivered justice in isolation from politics. But in order to deliver justice it had to engage in politics.

On a conceptual level, it is possible to separate the judicial and the political function. Whilst they are intertwined, law and politics are not

[886] Hazel Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', *International and Comparative Law Quarterly,* 46 (1997), 434–42. See Chapter 1.

merged: there is a boundary, which in the Tribunal existed at the doorway to the courtroom. In practice, as the foregoing chapters on the process of establishment, jurisdiction, procedure, State cooperation, and obtaining custody of accused have shown, an international tribunal such as the ICTY cannot stand apart from politics. In the exercise of its judicial function, however, the Tribunal had to be apolitical—that is, not susceptible to external political influence. There was a delicate balancing act that had to be performed at the nexus of international law and international politics. The key to this, as discussed in Chapter 8, was in the performance of the prosecutor.

The establishment of an ad hoc Tribunal for the former Yugoslavia was the result of a unique combination of legal, political, and diplomatic circumstances, as discussed in Chapter 2. It was the most obvious manifestation of the convergence of two distinct trends: the reinterpretation by the Security Council of that which constitutes a threat to international peace and security; and the development of international humanitarian and international criminal law, so that in 1993 it was 'impressively codified, well understood, agreed upon, and enforceable'.[887] At the political–diplomatic level, the Tribunal was the product of systemic changes in international relations following the end of the cold war, and the nature of the involvement of the international community in the Yugoslav War. The 'missing link' was the absence of a competent international institution. The Tribunal, as a Chapter VII mechanism for the restoration and maintenance of peace, represented the convergence of Security Council powers and responsibility for international peace and security with enforcement of international humanitarian law—a convergence of law and politics in the body of the Tribunal, and an explicit recognition of the nexus of peace and justice.

The establishment of the Tribunal was widely perceived to be no more than a fig-leaf to cover the failure of the international community to act to prevent or halt the atrocities taking place in former Yugoslavia. There was a kernel of truth in this, but the decision was motivated by a more complex set of circumstances, as discussed in Chapter 2. The crucial point is that the international community has never before reached for such a fig-leaf, or with such dramatic consequences. The establishment of ad hoc tribunals for the former Yugoslavia and Rwanda,[888] the adoption of the Rome

[887] Madeleine Albright, US Ambassador to the United Nations. S/PV. 3175 (1993), 22 February 1993.

[888] The International Criminal Tribunal for Rwanda was established by the Security Council in November 1994. S/RES/955 (1994), 9 November 1994.

Statute of the ICC in July 1998,[889] the arrest of General Augusto Pinochet in London in October 1998,[890] and the establishment of ad hoc tribunals in Cambodia, Sierra Leone, and East Timor[891] all pointed to an emerging norm of international justice. All were forms of 'international judicial intervention', the key to which is the relationship between the political mandate and the judicial function.[892] The Tribunal was established as a tool of politics, but it was a judicial not a political tool. As such, it developed a momentum of its own, so that it mattered less what the precise motives for its establishment were, and success depended on the Tribunal's ability to independently manipulate the political context in which it operated in order to fulfil its judicial mandate.

The process of establishing an international criminal court was much more complex and logistically more difficult than the speedy adoption of Resolution 827 implied. The fact that the Tribunal was created in a 'flurry of activity', and while the conflict was ongoing, created tremendous practical, logistic, financial, and political hurdles that had to be overcome in order to transform the Tribunal from a 'nebulous idea' of the Security Council to a living reality. The method of establishment had certain core implications for jurisdiction and procedure. As an ad hoc tribunal, it had a limited and specific mandate, and its competence was restricted accordingly in terms of subject matter and temporal and territorial jurisdiction. Also, because of its political mandate, it was crucial to ensure that that the Tribunal should apply only rules of international humanitarian law that are 'beyond any doubt part of customary law', which meant that the Statute was more conservative than was necessary.

[889] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[890] One of the most striking examples of the renewed emphasis on accountability was the arrest of General Augusto Pinochet when he arrived in London for medical treatment in October 1998. For discussion of the legal and political issues surrounding the arrest and extradition hearings, see Hawthorn, G., 'Pinochet: the Politics', *International Affairs,* 75/2 (1999), 253–8; and Marc Weller, 'On the Hazards of Foreign Travel for Dictators and Other International Criminals', *International Affairs,* 75/3 (1999), 599–617.

[891] Ad hoc tribunals were created in Cambodia and Sierra Leone. An agreement was reached between the UN and the Cambodian government in July 2000 to put Khmer Rouge leaders on trial in a Cambodian court with the participation of international judges and prosecutors. With respect to Sierra Leone, members of the Economic Community of West African States (ECOWAS) backed President Kabbah's request to the Security Council to create a tribunal similar to the one being created for Cambodia, with a mix of local and foreign prosecutors and judges.

[892] Kerr, R., 'International Judicial Intervention: the International Criminal Tribunal for the Former Yugoslavia', *International Relations,* XV (2000), 17–26.

The political impact of legal decisions on jurisdiction was twofold. Locally, decisions handed down by the court were intended to have a restorative impact. Locally and internationally, the question of whether or not it was an international armed conflict, and whether crimes were part of a widespread and systematic plan, was significant in political as well as legal terms. Politically, this was so because it assigned responsibility. Legally, it was relevant in order to clarify and develop the law. The reason that the prosecution engaged in lengthy and complex legal arguments in order to establish jurisdiction for grave breaches, crimes against humanity, and genocide was that the ideology of the Office of the Prosecutor under Justice Richard Goldstone as chief prosecutor was informed by a desire to go beyond the individual cases and to further codify and develop international humanitarian law. This ideology was shared by the judges. This might have undermined the ability of the Tribunal to deliver justice fairly and expeditiously, because the difficulties in establishing jurisdiction led to extremely lengthy and complex trials, but this does not amount to politicization. Rather, it was excessive legalization. There had to be a trade-off between consolidating international humanitarian law and the rights of the accused, but both imperatives were legal, not political.

In terms of procedure also, there was a need for 'reasonable judicial flexibility', in order to strike the correct balance between competing imperatives of politics and justice.[893] On the one hand, there was a legal imperative for judicial propriety, which coincided with the political imperative that 'justice must be seen to be done'. This consideration was paramount because it served the external political mandate of the Tribunal as well as its internal mandate, which was to deliver justice. Yet, legal and political imperatives were not always coincidental. There was a set of balancing acts that had to be successfully juggled by the Tribunal: the fair, impartial, and expeditious administration of justice set against the sheer volume of material and complexity of cases; the rights of the accused versus the rights of victims and witnesses; and the international interest in prosecution. To make things more difficult, the Tribunal did not have the luxury of time to develop rules of procedure and evidence; as Judge Dechênes pointed out, the Tribunal was 'navigating uncharted waters'.[894]

[893] Separate Opinion of Judge Shahabuddeen, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor* v. *Aleksovski,* IT-95-14/1, 2 July 1998, 4.

[894] Jules Dechênes, 'Toward International Criminal Justice', in Roger S. Clark and Madeleine Sann (eds.), *A Critical Study of the International Tribunal for the Former Yugoslavia, Criminal Law Forum,* 5/2–3 (1994), 269.

The need for State cooperation imposed an additional burden on the Prosecutor and President of the Tribunal to play a diplomatic and political role, as well as a judicial one. The particular status of the Tribunal as an ad hoc international justice mechanism meant that it must interact with the political context in which it operated in order to function internally. Although it had an investigative and a prosecutorial arm to carry out investigations and litigation, it lacked a police force to carry out arrests and had to ask for outside assistance to provide security and logistical support for investigators, as well as provide access to evidence and witnesses. The obligation to cooperate and assist the Tribunal was derived directly from the UN Charter, but in practice cooperation worked on the basis of voluntary compliance, not threat of coercion. The legal framework was important, but, as stated in Chapter 6, enforcement was a problem of politics rather than of law.[895] Where there was a reciprocal interest, cooperation worked very well. Equally, a reciprocal interest was established through cooperation, because it meant that agencies had a stake in the success or failure of the Tribunal. Ultimately, the interests of justice and the interests of States in restoring and maintaining peace coincided, since the mandate of the Tribunal was the restoration and maintenance of international peace and security. The key for the Tribunal was to persuade States of this.

The turning point was in June–July 1997, when the first arrests by international forces took place in the territory of the former Yugoslavia. The practical impact of this was enormous, not only because the Tribunal could operate as a fully functioning criminal court, but also because it provided an opportunity to remove troublesome individuals from the political process in Bosnia. It was also highly symbolic. Pragmatically, the effect of indictment and prosecution, if successful, was to remove perpetrators. This was crucial, as it was difficult to envisage a stable and lasting peace built on the assurances of those that planned and prosecuted the war, and were responsible for the formulation and implementation of the strategy of ethnic cleansing. On this basis, it was politically unworkable not to prosecute.[896] The diplomatic engagement necessary to secure this assistance was by its nature highly politicized.

Regardless of the legal framework, the ICTY demonstrated that success or failure of such an enterprise was ultimately dependent on political will. The law cannot be enforced in isolation from politics in any setting, but

[895] Cited in Morris, V., and Scharf, M. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis,* vol. I (New York: Transnational Publishers, 1996), 336. See Chapter 1.

[896] Zoran Pajić, 'Peace Through Justice', *Tribunal,* No. 2 (January/February 2000), 1.

especially in the international setting. The establishment of the Tribunal was the result of a political decision to use law for the pursuit of politics. That decision was informed by a certain ethical bias. The same ethical bias led to the development of the law in the first place. The crucial point is that, with the ICTY, international criminal justice was both politically desirable and diplomatically viable. The consequence might be, therefore, that this model of ad hoc international judicial intervention is the 'shiny new hammer' for the international community to swing, and not the International Criminal Court (ICC), except where the ICC is activated by resolution of the Security Council. The innovative use of Chapter VII fulfiled the role of enforcement much more effectively than an uncertain and perhaps unwieldy permanent international court. Contrary to the expectations of many, the ICC has now come into existence. Eighteen judges were sworn in during a ceremony in the Dutch parliament on 11 March 2003. Yet the United States, China, Russia, and India remain opposed and neither Iraq nor Israel have signed up. In addition, Washington continues to undermine the court by making bilateral agreements to guarantee immunity for American personnel. However, the twin contribution of the ICC, if it is effective, will be as a deterrent on the one hand and an impetus to national courts to pursue alleged criminals on the other. This view of the measure of effectiveness is shared by Bruno Cathala, the French judge who has been overseeing the ICC since it came into existence last summer: 'We are not trying to create a judicial empire here; quite the opposite. Paradoxically, one measure of our success will be not doing too much'.[897]

We have seen that international criminal justice is inherently political and selective because of the nature of international society. Crucially, however, this does not mean that the criminal justice process itself is politicized. The key to the Tribunal's success as a judicial body was in maintaining a delicate balancing act so that, while politics permeated every aspect of the Tribunal's work, it did not corrupt the judicial function, and this is the lesson for any future endeavours of this kind, whether in the ICC or in other ad hoc institutions. Whilst it was apolitical as far as the internal mandate was concerned, it was a tool of politics and operated in a highly politicized context. This balancing act was manifest in the role and function of the chief prosecutor. The performance of the prosecutor was central to the success of the Tribunal, and will be to any international court. The key to the success of the Tribunal thus far was in the ability of the incumbents of this post to engage in politics and diplomacy in order

[897] 'International Court Comes to Life', *Guardian,* 11 March 2003.

to enhance the credibility and effectiveness of the Tribunal, whilst at the same time ensuring that it did not impinge on the judicial function. When Del Ponte took over in September 1999, the Tribunal entered a new and different chapter of its history. The transfer of Milošević in June 2001 was a significant indicator of success for the Tribunal, but there was a degree of concern that, while there was no danger of politicization, because Del Ponte guarded her independence fiercely, her lack of political and diplomatic finesse was an impediment to securing the necessary cooperation for the exercise of the judicial function.

This study examined the establishment and operation of the Tribunal up to and including Milošević's transfer to The Hague on 29 June 2001. However, it is worth noting that the trial itself has raised some questions about possible politicization. At his initial appearance before the Tribunal, on 3 July 2001, Milošević's set the tone for the rest of the proceedings: 'I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ'.[898] When asked whether he'd like the indictment read out, Milošević retorted, 'That's your problem', and went on to allege that 'This trial's aim is to produce false justification for war crimes committed by NATO in Yugoslavia'.[899]

Milošević's opening gambit was to challenge the legal basis for the Tribunal itself; he alleged that

1. the International Tribunal was an illegal entity because the Security Council lacked the power to establish it;
2. the Prosecutor's decision to issue an indictment against him in the first place was not independent of the instructions of any government, any institution, or any person;
3. the International Tribunal was either incapable of providing him with a fair trial or of protection of his fundamental human rights;
4. the ban on any communication between the accused and the media violates his right to privacy and his freedom of expression; and
5. his arrest and transfer was unlawful because the Tribunal sent the arrest warrants to the authorities of the Federal Republic of Yugoslavia, not to the government of the Republic of Serbia, yet it was the latter that transferred the accused to the International Tribunal, with no power to act in such a manner, and no obligation to cooperate with the International Tribunal without an extradition arrangement.

[898] Transcript, MiloŠević (Kosovo, Croatia, and Bosnia Hercegovina), IT-54–02, 3 July 2001, p. 2 at 3–6.

[899] Ibid., p. 2 at 18 and p. 41 at 12–13.

The Trial Chamber dismissed all the objections raised. On the first point, they relied on the arguments put forward in the Tadic decision on jurisdiction, discussed earlier in Chapter 4. In addition, they reiterated the view, in response to the submission of the amici curiae that in order to avoid the 'criticisms of self determination of validity' the International Tribunal should seek an advisory opinion on the question of its competence from the International Court of Justice (ICJ), that the International Tribunal was competent to adjudicate issues concerning its own jurisdiction. On the second point, they found that there was no suggestion that the prosecutor acted upon the instructions of any government, any body, or any person in her decision to indict the accused (see discussion of role and function of the prosecutor in Chapter 8). On the third point, the Chamber attested that no grounds for suspecting bias, in the form of interest, material or otherwise, on the part of the judges in the matter being litigated had been advanced. Finally, in relation to point 4, they found that such restrictions as are placed on an accused person in detention in relation to his freedom of expression fall squarely within the category of permissible limitations under the ICCPR, that is, that they are provided by law and are necessary for a variety of public interest considerations, including public order. On the question of unlawful arrest, it is indeed the case that the arrest warrants were directed to the authorities of the Federal Republic of Yugoslavia (FRY), and were not issued to the government of the Republic of Serbia, but, as discussed in Chapters 6 and 7 above, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, and the Statute of the International Tribunal is interpreted as a treaty. Moreover, the obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal under the national law or extradition treaties of the State concerned.[900]

In response to his refusal to appoint defence counsel, on the basis that to do so would be to recognise the de facto legitimacy of the Tribunal, the Trial Chamber ordered the Registrar to designate counsel to appear before it as amicus curiae, 'not to represent the accused but to assist in the proper determination of the case'. Their role was effectively to guard Milošević's right to a fair trial by ensuring that any submissions or objections properly open to the accused were made, and drawing to the Trial Chamber's attention any mitigating or exculpatory evidence—that is, to do the job of defence counsel, but without taking instruction from the accused

[900] Decision on Preliminary Motions, *Prosecutor* v. *MiloŠević,* IT-37-99, 8 November 2001.

himself.[901] Without the appointment of such counsel, Milošević would have succeeded in scuppering the trial at the outset.

On 8 October 2001, a further two indictments were confirmed against Milošević in which he was charged with nine counts of grave breaches of the 1949 Geneva Conventions, thirteen counts of violations of the laws and customs of war, and ten counts of crimes against humanity for his alleged participation in a 'joint criminal enterprise' between August 1991 and June 1992 in Croatia; and with two counts of genocide and complicity in genocide, ten counts of crimes against humanity, eight counts of grave breaches, and nine counts of violations of the laws and customs of war in Bosnia. On 1 February 2002, the Appeals Chamber ordered that the three indictments concerning Kosovo, Croatia, and Bosnia be joined and tried together in a single trial. The decision to charge Milošević with crimes committed in Bosnia, particularly, was a risky one. On the one hand, it had the advantage of demonstrating the magnitude and extent—temporally and geographically—of the crimes with which Milošević was accused. On the other hand, however, it risked diluting the strength of the case against Milošević in respect of Kosovo. The direct link between Milošević and the crimes that were committed in Kosovo and even in Croatia was, after all, much more straightforward and evident than that between Milošević and the crimes committed in Bosnia, especially after the ostensible withdrawal of JNA forces in May 1992. The prosecutor might, therefore, have been better advised to bow to the Trial Chamber ruling on 13 December 2001, which provided that only the Bosnia and Croatia indictments be joined and the Kosovo trial go ahead separately first. This would have had the advantage of buying more time before finalizing an indictment for Bosnia and Croatia.

The trial opened on 12 February 2002. The prosecutor's opening statement was delivered over two days, and was followed on 14 February 2002 by an equally long but rather more effective statement from the accused, in which he demonstrated a command of the facts and an ability to mount an impassioned defence unparalleled in proceedings before the Tribunal to date. Milošević may have needed counsel to ensure full access to procedural mechanisms for his defence, but had no need to call on anyone else to recount the story of events since the late 1980s that would be his defence. One year into the trial, the *Economist* noted, 'His behaviour has put the entire tribunal—indeed the very idea of international war crimes trials—to its severest test.'[902] In the opening part of his statement, he

[901] Transcript, MiloŠević (Kosovo, Croatia, and Bosnia Hercegovina), IT-54-02, 30 August 2001, p. 7 at 8–15.

[902] 'The lesson of Slobodan MiloŠević's trial and tribulation', *Economist,* 15 February 2003, 39.

showed a video challenging key events in the lead up to and during the NATO bombing campaign over Kosovo, including the massacre at Račak, and detailed the damage wrought by the bombing campaign. He argued that the action in Kosovo was to combat terrorism, playing on post-11 September political anxieties, and was equally adept in being self-congratulatory about the Serbs and lamenting their victimhood. In one part, he stated proudly: 'We are the only country that managed to shoot down a so-called invisible NATO plane […] This is a wonder of technical achievement and they said nobody could shoot it down. We managed to shoot it down.'[903] Milošević raised the stakes in political terms by saying that he would call, among others, Clinton, Albright, the American team at the Dayton Accords, and all those who were present during the signing of the Paris Agreement (except, interestingly, for Blair and Schroeder whom he said he did not talk to personally). Whatever the merit or otherwise in what he said, in public relations terms at least round one went to Milošević.

The prosecution has recovered ground since then, however, and the trial receives only sporadic attention in the media as it proves to be as lengthy and procedurally as rigorous as any other of the trials conducted at the Tribunal. Crucially, the Trial Chamber has succeeded for the most part in keeping politics at bay, and largely thwarted the attempts of the accused to politicize the proceedings, whilst being fair. They have suspended proceedings whenever Milošević felt unwell, and have explained time and again the rules of the court with enduring patience. They have also granted tremendous leeway to Milošević when cross-examining witnesses. In April 2002, Milošević was granted the right to cross-examine on potentially politically sensitive issue of the activities of the Kosovo Liberation Army (KLA) and the NATO bombing campaign, in so far as it related to his justification of the conduct of Serb forces. The trial is likely to last at least another couple of years, and Milošević will want to drag out his defence for as long as possible, providing as it does a stage on which he can perform to the Serbian people, even if his legal case might be less impressive. On 11 September 2002 the Prosecution finished presenting its case with regard to Kosovo. The Croatia and Bosnia and Hercegovina part of the Milošević Trial started on Thursday 26 September 2002.

The stated aims of the Tribunal are threefold: peace, justice—for both perpetrators and victims—and deterrence. It is too soon to judge the record of the Tribunal in all respects except in the short term. Hopes that it would foster local reconciliation have not been fulfiled to the extent desired. One clear direct effect, however, was that the removal of indicted persons—including Milošević—has created the space for political

[903] Transcript, MiloŠević (Kosovo, Croatia, and Bosnia Hercegovina), IT-54-02, 14 February 2002, p. 255 at 17–25.

change to occur in Bosnia and in Serbia. Cooperation with the Tribunal has continued: two further arrests have been carried out by Serbian authorities—one pursuant to a sealed indictment issued in 2002,[904] and the second accused was publicly indicted in 1995.[905] His co-accused has already been sentenced.[906] In addition, a number of high-ranking former Serbian military and government officials have surrendered themselves, including three of Milošević's co-accused, Milan Milutinović, Nikola Sainović, and Dragoljub Odjanić,[907] as well as Vojislav Seselj, former President of the Serbian Radical Party (SRS).[908] Yet, two of the most notorious accused remain at large: Radovan Karadžić and Ratko Mladić.

The contribution that the Tribunal makes to long-term peace and justice in the region is more difficult to judge, and the jury is still out. It will be some years before the impact can be ascertained properly, but there have been significant short-term effects, as discussed above. The impact on international peace and security is perhaps more tangible. As stated above, the establishment of the Tribunal was part of a wider trend toward accountability and enforcement of international humanitarian law, and a catalyst for further developments, including the establishment of the ICC, which is why it was such a significant innovation.

The establishment of the Tribunal as a Chapter VII measure for international peace and security was the manifestation of an explicit link between peace and justice—politics and law. The impact of this was a marked increase in the emphasis afforded to international criminal justice on both rhetorical and pragmatic levels in the conduct of international politics. Yet the process of establishing a system of international criminal justice is not complete without a permanent and effective enforcement mechanism. The lesson of the Tribunal is that this is possible, if the political will exists, and that it does not follow that the political will determines the nature of the judicial process. The establishment of ad hoc tribunals and the adoption of the Statute of the ICC were all forms of international judicial intervention, which is inherently political, and has

[904] Predrag Banović (Meakić et al. IT-02-65). Banović was detained on 8 November 2001 and transferred to the custody of the Tribunal a day later.

[905] Ranko CeŠić (JeliŠić and CeŠić, IT-95-10/1). CeŠić was detained on 25 May 2002 and transferred to the custody of the Tribunal on 16 June 2002.

[906] Goran JeliŠić was sentenced to forty years imprisonment on 14 December 1999.

[907] Slobodan MiloŠević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Vlajko Stojiljković 'Kosovo', IT-99-37, 24 May 1999; JL/PIU/403-E, The Hague, 27 May 1999. See earlier, p. 196

[908] Seselj was transferred to the ICTY on 24 February 2003.

to be in order to be able to function. It does not follow on a conceptual level that the judicial function is inherently politicized, however, if the balance is managed properly. This study of the operation and function of the Tribunal has shown empirically that the external political function did not impinge on its status as an independent and impartial judicial body. Instead, it enhanced its effectiveness.

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