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# **The International Criminal Tribunal for the Former Yugoslavia**

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***“I know that the Tribunal is working for justice:  
but what kind of justice is not clear.”***

(Interviewee in the documentary film *Slijepa Pravda*)

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## *Preface*

### *What kind of history?*

One of the strengths—but sometimes one of the greatest difficulties—of the Scholars’ Initiative has been that it has required the integration of approaches by practitioners of a variety of disciplines, although its overall rationale and strategy have been conceived by historians. With regard to the balance of disciplines involved the experience of the different groups contributing to the project as a whole will have varied. Consequently, it will be useful to frame this report from Group 10 with a few words which will help the reader to understand the way in which its authors have interpreted their particular task.

The manner in which history comes to be read is never determined solely by the intentions of the historian in writing it. Questions of readership and “reception theory” are bread and butter to the literary specialist, but perhaps too little-considered by practitioners of the social sciences—including history. The production of this report has been a long, complex and sometimes painful one, and the reasons for this are bound up in large measure with problems relating to the manner in which earlier versions of it were read. This is not simply to blame the reader: after all, every author has an obligation to make clear the characteristics of the form of communication which he or she uses, as well as the purposes which motivate writing, so that the reader can at least read responsibly and in an informed manner. In presenting this report, therefore, it is appropriate to begin with a few words which might help readers to place it, recognise it for what it is, and set aside expectations which they might have harboured that it will be some entirely different kind of text. Problems of this kind arise not only between the formal and narrative conventions of different social sciences, but even within disciplines, and to some extent even within the discipline of history.

A potentially serious problem (certainly for this group report) has been raised by an interpretation to which the *Prospectus* of the Scholars’ Initiative is open. The claim that its results can “furnish a common, and ostensibly legitimate, alternative account [of history]” lays the basis for an extremely important controversy.<sup>1</sup> The references to a “common” and “legitimate” account of the past can be read as implying that the Initiative will furnish some kind of canonical version of the past—that other, heterodox narratives are illegitimate. Taken in its context, it ought to be apparent that this is not necessarily intended, and that “commonality” and “legitimacy” apply to the “indisputable scientific credentials of its participants”, and the

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<sup>1</sup> Scholars’ Initiative, *Prospectus*, p. 3.

“impartiality of its methodology”, and not to the manner in which its conclusions close-off further historical debate. The expectation that there can ever be a canonical version of history is entirely foreign to the spirit in which this report was written—indeed, this is never possible, and the belief that it might be is surely dangerous. There are two primary reasons, which should be familiar to historians, why this is the case.

First of all, there will always be a variety of positions from which legitimate historiographic questions can be posed. Is the International Criminal Tribunal for the former Yugoslavia (ICTY) to be regarded (for example) as one scene within the last act of the recent Yugoslav wars, or is it to be understood as a prelude to the development of the International Criminal Court? Is its narrative to be shaped by notions of its significance for the Balkan region, or by some criterion of its relevance for the globalisation of justice? History is always composed with an eye to the manner in which it illuminates the present, and the problems of the present constantly confront us with novelty.

Secondly, the materials available to the historian which could be used to construct any narrative of the past are themselves changing. At the time of writing immense quantities of archival material which will be essential to the interpretation of the ICTY and its significance are still unavailable to historians—the records of the Tribunal itself, as well as those of major states, and of key individual players. It is not even remotely possible at this moment to attempt a synthetic history of this institution when the task of writing primary history has hardly begun. At a conference for young social scientists held in Sarajevo in November 2005, a panel composed of Ph.D. candidates presented their researches into the ICTY. A subsequent event planned to take place in Paris in May 2006 will present an even larger range of current work in this area. A good deal of research activity is now taking place in relation to the Tribunal, and the most that this report can hope for is to play its part in a rapidly-expanding and complex set of debates which will certainly continue for many years. We are still at the stage of clarifying the issues which ought to be of concern to social scientists, which might fruitfully be addressed, and eliminating what seem to be unpromising lines of enquiry.

It is in the light of this claim to constitute a contribution to this continuing and open-ended debate that this report should be read.

### *New questions for old*

An important characteristic of scholarly and scientific disciplines within the modern world of learning is an awareness that, in the course of any research endeavour, it might be necessary to refine (or even to redefine) the original questions which set investigation in motion. Within this

milieu the element of *discovery* is intrinsic to the process of enquiry. This point has been illustrated with some force during the work of Group 10 of the Scholars' Initiative, dealing with the ICTY. An important component of our work has been the discovery that the questions which were originally highlighted as being the most significant points of controversy in relation to the work of the Tribunal are not necessarily those which it is most productive to pursue. Indeed, perhaps the greatest service which the Group can offer to the community of scholarship, in presenting its report, is to suggest an explanation as to why these initial motivating questions might have derived from premises which themselves now need to be questioned.

To address these ideas is neither to challenge the value of the Scholars' Initiative in general, nor the legitimacy of including the ICTY as the focus of an area of controversy worthy of attention within the project. In presenting this report, however, we owe it to readers whose reception of it is framed by familiarity with the original prospectus, to clarify exactly what are the questions addressed here, and why we have become convinced of their significance. The *Prospectus* of the Initiative, posted on its website, summarises the focal concerns of our group in three questions.

“To what extent is the ICTY a political body? To what extent is it impartial?

.... anti-Serb?”

Although they appear to be very straightforward questions, which ought to be amenable to equally straightforward answers, this is far from being the case. In the course of our research we have moved away from the attempt to answer them either in simple negative or affirmative terms, and arrived at the conclusion that it is more useful to investigate *the sense in which it might be said* that the Tribunal is “political”, and *the gap between intention and effect* with respect to its “impartiality”. Perhaps more significantly, in relation to the overall construction of the aims of the wider Scholars' Initiative, we believe that it is important to challenge the explicit framing of its “partiality” or “impartiality” in terms of the specific position of Serbs.

That this process of the reorientation of questions should be necessary is far from surprising. The project, after all, sets out to challenge the accounts of the Yugoslav experience which have come to be embedded in the lay understanding of history, particularly in the region itself. These accounts often need to be challenged, not simply because the presumed “facts” upon which they are based are false, but because the very intellectual framework within which they belong is distorted. It is not possible to provide a fully effective social-scientific alternative to such lay understandings which leaves undisturbed the ground of assumptions on which they rest.

*“To what extent is the ICTY a political body?”* The question contains within it the rhetorical implication that it should somehow not be a “political body”, and that to reveal its political character is to expose its fundamental illegitimacy. Certainly this language is encountered frequently in press and public discussion of the Tribunal within the region: yet it is not one which any social scientist would ever entertain seriously. Of course *all* courts are “political bodies”. They are essentially embedded within the state, and the fact that the ICTY is an *international* tribunal can not be expected to elevate it above the world of politics into some Platonic realm of ideal justice. The properly social-scientific answer to the original question is an explanation of *the specific manner in which international justice takes on a political aspect.*<sup>2</sup>

*“To what extent is the ICTY impartial?”* In large measure, precisely because courts are embedded within a political matrix, they are *never* completely impartial—although typically their effectiveness and legitimacy rest upon the *belief* in their impartiality. A striking feature of the work of the ICTY, however, is the conspicuous gap which has grown up between the *international* perception of its legitimacy (based substantially upon belief in its impartiality) and *local* doubts on this score within the former Yugoslavia. Understanding of the importance of the Tribunal as an experiment in international justice is best advanced by rephrasing the original question in order to explore the origins and significance of that gap in perception.

*“Is the Tribunal anti-Serb?”* This is certainly a widespread perception within Serbia. To tackle this question without further qualification, however, would not be very helpful. Apart from anything else the result would be to frame the Scholars’ Initiative irrecoverably as either pro- or anti-Serb! In fact, however, when one investigates the reception of the ICTY within the region, it is remarkable that different ethnic groups—and not only the Serbs—have come to perceive The Hague as at best indifferent to their own interests, if not hostile to them. Investigation of the reasons why that should be the case tells us far more interesting things about the Tribunal, and about the differing characteristics of political cultures and processes within the newly formed post-Yugoslav states.

A central aim of the Scholars’ Initiative from the outset has been to provide:

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<sup>2</sup> Extensive discussion of this conceptual issue does not belong centrally within this report. See, however, for a fuller recognition of the issues, Appendix 1.

.... an attempt by scholars to bridge the gap that separates their knowledge of the tragic events of the period 1986-2000 from the proprietary interpretations that nationalist politicians and media have impressed upon mass culture.<sup>3</sup>

This report is offered in the belief that the best way to undermine these “proprietary myths” is to *challenge* their central questions rather than to attempt to *answer* them, for to do so without challenge would be only to confirm their legitimacy. While avoiding the Scylla of extreme nationalism, however, it is equally important to avoid the Charybdis of implicit “Orientalism”.<sup>4</sup> We cannot take it for granted that because the world-view of Balkan peoples is discrepant from that which prevails among Western scholars, it must be founded on error, and that the only plausible reason they might question the institutions of international justice is that they have been led astray. While endeavouring to lay to rest some of the evidently mythological images of the ICTY which have become current in the Balkans, however, we are equally ready to point out that what is after all an experiment in international justice is open to critical scrutiny. Neither the process of demythologisation nor that of independent critique will be completed on this occasion—but we hope that they will both have been given a significant impetus.

The first draft of this report attracted a good deal of criticism. The helpful and well-intentioned comment of several colleagues has been very useful in the revision process, and is gratefully acknowledged here. We hope that any improvement in the text is an adequate return for their efforts. A word of caution is in order. This report does not set out to be—and cannot be—an encyclopaedic work of reference on either the ICTY or the Yugoslav wars. The concrete output expected eventually from this Group (as from all others participating in the Scholars’ Initiative) is a chapter of around 12,000 words. The text offered here already exceeds that target by an embarrassingly large margin. Suggestions that our report ought to have encompassed a comprehensive survey of the press of the region, detailed analysis of court transcripts, an examination of the role of expert witnesses,<sup>5</sup> a critique of the Rules of Evidence and Procedure adopted by the Tribunal, or that it should engage with the problematic relationship between justice and reconciliation, all fall well outside the possibilities of a project which has been mounted without the benefit of large research grants or permanent personnel.

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<sup>3</sup> Scholars’ Initiative, *Prospectus*, p. 3.

<sup>4</sup> “Orientalism” here is used in the sense developed by Edward Said, in his book of that title. Edward Said, *Orientalism*. London: Routledge & Kegan Paul, 1978.

<sup>5</sup> A panel dealing with this issue will participate in a forthcoming conference in Paris. We are relieved to be able to defer discussion of this topic until then.



## *Introduction*

### *The problem of bias*

The remit which was originally given to Group 10 was to investigate the allegations of bias which had been laid against the International Criminal Tribunal for the former Yugoslavia (ICTY). The task seemed, at first sight, to be fairly straightforward: but as members of the team began to explore the problem this originally-defined exercise appeared to be pointless. At the meeting which took place in Sarajevo, in July 2002, participants generally agreed on two things. We were aware of no evidence of deliberate partiality on the part of the Tribunal. Allegations of bias, however, were rife within the Yugoslav region. The question was: how to reconcile these disparate, and apparently directly contradictory, observations.

At that time there was little scholarly investigation of the ICTY in any discipline. The first major study to appear had been Michael J. Scharf's *Balkan Justice*, which (reflecting the author's professional position as an international lawyer) had concentrated its attention on an examination of the Tadić case.<sup>1</sup> As the verdict on Tadić had only been delivered in the May of the year of publication, the role of this book was primarily to acquaint the public with how the ICTY worked rather than to provide a critical analysis or evaluation. This was followed in 2000 by Gary Bass' *Stay the Hand of Vengeance*.<sup>2</sup> This set itself the aim of providing a comparative study of all of the attempts to institute a judicial response to war by placing on trial the leading figures held to be responsible for its conduct, since Napoleon. This very valuable study did emphasise the fact that all of the five cases which it examined needed to be understood within their political context, which to a large extent explained both their initial character and the reasons for their ultimate failure—with the exception of the ICTY, about which final evaluation was still impossible. It also made it clear that the ICTY should not be considered as an isolated and *ad hoc* attempt to wreak vengeance upon any of the actors in the Yugoslav wars, but was part of a recurring concern to attempt to respond to war by judicial means. As its title suggested, war crimes trials can be regarded as much as attempts to “stay the hand of vengeance”, as the means of exacting vengeance.

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<sup>1</sup> Michael J. Scharf, *Balkan Justice: the story behind the first international war crimes trial since Nuremberg*. Durham (NC): Carolina Academic Press, 1997. See also: Virginia Morris, and Michael P. Scharf, *An Insider's Guide to the ICTY*. Irvington on Hudson (NY): Transnational Publishers, 1995; Roger S. Clark and Madeleine Sann, eds. *The Prosecution of International Crimes: a critical study of the International Criminal Tribunal for the Former Yugoslavia*. New Brunswick and London: Transaction Publishers, 1996.

<sup>2</sup> Gary J. Bass, *Stay the Hand of Vengeance: the politics of war crimes tribunals*. Princeton University Press, 2000.

Similar studies of the long-term historical process which led to The Hague appeared also in French. Pierre Hazan's *La justice face à la guerre*, and Jean-Paul Bazelaire and Thierry Cretin's, *La justice pénale internationale*, both appeared in 2000.<sup>3</sup> Both were written by journalists, and both primarily concerned to chart the evolution of international humanitarian law "from Nuremberg to The Hague". A significant feature of the way in which The Hague tribunal was framed in France at that time was its contextualisation in relation to the trials of former leading Nazi figures, and in particular, in relation to France's attempts to come to grips with its own legacy of anti-Semitism.<sup>4</sup> It is worth noting that France had been the location of a well-publicised and controversial trial for war crimes as recently as 1987—that of Claus Barbie. In the literature in French too the question of bias was not primarily at issue.

Little attention had been given either in Germany, at the time of the Sarajevo meeting, to the character and importance of the ICTY, and accusations of bias did not appear to have figured as significant there.<sup>5</sup>

There was extensive discussion within the legal community at the time regarding the implications of the creation of the ICTY *for law and jurisprudence*.<sup>6</sup> No attempt was made at that time, in English, French or German-language literatures, to expose "bias" in the working of the ICTY.<sup>7</sup> The prevailing tone of discussion was to welcome its creation as a significant advance in the development of international humanitarian law; and the work of Aryeh Neier (at the time, President of the Open Society Institute, and a figure who had been especially active in agitating

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<sup>3</sup> . Pierre Hazan, *La justice face à la guerre: de Nuremberg à La Haye*. Paris: Stock, 2000; Jean-Paul Bazelaire and Thierry Cretin, *La justice pénale internationale*. Paris: Presses Universitaires de France, 2000. See also: Karine Lescure, *Le Tribunal penal international pour L'Ex-Yougoslavie*. Paris: Monchrestien, Centre de Droit International de Paris I, No. 6, 1994.

<sup>4</sup> See, for example: Florent Brayard ed. *Le Génocide des Juifs: entre process et histoire, 1943-2000*. Paris: CNRS/ Collection "Histoire du Temps Présent", 2000.

<sup>5</sup> In the scholarly literature, see: Herwig Roggemann, *Der Internationale Strafgerichtshof der UN von 1993 und der Krieg auf dem Balkan*. Berlin: 1994. The Krstić trial had been treated in a collection of documents edited by Caroline Fetscher and Julija Bogojeva, *Srebrenica: eine Prozess*. Frankfurt am Main: 2002. The group is indebted to Bodo Weber for these observations.

<sup>6</sup> A flavour of this extensive literature can be gained from: Belinda Cooper, ed. *War Crimes: the legacy of Nuremberg*. New York: TV Books, 1999; Timothy D. Mak, "The case against the International War Crimes Tribunal for the former Yugoslavia", *International Peacekeeping*, 2(4) Winter 1995, pp. 536-63. Other influential voices were those of Geoffrey Robertson, *Crimes against Humanity: the struggle for global justice*. London, Penguin Books, 1999, and Payam Akhavan, "Justice in The Hague: peace in the former Yugoslavia." *Human Rights Quarterly* 20: 737-816, 1998. Subsequently, of course, the professional literature on this subject has burgeoned.

<sup>7</sup> This is despite recognition that it is possible to examine the political dimension of the Tribunal's creation and functioning. See: Beigbeder, Y. *Judging War Criminals: the politics of international justice*. London and New York: Macmillan, 1999.

for the creation of the Tribunal) was particularly important in setting the tone of discussion.<sup>8</sup> It is perhaps significant that the first Chief Prosecutor of the ICTY, Justice Richard Goldstone, in his own writing about the Tribunal, did not regard it as necessary to defend it against accusations of bias.<sup>9</sup>

The idea of bias was similarly absent, at the time of the Sarajevo meeting of Group 10, from the social-scientific literature devoted to the Yugoslav wars, which had little to say at all about the interest of any aspect of the ICTY.<sup>10</sup> Given the undoubted familiarity of the generality of specialists with conditions in the “Yugoslav space”, it is reasonable to assume that, had the issue of the bias of the ICTY been one which was deemed worthy of attention, there would have been rather more evidence of this in the scholarly literature. If the Tribunal was considered to be controversial at all *within the community of social science* when Group 10 began its work, it was from the point of view of its questionably effective contribution to the international response to the conditions of war in the Balkans, and the circumstances which lay behind its foundation.

A similar situation prevailed within the legal literature, where critical discussion of the ICTY centred upon a number of procedural and conceptual issues, but the question of whether or not it was substantially biased in its practice was not addressed.<sup>11</sup>

This lack of interest in the issue of bias on the part of scholars of different disciplines contrasted sharply, however, with widespread popular perceptions of “The Hague” within the former Yugoslavia. While international lawyers generally celebrated what they portrayed as positive developments in international law, and reported substantial progress on individual cases, the citizenry of the former Yugoslavia (the purported constituents of the Tribunal) remained either ignorant or largely skeptical. Not surprisingly, this startling contrast between professional

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<sup>8</sup> Aryeh Neier, *War Crimes: brutality, genocide, terror and the struggle for justice*. New York: Times Books, 1998.

<sup>9</sup> Goldstone, R. (1996). *Prosecuting War Criminals*. London: David Davies Memorial Institute of International Studies: 21, 1996; Richard Goldstone, *For Humanity: reflections of a war crimes investigator*. New Haven and London: Yale University Press, 2000.

<sup>10</sup> The following specialists, whose work would have been available to those attending the Sarajevo meeting of the Scholars’ Initiative in 2002, at least mention the work of the ICTY in passing. Susan Woodward, *Balkan Tragedy: chaos and dissolution after the Cold War*. Washington DC: The Brookings Institution, 1995, pp. 322-3; Carole Rogel, *The Breakup of Yugoslavia and the War in Bosnia*. Westport (CT) and London: Greenwood Press, 1998, pp. 65 and 72-3; John B. Allcock, *Explaining Yugoslavia*. London: Hurst, 2000, p. 440; Aleksandar Pavković, *The Fragmentation of Yugoslavia: nationalism and war in the Balkans*. London: Macmillan, 2000, pp. 172-3, 180. It is remarkable how many experienced commentators on the region at that time made no mention at all of the Tribunal and its work. Particularly noteworthy in this respect, in view of its explicit concern with issues relating to international intervention in Yugoslavia, is Richard H. Ullman, *The World and Yugoslavia’s Wars*. New York: Council on Foreign Relations, 1996.

<sup>11</sup> Representing contrasting approaches and points of view, see: Aleksandar Jokić, ed. *War Crimes and Collective Wrongdoing: a reader*. Oxford: Blackwell, 2001; Mark J. Osiel, “Why prosecute? Critics of punishment for mass atrocity.” *Human Rights Quarterly* 22:2000, pp. 118-147; Antonia Cassese and Mireille Delmas-Marty, eds. *Crimes internationaux et juridictions internationales*. Paris: Presses Universitaires de France, 2002.

and lay perceptions of the Tribunal in relation to the salience of the question of bias suggested itself as a primary focus for our research.

Following the Sarajevo conference the members of the group contributed a variety of types of input to the report, ranging from “desk research” synthesising aspects of the literature; detailed scholarship addressing specific aspects of the Tribunal’s work; a survey of the public opinion research available in the Yugoslav region; interviews with a small number of key actors; reflection on their own experience as participants in one aspect or another of the work of the ICTY, and as researchers in the region; and a small, specially-commissioned focus-group investigation to explore attitudes to its work.<sup>12</sup> Following a fairly critical reception of an earlier draft of our report, it has been revised and extended, taking into account the several useful suggestions and additional published work.

The report of our work which follows is divided into five main sections. Section I presents a historical survey of the events which led to the foundation of the ICTY. This is supported by two Appendices, which offer a rather more detailed and long-term picture of the development of international humanitarian law, and a brief study of the different ways in which the Tribunal was envisioned at the time.<sup>13</sup> The second Section continues that historical account, examining the contrasting stances of the principal international actors in relation to the ICTY, and the way in which these have changed over time. The idea which underlies both of these sections is the need to understand the Tribunal within its historical context, explaining it in terms of a very complex process, the outcome of which does not reflect directly the intentions of any one of the parties involved. Section III turns its attention to the ICTY itself, and examines its structure and operation, taking in turn each of the major components of the organisation—the Trial Chambers, the Registry and the Office of the Prosecutor. Each of these can be shown to be, in some sense, attended by problems and attracting criticism, and the manner in which the Prosecutor’s office works has certainly generated its share of controversy. The overall result of this survey, however, is the conclusion that the problems which have attended the operation of the Tribunal are not primarily those of bias. Nevertheless, the fact that it has come to be oriented strongly towards an international constituency, having insufficient regard for the needs and concerns of people in the

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<sup>12</sup> Regrettably, Rachel Kerr’s extensive study of the Tribunal has come to hand too late for her work to be considered in this report. Rachel Kerr, *The International Criminal Tribunal for the former Yugoslavia: a study in law, politics and diplomacy*. Oxford University Press, 2004.

<sup>13</sup> The main body of the report is offered as a collective enterprise, having emerged from a complex process of the exchange of materials and their editorial summarising. Consequently this bears no attribution of individual authorship. The Appendices, however, have each been compiled by individual members of the team, and retain the recognition of their authors’ identities.

Balkan region, has created a “blank façade” upon which it has been possible for interpretations of bias to be projected.

A central concern of our project has been to go beyond the simple observation that the ICTY is often regarded negatively within the region, and to identify and explain the different ways in which it has come to articulate with local political structures and cultures. In this respect, the widely current misunderstandings of the ICTY can not be reduced to crude misrepresentation by nationalist politicians, who have been ready to assimilate the narrative of the war crimes process to their own mythologised versions of the past. Consequently, Section IV offers a brief comparative study of the reception of the ICTY in Croatia, Serbia and Bosnia and Hercegovina, attempting to probe in greater depth the nature and sources of local perceptions of the Tribunal, and to understand these within their political context. In relation to this section, Appendix 4 undertakes a survey of the representation of the ICTY in the Serbian media; and Appendix 5 gives an account of a small focus-group investigation which was undertaken specifically for this report.

Section V, finally, draws together and summarises our conclusions, which provide a more nuanced view of the problems experienced by the Tribunal, and the reasons for the lack of a sympathetic response to it within the former Yugoslavia—ostensibly its principal constituency. It is an important element of these conclusions that, whatever its difficulties and deficiencies, the ICTY will leave a significant legacy to the development of international humanitarian law. To this end, this section is also supported by an appendix (number 6) which undertakes a detailed analysis of the manner in which the work of the Tribunal has resulted in a significant redefinition and clarification of the nature and importance of sexual violence within the body of international law.

## ***I: The Creation of the International Criminal Tribunal for the former Yugoslavia***

Those who might be tempted to see in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) a device directed specifically against one or another of the peoples or states of the former Yugoslavia should pause in order to place this event in its historical context. The fact that fifty years passed after the Nuremberg and Tokyo tribunals before another attempt was made to bring to justice those accused of war crimes should not be taken as support for the view that this was an *arbitrary* event. Karine Lescure asserts that the idea of “war crimes” is an invention of the twentieth century.<sup>1</sup> The idea that warfare can and should be regulated by legal norms can be traced back to the middle of the nineteenth century; however, and it is important to acknowledge that it forms only one element of the process of the development of international humanitarian law.<sup>2</sup>

The ICTY was expressly set up in order to *apply* existing international law, and not to *create* it. The instruments of international law already in existence before the break-up of Yugoslavia might be considered to have placed states under an obligation to act in order to enforce this normative code. In the absence of a permanent international criminal court, however, the question arose as to the *manner* in which these norms might be enforced effectively—not their validity as norms. Although international action against war crimes in Yugoslavia does not require explanation at this normative level, therefore, what does merit further examination is the establishment of the specific *means* by which the law was given organisational embodiment, brought to life and made effective. For this reason, the circumstances surrounding the foundation of the ICTY are the focus of this first section of the report.

In his autobiographical fragment *For Humanity*, Justice Richard Goldstone recounts an occasion on which he was asked why the UN had decided to set up a war crimes tribunal for Yugoslavia, when it had not acted in cases such as Cambodia or Iraq. His off-the-cuff response

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<sup>1</sup> Karine Lescure, *Le Tribunal pénal international pour l'Ex-Yougoslavie*. Paris: Monchrestien, Centre de Droit International de Paris I, Etudes Internationales, No. 6, 1994, p. 29.

<sup>2</sup> Since the idea of the arbitrariness of the ICTY's creation is an important part of the foundation of the myth of its partiality, a brief history of the development of international humanitarian law is provided in Appendix 2.

was: “Somebody had to be first!”<sup>3</sup> Although his remark implicitly acknowledges the fact that the ground for this institutional innovation had been prepared already, it poses the question as to why it should have been thought to be appropriate to make the transition from theory into practice *at this particular moment*. The answer which we explore here is in terms of the confluence of a specific set of political circumstances which characterised the international scene at that time.

This section does not set out to provide an exhaustive history of the foundation of the ICTY. This task has yet to be undertaken in full, although the accounts already published by Cherif Bassiouni, Gary Bass, John Hagan and Pierre Hazan have laid a valuable foundation.<sup>4</sup> Our concern here is to draw attention to the character of the political process which resulted in the establishment of the tribunal in The Hague, and in doing so to counter (or at least qualify heavily) two approaches to explanation which are often encountered. The first sees its creation as the result of the will of a single political agent, according to which the ICTY is no more than the creature of some power or powers. The second represents the ICTY as a shameful fraud which was intended to serve as a fig-leaf covering the failure of the “international community” to devise a remotely adequate response to the catastrophe in Yugoslavia. To some extent, of course, these views must stand in mutual contradiction, and cannot (without heavy qualification) both be true. Whereas the first endows certain agents with exceptional capability to realise their will against possible opposition, the second emphasises the absence or ineffectiveness of will. Both of these views of the genesis of the ICTY contain a grain of truth: but to insist on them as simple statements of historical fact constitutes a historical travesty. Above all, to reduce the history of the institution to a single determining cause in this way overlooks entirely the question of *time*, and obscures the important ways in which the motives of the principal actors and the Tribunal’s relationship to its global political context have varied as it has developed.

The configuration of determining forces shifted in significant respects over time, so that agents and their purposes which might, at one stage, have been identifiable as making a major contribution to events, did not necessarily sustain their role throughout the entire process, and

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<sup>3</sup> Richard Goldstone, *For Humanity: reflections of a war crimes investigator*. New Haven and London: Yale University Press. He presented a more considered account on pp. 78-80. See also comment by Goldstone in *Prosecuting War Criminals*. London: David Davies Memorial Institute of International Studies, Occasional Paper No. 10, August 1996, p. 10.

<sup>4</sup> M. Cherif Bassiouni, *The Commission of Experts established pursuant to Security Council Resolution 780: investigating violations of international humanitarian law in former Yugoslavia*. Chicago: International Human Rights Law Institute, DePaul University, Occasional Paper 2, 1996; (reprinted in the volume of essays edited by Roger S. Clark and Madeleine Sann, *The Prosecution of International Crimes: A critical study of the International Tribunal for the Former Yugoslavia*. New Brunswick and London: Transaction Publishers, 1996); Gary J. Bass, *Stay the Hand of Vengeance: the politics of war crimes tribunals*. Princeton University Press, 2000; John Hagan, *Justice in the Balkans: prosecuting war crimes in The Hague tribunal*. University of Chicago Press, 2003; Pierre Hazan, *La Justice face à la guerre: de Nuremberg à la Haye*. Paris: Stock, 2000.

*vice versa*.<sup>5</sup> The ICTY emerges, in common with many other important developments in social life, as the unintended consequence of a complex conjunction of competing human actions, both purposeful and unintended. Although significant aspects of this historical account will be covered in the reports of other Research Groups within the Scholars' Initiative, it is an important part of our case that the formation of the ICTY has to be understood as taking place within its wider international context, and in particular as a result of the failure of other attempts by international actors to find a successful way of tackling the problems arising from the disintegration of Yugoslavia.

### ***Genesis: the end of the Cold War***

The configuration of political circumstances which brought to a close what Diane Orentlicher has termed “a half-century of silence” in the matter of war crimes, was the ending of the Cold War.<sup>6</sup> Following the collapse of Soviet hegemony in Eastern Europe, symbolised by the breaching of the Berlin Wall in 1989, the NATO states were deeply preoccupied with broad questions of the reconfiguration of patterns of security as the Soviet threat receded, the possibility of a “peace dividend”, and the future role of the alliance. The hearing of the Foreign Affairs Committee of the House of Commons, between October 1991 and February 1992, at a time when the end of Yugoslavia was incontrovertibly upon us, while devoting a great deal of attention to the Yugoslav crisis, expressly framed that problem in terms of the need to rethink the situation in “*Central Europe*”.<sup>7</sup>

Nor was this debate confined to the North Atlantic area. There was widespread—indeed, global—discussion of the hypothetical emergence of a “New World Order” (NWO), which might come to replace the centuries-old “Westphalian paradigm” of the pattern of inter-state relations, but it remained largely unclear just what were the normative or institutional components of this

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<sup>5</sup> This idea is developed further, with specific reference to the later history of the Tribunal, in Section II, below.

<sup>6</sup> Orentlicher, in Belinda Cooper, ed. *War Crimes: the legacy of Nuremberg*. New York: TV Books, 1999, pp. 107-112. The same point also has been made by Peter Maguire, “Nuremberg: a Cold War conflict of interest” (pp. 67-86); Jörg Friedrich, “Nuremberg and the Germans” (pp. 87-106), in Cooper ed. *War Crimes*; and Thierry Tardy, *La France et la gestion des conflits yougoslaves (1991-1995). Enjeux et leçons d'une operation de maintien de la paix de l'ONU*. Bruxelles: Bruylant, 1999, pp. xxi-xxii. Perhaps this factor can not be the unique determinant of the persisting failure to engage with these issues. As Aryeh Neier points out, the wide remit of the United Nations Transitional Authority in Cambodia (UNTAC), in 1991, was marked by the “conspicuous omission” of any mention of the need to deal with crimes against humanity committed by the former Cambodian regime. (Neier, *War Crimes*, p. 24.) The wider significance of this context is also stressed by Renéo Lukic, *L'Agonie Yougoslave (1986-2003). Les États-Unis et l'Europe face aux guerres balkaniques*. Quebec: Les Presses de l'Université Laval, 2003, Chap. 1.

<sup>7</sup> Foreign Affairs Committee of the House of Commons, *Central and Eastern Europe: Problems of the post-communist era*, London, HMSO, February 1992.



“Order”—or, where these appeared already to be in existence, the degree of their effectiveness.<sup>8</sup> The beginnings of this NWO might be said to date from the founding of the Conference for Security and Cooperation in Europe (CSCE), in August 1975.<sup>9</sup> Following the end of the Cold War the adoption of the “Charter of Paris”, on 21 November 1990, initiated the transformation of what had been primarily a political forum for the discussion of a range of European issues into a set of institutions (the Organisation for Security and Cooperation in Europe—OSCE) intended to manage conflict and ensure coordination in the face of common problems. When the Yugoslav crisis broke, however, these arrangements were entirely untested, and embodied collective aspiration but without experience. What is more, as a British Foreign Office memorandum of November 1991 observed: “the consensus principle means that the CSCE’s intervention can only be effective if, and in so far as, it is welcome to the government concerned.”<sup>10</sup>

### ***The Europeanisation of the negotiation process***

The strength of these predispositions, and the apparent existence of appropriate European structures, provided grounds upon which the USA could base its own preferences to allow European governments to make the running in response to the Yugoslav crisis.<sup>11</sup> During the initial period of the Yugoslav crisis the attention of the administration of President George Bush was concentrated primarily upon the Middle East—particularly following the Iraqi invasion of Kuwait in 1990, and the subsequent Gulf War. As Yugoslavia slid into war, the approach to the Presidential elections of November 1992 not unnaturally focussed minds mainly upon domestic issues. The USA perceived no immediate threat there to its own interests; and while taking the general view that a redrawing of the map in the Balkans was undesirable, and certainly destabilising, the American administration felt itself to be under no pressure to engage directly with the problems of Yugoslavia.

Before the fighting began, Washington had urged the EC to accept leadership responsibility out of the reasonable belief that the allies had more economic and political leverage in

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<sup>8</sup> See the discussion of these issues in Steve Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission*. Dartmouth: Ashgate, 2000, Chapter 3. Perhaps it is not surprising that in this context attention should have been focussed, with respect to matters of international law, upon questions to do with secession and the recognition of states as members of that order.

<sup>9</sup> See Terrett, *Dissolution of Yugoslavia*, Chap. 4.

<sup>10</sup> Foreign Affairs Committee, *Central and Eastern Europe*, Vol. II, p. 18.

<sup>11</sup> David Binder has remarked that the phrase “United States policy towards Yugoslavia” at this time was “a widely noted oxymoron”. David Binder, “Thoughts on United States policy towards Yugoslavia”, *South Slav Journal*, 16(3-4):1-4. See p. 1.

Yugoslavia .... At the highest levels and at every turn, the United States encouraged the allies to engage and offered its support.<sup>12</sup>

The large-scale involvement of European countries in the region in the form of trade and investment (outweighing that of the USA) was expected to give the Europeans a superior economic leverage on the parties to the Yugoslav conflict.<sup>13</sup> It appears that Lawrence Eagleburger was, for some time, the only prominent figure in American politics who argued for direct American engagement.<sup>14</sup>

In December 1991 the “European Community” (EC) had just re-designated itself as the “European Union” (EU) with the signing of the Maastricht Treaty, and the possible expansion of concerted political and diplomatic action by “Europe” was very much on the agenda. The leaders of the Union took the state of affairs in Yugoslavia as an opportunity to explore the opportunities in this direction.<sup>15</sup> Both the EU and the OSCE held out great expectations with respect to the possibilities for responding to a major conflict in Europe, but they faced three common problems. Neither organisation had experience of how potential might be translated into action; the reality of Yugoslav crisis did not match the kind of scenarios which had served as templates in the process of devising these institutions. Crucially, neither body had at its disposal military forces, other than those of their constituent states. It was clearly the case that the EU had no military apparatus which could replace NATO, and the OSCE had never seen itself as operating at this level. Consequently, within Europe, the international response to war in Yugoslavia was heavily biased from the beginning towards negotiation or mediation rather than military intervention. Writers such as Brendan Simms and James Gow, who have been vociferous in their criticism of the “lack of will” to deal with the Yugoslav crisis, on the part of European political leaders at this time, fail to give adequate recognition to their *positive commitment* to a specific course of action which unfortunately was not backed by armed force.<sup>16</sup>

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<sup>12</sup> David C. Gompert, “The United States and Yugoslavia’s Wars”, in Richard H. Ullman ed. *The World and Yugoslavia’s Wars*. New York: Council on Foreign Relations, 1996, Chap. 5. See esp. p.127. Renéo Lukić has given a rather harsher assessment of the Bush White House, describing American policy towards Yugoslavia at the time as characterised by “tacking and inconstancy” and even “lethargy”. *L’Agonie Yougoslave*, pp. 264 and 267. Antoine Garapon writes of American “ambivalence”. Antoine Garapon, *Des Crimes qu’on ne peut ni punir ni pardonner: pour une justice internationale*. Paris: Odile Jacob, 2002, p. 40.

<sup>13</sup> James Gow, *Triumph of the Lack of Will*. London: Hurst & Co., 1997, p. 49.

<sup>14</sup> See Neier, *War Crimes*, pp. 124-128; Bass, *Stay the Hand of Vengeance*, pp. 213-214.

<sup>15</sup> The foreign minister of Luxembourg proclaimed it “the hour of Europe”. Quoted by Gompert, “US and Yugoslavia’s Wars”, p. 127.

<sup>16</sup> Simms, *Unfinest Hour*; Gow, *Triumph of the Lack of Will*. It is interesting to note that Burg and Shoup’s analysis gives no recognition at all to these background factors, and neither does the collection edited by Magaš and Žanić. Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: ethnic conflict and international intervention*.

The initial aims of the European Community (which were consolidated even before Maastricht) can be summarised concisely:

respect for the provisions of the UN Charter, the Final Act of Helsinki and the Charter of Paris, especially with respect to the rule of law, democracy and human rights;  
guarantees for the rights of ethnic and national minorities;  
respect for the inviolability of all frontiers, which could only be changed by peaceful agreement;  
commitment to settle by agreement or arbitration all questions concerning state succession and regional disputes;  
acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability.<sup>17</sup>

It is necessary to recognise that this approach at first seemed to yield success, as it was European negotiators who brokered successfully the Brioni Accord, which brought about a peaceful conclusion to the process of Slovene secession, on 7 July 1991. In the light of this it seemed not unreasonable to assume that similar progress might be made in relation to the Croatian crisis, when the EC-sponsored conference on Yugoslavia convened in The Hague under the chairmanship of Lord Peter Carrington on 7 September. The Hague conference set out to “adopt arrangements to ensure peaceful accommodation of the conflicting aspirations of the Yugoslav peoples”. With hindsight it is clear that the Community, in adopting a policy of mediation between the local parties to conflict, was committed in advance to limit itself to diplomatic and humanitarian intervention, and that by this stage without the backing of armed force it stood little chance of realising its aims.<sup>18</sup>

### ***Explaining the Yugoslav crisis—inferential structures***

A further, highly significant characteristic of international responses to the Yugoslav crisis in 1991 was that these were founded upon misunderstandings of the nature of the problem. In both the European states and in North America, an important role was played in the interpretation of

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.New York and London: M.E.Sharpe, 1999; Branka Magaš and Ivo Žanić eds. *The War in Croatia and Bosnia-Herzegovina: 1991-1995*. London: Cass, 2001. Yves Beigbeder also is dismissive of the motives for the creation of the ICTY as an “alibi for the big powers’ ineffectiveness”. Beigbeder, *Judging War Criminals*, p. 146.

<sup>17</sup> S. Trifunovska ed. *Yugoslavia through Documents: from its creation to its dissolution*. Dordrecht: Martinus Nijhoff, 1994, pp.431-2. For an important survey of the diplomatic and legal aspects of the break-up of Yugoslavia, see: Peter Radin, *The Break-up of Yugoslavia and International Law*. London and New York: Routledge, 2002, Chaps. 6 and 7.

<sup>18</sup> This abbreviated summary of events might be supplemented by a reader of the rather fuller coverage provided by Research Groups 2 and 5 of the Scholars’ Initiative, dealing with *The Dissolution of Yugoslavia (1986-91)* and *The International Community and the FRY Belligerents (1989-95)*.

events by a set of “inferential structures” which already dictated how the conflict was to be explained.<sup>19</sup> Two narratives of Balkan history became particularly influential in this respect.

The first of these anticipated that any renewed conflict in the Balkans would recapitulate aspects of the Second World War. David Owen’s account of the process by which he came to be drawn into the Yugoslav situation is instructive. At the start of the fighting, he tells us, he refreshed his memories about Yugoslavia by taking up again Rebecca West’s *Black Lamb and Grey Falcon*, and Fitzroy Maclean’s *Eastern Approaches*. In relation to the latter, “I was keen to establish how many German divisions the Yugoslav partisans really had tied down.”<sup>20</sup> Owen was also familiar with Milovan Djilas’ writing about the war. “I remember being shocked by the brutal nature of the writing but I now recognise that it represents many Yugoslavs’ basic attitude to war.”<sup>21</sup> Owen was far from being alone in his framing of the situation in terms of the impossibility of fighting a war in the Balkans without inordinate cost, based upon accounts of the Second World War. A panel of British academics called to give evidence to the hearings of the Foreign Affairs Committee of the House of Commons, in November 1991 found themselves outbidding each other in their estimates of the number of troops which would be required in order to provide an effective peace-keeping force, with estimates rising from 50,000 to 300,000 men “to occupy and keep all of Yugoslavia quiet”.<sup>22</sup>

The second narrative was the myth of “ancient hatreds” fostered by publicists such as Robert Kaplan (*Balkan Ghosts*).<sup>23</sup> These views made the conflict in Yugoslavia essentially

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<sup>19</sup> The concept of “inferential structures” was devised by Jim Halloran and his colleagues, in their study of press treatment of the anti-Vietnam war demonstrations in Britain. The term explains the manner in which events come to be framed unconsciously in relation to antecedent events, from which it is inferred that they have a certain character. In this way, the British press approached the London demonstrations of 1968 having already framed these by reference to a succession of other events which had been characterised by violence or disorder. A prior commitment was made to the idea that these demonstrations would also be violent, which coloured both press treatment of them and the police response. This ensured a focus of the news media upon any sign of violence during the events themselves, and resulted in serious distortions in reporting. The key idea here is that a structure of inference is unwittingly created which ensures that actors come to “infer” that a given set of events will be like other events with which they are already familiar. The resulting (inappropriate or mistaken) responses serve as self-fulfilling prophecies, ensuring that the events in question do develop the characteristics inferred. James D. Halloran, Philip Elliott and Graham Murdock, *Demonstrations and Communication*. Harmondsworth: Penguin Books, 1970.

<sup>20</sup> David Owen, *Balkan Odyssey*. London: Victor Gollancz, 1995, p.6. I have been advised informally on several occasions about the significance of the role of Fitzroy Maclean in the perpetuation of this element of framing. Maclean certainly sustained the view that war in Yugoslavia would recapitulate the partisan struggle. I recall hearing him address a meeting at the Hay-on-Wye Festival. At the end of his presentation I asked him what he believed might have changed in Yugoslavia since the Second World War, and what novel elements we might need to take into account in understanding developments there. He appeared not to understand the question! (JBA)

<sup>21</sup> Owen, *Balkan Odyssey*, p. 35.

<sup>22</sup> Foreign Affairs Committee, *Central and Eastern Europe*. Vol. II, pp. 98-99.

<sup>23</sup> Kaplan’s book is widely credited as a major baneful influence in popularising this view. (Robert Kaplan, *Balkan Ghosts*. New York: St. Martin’s Press, 1993.) It should be recognised, however, that these ideas were both in

incomprehensible to the outsider, rooted as it was presumed to be in chronic mental states or cultural predispositions. From the British point of view it seems likely, however, that the “ghosts” which haunted the corridors of the Foreign Office had as much to do with the experience of Northern Ireland as the Balkans. The fear of another protracted and costly involvement in a political situation which we fundamentally did not understand, cast a chill shadow.<sup>24</sup> The arms embargo imposed by UNSC Resolution 713, of 25 September 1991, was clearly a reflection of such perceptions. The justification for this was often framed in terms of the need to “avoid pouring oil on the flames”—in other words to avoid making worse a situation in which the locals were *naturally* “combustible”! The metaphor of the “Balkan tinderbox” was frequently deployed.<sup>25</sup>

Academic commentators on the Yugoslav crisis often did not help here. Approached by politicians or the communications media with requests for explanation, it was not uncommon for academics to seek to justify their own claims to expertise by insisting on the remarkable complexity of the Balkan situation. Introducing his written evidence to the hearing of the Foreign Affairs Committee of the British House of Commons, in November 1991, for example, James Gow insisted that: “The principal and overriding characteristic of the war in Yugoslavia is its complexity”.<sup>26</sup> An important and frequent feature of such responses was the expectation of a “domino theory” of conflict, whereby wars beginning in Slovenia, extending through Croatia and inevitably to Bosnia, could eventually take in Macedonia and Kosovo.<sup>27</sup> These latter two

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circulation well before the appearance of his book, and if anything held in a more extreme form by others. In particular, several books by Stjepan G. Meštrović, in which he set out to revive and popularise the ideas of Dinko Tomasić, examining the consequences of the existence of supposedly antithetical character-types among the Balkan peoples, attracted wide attention. Even a historian as respectable as Mark Wheeler referred (in 1992) to events in the Balkans at this time as “tribal madness”! (Foreign Affairs Committee, *Central and Eastern Europe*. Vol. II, p. 77.) In France, the venerable Marxist historian Étienne Balibar delivered himself of the following extraordinary opinion (also in 1992).

“Croates”, “Serbes” et “Mussulmans” ne sont, à coup sûr, ni des nations ni des religions. Pour leur malheur ils sont beaucoup plus: des incarnations volontaires ou involontaires de civilisations “inconciliables”, et ils sont beaucoup moins: de simples solidarités claniques, resurgissant comme l’ultime recours contre le ravage des identités politiques de la “modernité.” En réalité, je ne vois qu’un *seul nom* qui leur convienne exactement, *ce sont des races* (entendons par là des racisms réciproques). (Cited in Lukic, *L’Agonie Yougoslave*, p. 18. (Emphasis in the original.)

Presumably their status as specific “races” called into question their relation to the human race?

<sup>24</sup> This factor, mentioned in passing by Simms, we believe will be revealed by historians to have had a rather larger significance. See Simms, *Unfinest Hour*, p. 10.

<sup>25</sup> Foreign Affairs Committee, *Central and Eastern Europe*, Vol. II, pp. 98-99. The phrase is also used (apparently without irony) by Richard Ullman, *World and Yugoslavia’s Wars*, pp. 20-22.

<sup>26</sup> Foreign Affairs Committee, *Central and Eastern Europe*, Vol. II, p. 71. Looking back over numerous conversations with journalists at this time, I recall that this must also have been a consequence of my own comment on events. *Mea culpa!* (JBA)

<sup>27</sup> See, for example, Ullman, *Yugoslavia’s Wars*, pp. 20-21.

possibilities raised the spectre of wider Balkan conflicts, drawing in Greece, Bulgaria and Albania, all of which had evident interests in the future disposition of the parts of the former Yugoslav body-politic.<sup>28</sup> An influential base had been laid already for these fears, about the possible general spread of conflict in the Balkans, in the work of General Sir John Hackett, whose speculative analysis of the likely causes of a Third World War had identified its starting point in the Balkans.<sup>29</sup> Academic insistence upon the complexity and intractability of this revived “Eastern Question” hardly provided assurance to politicians that effective international military involvement was possible.

In the face of these inferential structures, which promised a return to the familiar in the Balkans, whether in the form of the “Eastern Question” or the Second World War, it came to be believed that the best that the “international community” could do was to mediate and provide humanitarian support. This was reflected from the beginning in the deployment of the European Community Monitoring Mission in Croatia, after the signing of the Brioni agreement, which concentrated a good deal of its energies into the negotiation of cease-fires. The same assumptions can be recognised in the establishment of the United Nations Protection Force (UNPROFOR), which moved into Croatia following its establishment on 21 February 1992. Created with an initial remit of twelve months, it was intended to stabilise the situation on the ground and permit the delivery of humanitarian relief, pending the outcome of high-level diplomacy. The trouble was that once they were committed to these postures, the prospect of enforcement action by the military became even less likely, as this was perceived as endangering personnel engaged in monitoring or relief work.

### ***Elite inaction and public outrage***

Introducing his historical survey of “the politics of war crimes tribunals”, Gary Bass notes that: “liberal states are most likely to support a war crimes tribunal if public opinion is outraged by the war crimes in question. And they are less likely to support a war crimes tribunal if only elites are outraged”.<sup>30</sup> This generalisation certainly holds true of the ICTY. “Elites” in the liberal-democratic states were slow to become “outraged” by the descent into war, and pressure for the

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<sup>28</sup> In this respect we believe that Carole Hodge’s account of British official indifference to the Yugoslav crisis in terms of its cooptation by a pro-Serb lobby, is rather one-sided. Carole Hodge, *The Serb Lobby in the United Kingdom*. Seattle: University of Washington, Donald Treadgold Papers, No. 22, September 1999. We need to give greater weight to *unintentional* factors.

<sup>29</sup> Sir John Hackett, *The Third World War*. London: Barclay Books, 1980.

<sup>30</sup> Bass, *Stay the Hand of Vengeance*, pp. 28-29.

creation of the tribunal came initially from “nonstate” actors. Effective action at the international level only became possible once significant elites in the liberal-democratic states were motivated to take up the issue.

The pressure to break this deadlock came, as Bass notes, very emphatically from “nonstate actors”—especially from the press. Three stories were particularly important in focussing popular attention on the Balkan situation—the siege of Vukovar, which fell to Serb forces after a three-month siege in November 1991—and the attack on Dubrovnik, in December. In the United States publication of the interview by John Burns with the self-confessed war criminal Borislav Herak was also particularly influential.<sup>31</sup> Prior to these events the public relations war had been largely won by Belgrade. With these events, however, it became clear that the Milošević regime had little understanding of western public opinion. The “reception” provided for foreign correspondents, by the Yugoslav Army, in the ruins of Vukovar was bizarre.<sup>32</sup> The “Convoy of Hope” which Stipe Mesić led into the beleaguered city of Dubrovnik, by way of contrast, was a media coup. The interview with Herak had the added power of being an account by a direct participant in the action. The relevance of these events is summed up by Mihailo Crnobrnja:

.... Serbia helped its adversaries by contributing to its own poor image. For example, the Serbs, with the destruction of Vukovar and bombardment of Dubrovnik, actually contributed much more to the recognition of Croatia than the political pressures of German Chancellor Kohl or foreign minister Genscher.<sup>33</sup>

The policy of sanctions, arms embargos and negotiation had evidently failed by the summer of 1991, and the process of moving international responsibility to the UN began—partly stimulated by growing American concern about the inability of European leaders to resolve the crisis. An important stage in this process was marked by the emergence of strong disagreements within the EC over the issue of the recognition of the secessionist states—Slovenia and Croatia. A potential mechanism existed for resolving disputes between states, in the International Court of Justice (ICJ).<sup>34</sup> There were two obstacles to the use of this, however, on this occasion. Not only had Yugoslavia not signed the *Optional Protocol* to the statute of the ICJ, but competence of the

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<sup>31</sup> Aryeh Neier, *War Crimes: brutality, genocide, terror, and the struggle for justice*. New York: Times Books, 1998, p. 126. See also: Garapon, *Des Crimes qu'on ne peut ni punir ni pardonner*, p. 30.

<sup>32</sup> “Of some 15,000 persons believed to be in Vukovar on November 18 1991, close to 3,000 are missing.” Neier, *War Crimes*, pp. 7-8.

<sup>33</sup> Crnobrnja, *Yugoslav Drama*, p. 230.

<sup>34</sup> These developments are examined in detail in Steve Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission. A contextual study of peace-making efforts in the post-Cold War world*. Aldershot: Ashgate, 2000.

Court was confined to disputes between *states*.<sup>35</sup> In August 1991, therefore, the EC agreed to create an *ad hoc* mechanism for settling upon a framework within which disputes between the Yugoslav republics could be handled. It set up an Arbitration Commission, headed by the French jurist and constitutional expert Robert Badinter, which began its work in September.

The terms of reference of the Commission, in terms of the nature of the “disputes” which it was expected to arbitrate, were both wide and (to some extent) unclear.<sup>36</sup> The matter of recognition appears to have arisen, however, as a consequence of questions raised by the Serbian delegation to the EC Conference on Yugoslavia (ECCY), to do with rights to self-determination, secession and the status of internal or administrative frontiers.<sup>37</sup> The Chair, Lord Carrington, then referred these questions to the Commission. On 29 November 1991 the Commission delivered the first—and probably the most notorious—of its opinions, to the effect that Yugoslavia was “in the process of dissolution”.<sup>38</sup> The legal basis of the opinions delivered by Badinter and his colleagues is beyond the concern of this report: their consequences, however, are central to it, because it was in response to these that the ECCY required the Yugoslav republics to state their intentions with respect to secession, and laid down conditions (including time limits) within which these conditions should be met.<sup>39</sup> The results of the deliberations of the Commission, however, precipitated an acute conflict within the EC, in which the governments of different states could not see eye to eye upon the acceptability of its opinions or the appropriateness of proposed responses to them. It has been a matter of vociferous debate since then as to whether the German government broke ranks with its European colleagues over the substance of this issue, or merely over the matter of timing.<sup>40</sup> Whatever the case, however, during the winter and early spring of 1992 it became abundantly clear that the expectation that the Europeans could lead effectively the international response to the Yugoslav crisis was no longer credible. The death-knell of Europe’s role as the bearer of prime responsibility was the conflict over the recognition of Slovenia and Croatia, in which it became clear that there were very serious differences of

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<sup>35</sup> Terrett, *Dissolution*, p. 121. Note also that the European Court of Justice was only empowered to hear cases involving member-states of the EC.

<sup>36</sup> Terrett, *Dissolution*, Chap. 5.

<sup>37</sup> Terrett, *Dissolution*, pp. 141-142.

<sup>38</sup> Terrett, *Dissolution*, pp. 150-152.

<sup>39</sup> It should be clear that the Commission intended its opinions to have the status of advice, and that action upon these was the responsibility of the European Council. Terrett, *Dissolution*, pp. 164-166.

<sup>40</sup> Perhaps clarity will be granted by the report of the group within the “Scholars’ Dialogue” programme, which is writing on this question.



approach between different European states, such that the creation of a really effective policy which had the backing of the EU was unlikely.

In November 1991, United Nations Security Council Resolution (UNSCR) 721 requested a report on the feasibility of establishing a peace-keeping force for Yugoslavia. On 3 December Boutros Boutros-Ghali took over from Perez de Cuellar as Secretary General of the UN—noted for his caution and commitment to the efficaciousness of economic sanctions. The diplomatic initiative in the search for a solution to the Yugoslav crisis passed to the UN, where primacy continued to be given to the belief that the way forward lay through mediation rather than enforcement. On 21 February 1992 UNSCR 743 was passed, creating UNPROFOR and authorising its deployment in Croatia. (Deployment began in March, and was not completed until July, partly because of the strategic error which persuaded its first commander, Gen. Satish Nambiar, to locate his headquarters in Sarajevo.) The continuing deterioration of the situation in Bosnia led to the extension of the remit of UNPROFOR to that republic by UNSCR 776, on 14 September 1992. The chief characteristic of UN policy was its commitment to the concept of UNPROFOR as the protector of humanitarian aid. It could not be a proper peace-keeping force as there was no peace to keep, and an alternative policy of enforcing an end of hostilities by military intervention could not secure the requisite international backing.

The tide of public indifference really turned, however, with the reports, in July and August of 1992, of detention camps, filed by journalists (in the English-speaking world) such as Roy Gutman, Penny Marshall, Ed Vuillamy, John Burns and Maggie O’Kane, and also (to Francophone audiences) Jean Hatzfeld and Yves Heller.<sup>41</sup>

A further impetus to the redefinition of the Yugoslav situation came in August 1992, with the publication of several reports on the war in Bosnia by significant non-governmental and international organisations. The first of these was the Human Rights Watch report.<sup>42</sup> The first report of Tadeusz Mazowiecki, the UN special commissioner for human rights, was presented in August 1992.<sup>43</sup> (His reports were a significant factor in ensuring that governments could not

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<sup>41</sup> Lukic, *L’Agonie Yougoslave*, p. 7; Bassiouni, *The Commission of Experts* p. 29.

<sup>42</sup> Helsinki Watch, *War Crimes in Bosnia-Herzegovina*. New York and London: Human Rights Watch, 1992. On the significance of this report, see Neier, *War Crimes*, pp. 120-123. Neier was the founder, and at that time the director, of Human Rights Watch. A crucial factor motivating the organisation to take up the Yugoslav question was the possibility of putting to the test legislation relating to genocide. An earlier report published in June by a Bosnian NGO was perhaps significant in drawing attention to the problem, although it had less public impact than did the Helsinki report. See: Le Nouvel Observateur et Reporter sans frontières, *Le Livre Noir de l’Ex-Yougoslavie*. Paris: Arléa, 1993, pp. 1-25. (Bass also deals with this, as does Hazan.)

<sup>43</sup> *Livre Noir*, pp. 181-197.

remain in ignorance of the problems.) This was followed in September by publication of a report on the situation in Bosnia commissioned by the CSCE.<sup>44</sup>

As Jonathan Eyal has remarked:

Almost everything which followed during the second half of 1992 was dominated by similar considerations: how to appease public opinion, limit the damage to the reputation of European institutions and individual governments, prevent any further confrontation within the EC and reduce the fighting in the Balkans without acquiring open-ended obligations.<sup>45</sup>

On 26 and 27 August the London Conference was convened—involving representatives of more than 20 states, together with the leaders of the former Yugoslav republics and autonomous provinces. This took place partly because of the obvious gap between the rising international public concern about the situation and the conspicuous failure of the European-led Carrington mission. At the London Conference, responsibility for future EU negotiations was formally handed over to Lord David Owen, who was joined by Cyrus Vance, as special representative of the UN Secretary General. Their efforts to negotiate a settlement of the conflict resulted in the “Vance-Owen Peace Plan” for Bosnia and Hercegovina, which was presented in Geneva on 2-4 January 1993. Although this was soon endorsed both by representatives of the secessionist Bosnian Croats and the Bosnian government, it became clear rapidly that the plan would founder on the opposition of the Bosnian Serbs. By the end of March, it was evident that the Plan was a dead letter, and Cyrus Vance tendered his resignation, advising Owen to do likewise. Radovan Karadžić, the leader of the Bosnian Serbs, was put under enormous pressure to accept the plan, and at the Athens meeting of 1-2 May even put his signature to it. He made it clear, however, that effective endorsement was conditional upon its ratification in a referendum, which was to take place on 15-16 May. To the surprise of very few, this was not forthcoming.

### ***The formation of the ICTY***

The commitment of the EU to a negotiated peace, in the form of the Owen-Vance negotiations, however, confirmed the unlikely prospect of military intervention by other states, and directed attention towards the exploration of other possibilities. By the early autumn of 1992 it is possible to speak, without exaggeration, of “public outrage” in response to the reporting of events in Yugoslavia. Although various public figures outside the media also played an important part in this process (Hazan reports the role of French advocates, Badinter and Delmas) it is evident that

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<sup>44</sup> *Livre Noir*, pp. 199-233.

<sup>45</sup> Jonathan Eyal, *Europe and Yugoslavia: lessons from a failure*. London: Royal United Services Institute, 1993, p. 69.

politicians followed in the wake of public sentiment. Consequently the matter came before the General Assembly of the UN on 23 September, when the possibility of a tribunal was proposed by Klaus Kinkel. On 6 October resolution 780 was passed in the Security Council, establishing a Commission of Experts was created in order to explore the feasibility of a war crimes tribunal.<sup>46</sup>

That Commission had before it not only the material already published, but the results of investigative missions which it conducted (despite operating upon an insecure and very limited budget) including the exhumation of mass graves.<sup>47</sup> As the Commission pursued its deliberations, further *prima facie* evidence of the scale and seriousness of war crimes in Yugoslavia accumulated. In October, Amnesty International added its voice to the growing volume of well-documented protest about the scale and seriousness of “grave violations” of the Geneva and Hague conventions in the region.<sup>48</sup>

In the context of the accusations which have been made regarding the political pressures which shaped the creation of the ICTY, it is important to acknowledge several features of the Commission and its work.<sup>49</sup> Its original Chair, the Dutch professor of international law Frits Kalshoven, has complained publicly about the difficulties faced by the Commission, attributing some of these to deliberate obstruction (blaming Britain, France, Germany and Italy). Several secret services were accused of refusing to pass on relevant information they were believed to possess. Kalshoven resigned his post before the Commission had completed its task (on medical grounds) handing over responsibility to Cherif Bassiouni (President of the International Human Rights Law Centre, at De Paul University, in the USA). Evidently Kalshoven and Bassiouni had divergent ideas about the Commission’s purposes and methods, and to some extent it is likely that these personal differences as much as external interference played a part in its problematic start. A great deal of its eventual success was owed, however, to the personal dedication and hard work of Cherif Bassiouni, in overcoming problems posed by the inadequacy of the resources placed at its disposal and the lack of cooperation from relevant parties. Bassiouni also believed, it seems,

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<sup>46</sup> A detailed account of the creation and operation of the Commission is given by M. Cherif Bassiouni, *Commission of Experts*. See also Hazan, *La Justice face à la guerre*, pp. 48-9. There are some minor discrepancies between these two accounts. We have relied heavily upon Bassiouni (a former Chair of the Commission) in this section. The idea of a tribunal was first aired by Mirko Klarin, in an article in *Borba*.

<sup>47</sup> *Livre Noir*, pp. 285-295 and 261-302. See also, Beigbeder, *Judging War Criminals*, 147-8.

<sup>48</sup> *Livre Noir*, pp. 235-278. Resigning from his position as head of UNPROFOR in August 1992, Gen. Lewis MacKenzie returned to Canada. It has been suggested that his pressure upon the Canadian government (and the publication of his memoirs) was an important factor in promoting Canadian support for the creation of the ICTY at this time. See Gow, *Triumph of the Will*, p. 96.

<sup>49</sup> We are grateful to Selma Leydesdorff for providing an English summary of Cees Banning and Petra de Koning, *Balkan aan de Noordzee, Over het Joegoslavië-tibunaal, over recht en onrecht*. Amsterdam:Prometheus-NRC Handelsblad, 2005, which has been useful in the preparation of this section of the report.

that British diplomacy was hostile to the investigation, although both his own published account and the interviews given by Kalshoven also make it clear that many of their difficulties were rooted in the bureaucratic culture of the UN itself. The members of the Commission were nominated for their individual expertise in relevant areas, and not as representatives of particular states.<sup>50</sup>

On 22 February 1993 the Security Council of the UN decided, by a unanimous vote, that: “an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>51</sup> Resolution 808 directed the Secretary General to submit to the UNSC a specific proposal to this effect. Accordingly, on 3 May 1993 the Secretary General submitted his report, which was approved by the Council on 25 May, again by a unanimous vote (UNSCR 827) creating the International Criminal Tribunal for the Former Yugoslavia.

The experience of the Commission of Experts underlines several important general points in relation to the events which led to the creation of the ICTY. In the first place, it was set up in response to widespread *public* concern rather than as an expression of the determination of the major international actors. (The initial resolution was proposed by France, Italy and Sweden.)<sup>52</sup> Indeed, to some extent its existence seems to have been regarded as an embarrassment, because the possibility that key players in the events were identified as possible war criminals was interpreted as potentially prejudicing the outcome of concurrent peace negotiations.

(O)n 15 December 1992, Acting Secretary of State Lawrence Eagleburger announced to the Conference on the Former Yugoslavia held at the UN in Geneva (in a room adjacent to where the Commission was meeting that same day) that the USA had identified a number of war criminals who should be brought to trial. They included Slobodan Milošević of Serbia and Bosnian Serb leaders Radovan Karadžić and Ratko Mladić. This bombshell threw off Vance and Owen, whose plan was dependent upon these very leaders’ acceptance. In that context, the last thing that those who wanted a political settlement to be reached was to have an activist Commission of Experts that could likely prove the accusations made by Secretary Eagleburger. The priority at the time was a political settlement—and justice was not viewed as an inducement to that end. Indeed, there was

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<sup>50</sup> Bassiouni, *Commission of Experts*, pp. 4-7; also Garapon, *Des Crimes qu’on ne peut ni punir ni pardonner*, p. 31.

<sup>51</sup> All resolutions of the Security Council can be seen on the UN website: [www.un.org](http://www.un.org).

<sup>52</sup> There has been talk of an “American-British-Australian conspiracy” driving the formation of the Tribunal. The evidence for this appears to be both thin and contradictory. It has to be acknowledged that this is an area upon which further research would be instructive, although to undertake this would have been beyond the resources of Group 10.

then great apprehension that the Commission might be an impediment to a political settlement.<sup>53</sup>

Throughout the period of its operation funding for the Commission remained irregular and insecure, dependent in large measure upon contributions to a voluntary trust fund. Roughly a third of its direct financial support appears to have come from the USA (the Clinton administration by this date having replaced that of George Bush, and moved strongly behind the project). Other backing in money, in services and in personnel was contributed by a wide range of governmental and non-governmental sources (such as Physicians for Human Rights).<sup>54</sup> Cherif Bassiouni attributes the persisting problem of serious under-funding which afflicted the Commission primarily to the bureaucratic character of the UN, and to inefficiency rather than to any systematic attempt to subvert its work.<sup>55</sup>

The Commission's work was suddenly terminated in July 1994, in a manner which Bassiouni has described as "untimely" and "premature", suggesting that the political context to this decision has never been explained adequately, and that the idea of a war crimes tribunal was opposed by at least some important international actors.<sup>56</sup> It is likely that its work was wound up in the expectation that its tasks could be assumed by the newly-created Tribunal, however, and not because of some deliberate act of subversion. It is undoubtedly the case that the "premature" termination of its work did have one consequence of enormous importance, in that it prevented the government of Yugoslavia from making any formal presentation of its own evidence, and that that information was not available in time for the Commission to make its final report. This did lend credence to the idea that the ICTY, from its inception, has been designed principally as an instrument to punish the Serbs and their allies, and in that respect has been very damaging.

No more than five months elapsed between the publication of the Helsinki Rights Watch report in August 1992 and the first UN resolution; and only a further three months before the Secretary-General's report was enacted in May 1993. By the regular standards of these bodies, this is quite remarkable alacrity. It is useful to explore the reasons why the permanent members

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<sup>53</sup> Bassiouni, *Commission of Experts*, pp. 7-8. For David Owen's comments on this episode, see his *Balkan Odyssey*. London: Victor Gollancz, 1995, pp. 80-81. For a wider consideration of the possible incompatibility between the diplomatic pursuit of peace and a concern for justice, see: Jean E. Manas, "The Impossible Trade-off: 'Peace' versus 'Justice' in settling Yugoslavia's wars, in Ullman ed. *World and Yugoslavia's Wars*, pp. 42-58. The tension over this issue is also noted by Richard Holbrooke in his memoirs. Richard Holbrooke, *To End a War*. New York: The Modern Library, 1999, pp. 107-8 and 332-3.

<sup>54</sup> For further consideration of the issue of financial support, see Section II, below.

<sup>55</sup> See Bassiouni, *Commission of Experts*, pp. 8-11, and esp. fn. 25.

<sup>56</sup> Bassiouni, *Commission of Experts*, p. 64.

of the Security Council should find it possible or necessary to respond so positively to this wave of popular outrage.

### **Conclusions**

A widely-shared consensus among commentators seems to be that, far from constituting the outcome of a determined political will on the part of any one of the principal international agents, the ICTY reflected the “triumph of the lack of will” (in James Gow’s telling phrase), and was expected to stand as a substitute for effective intervention in the region.<sup>57</sup> The sense of a lack of energetic commitment in the part of the major states (and indeed on the part of the UN itself) is suggested by the subsequently protracted and difficult process of setting up the Tribunal, staffing it—and above all, *funding* it realistically. These difficulties do lend support to the impression that once the gesture had been made of passing the appropriate resolutions, nothing much was expected to happen.<sup>58</sup>

The USA, Britain, France, and Italy have all been cited, albeit in contradictory fashion, at different times and by different authors, as responsible in part both for the emergence of the Tribunal and for the hampering of its work. Whatever may have been its subsequent fate, the war crimes process was clearly, at that time, not the stalking-horse of any of the “Great Powers”. What is striking is the conflicting and confused nature of policies relating to the Yugoslav wars at this time, both within and between the principal international actors.<sup>59</sup> Doubtless this is an area which will yield to further and more detailed research as opportunities for scholarship are opened up. Once created, however, rather like a Spartan infant left exposed on the hillside, the Tribunal survived: and although it continued intermittently to be both the object of policy and the victim of neglect, it also emerged as an independent agent upon the political scene.

These events have been recounted here in a somewhat more extensive manner than might have been thought necessary, for a particular reason. It is important to counter the notion that the creation of the ICTY was an *arbitrary* event, the purpose of which was specifically to “punish”

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<sup>57</sup> James Gow, *Triumph of the Lack of Will*. Also Jane M.O. Sharp, *Honest Broker or Perfidious Albion? British Policy in Former Yugoslavia*. London: Institute for Public Policy Research, 1997, esp. pp. 24-5. Richard Holbrooke also observes that: “When it was established in 1993, the tribunal was widely viewed as little more than a public relations device.” Holbrooke, *To End a War*, p. 189. Incidentally, Brendan Simms is wrong in pointing specifically to the obstructive role of Britain. One of the movers of Resolution 808 within the UN was the British representative.

<sup>58</sup> The low salience of the ICTY in the international politics of the time is tacitly conveyed by the fact that the majority of the historical accounts of the break-up of Yugoslavia published to date have very little (if anything) to say about it. See Banning and Koning, Chap. 2.

<sup>59</sup> The Clinton White House had by that time, leant its support to the war crimes investigations, although it is known that there were serious policy disagreements between rival segments of the American political and military establishment. See Lukic, *L’Agonie Yougoslave*, pp. 254-263.

those responsible for the break-up of Yugoslavia. It was not arbitrary, but came at the end of a long and complex process involving a series of failed attempts to find a negotiated solution to the Yugoslav crisis. Furthermore, the predisposition of all parties throughout the crisis had been to adopt approaches which were highly *legalistic*, in which respect the creation of the Tribunal (at the end of that process) can be seen to share characteristics with the Badinter Commission (at its beginning).

## ***II: The Tribunal as an instrument of international politics***

The claim that the ICTY is a “political” body often is intended to mean that the Tribunal is no more than the creature of some powerful state or group of states. Although to some extent our historical account of the formation of the ICTY will have indicated that this view is heavily distorted, it is worth dwelling on this belief further with in relation to the continuing operation of the Tribunal since its formation in 1993. It is unproblematic to portray the Tribunal as emerging from a context of international politics within which state and non-state actors pursue their several aims. It is important to draw a distinction, however, between the instrumental *intentions* with which the Tribunal may be regarded, as an object of policy, and the much stronger claim that in practice it has been simply the creature of some specific external power or powers.

Even limiting our discussion to the interests and actions of *states*, it is clear that the degree of their engagement and the direction of their commitment in relation to the ICTY has changed significantly over time. In fact, one of the most obvious features of the international context of the Balkans since 1992 has been the *inconsistency* of the stances towards the region’s problems, taken by the several major international actors. Each of the major states involved can be shown to have experienced internal political conflict over the utility and character of the Tribunal. Power has as often been used in order to prevent developments as to accelerate them. The result has been notable for the way in which the unintended consequences of action have been as significant as the intentions of international actors.

In this section of the report we examine briefly the diversity of policies towards the ICTY, since its foundation, of each of the principal international agents involved in “the Yugoslav space”—the United States of America, Great Britain, France, Russia and the UN itself.<sup>1</sup>

### ***The United States of America***

The United States of America, in the course of the history of the ICTY, has had three Presidents (George Bush Sr., Bill Clinton and George W. Bush) and six Secretaries of State (Lawrence Eagleburger, Warren Christopher, Madeleine Allbright, Colin Powell and Condoleeza Rice). Each has had his or her own take upon the character and relative importance of the ICTY, so that

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<sup>1</sup> It would be mistaken to believe that the Balkan states have been no more than passive victims of international politics. Each has “played up to” the Tribunal in different ways, seeking to extract political advantage from its existence. These political responses by regional governments are touched upon, however, in Section IV. Note that these issues are treated relatively briefly here, because of the amount of attention they are likely to merit in the reports of other Research Groups.



it is not meaningful to attempt to identify a single “American” stance towards the Tribunal. Whereas Eagleburger was widely believed to be pro-Serb, Warren Christopher, although cautious about involvement in the region, was critical of the international arms embargo, backed Clinton’s “lift and strike” policy, and gave US assent to the creation of the Tribunal. A significant watershed was created in the winter of 1995-6, with the signature of the Dayton Agreements, which concluded the war in Bosnia. Here compliance with the ICTY was written into Article IX of the General Framework Agreement, as an obligation accepted by all parties. The work of the Tribunal was endorsed, in this context, as making a significant contribution to the achievement of the “peace and stability” sought by the UNSC Resolutions which has created it.

Madeleine Albright, as US Ambassador to the UN between February 1993 and January 1997, was strongly committed to the Tribunal, and her impassioned speeches to the Security Council were highly influential in securing the passing of the relevant resolutions.<sup>2</sup> Albright was clearly committed to engagement with the Yugoslav situation, and frustrated not only by what she saw as the obstructionism of European powers, but also by the relative cautiousness of both the intelligence community and the United States Department of Defense.<sup>3</sup> There was clearly a major shift in the position of the American administration after January 1997, when she replaced Warren Christopher in the State Department. American interest in and support for the Tribunal was given an additional boost as a consequence of the developing crisis in Kosovo, and the NATO intervention in 1999.

The pendulum swung the other way with the election of George W. Bush to the White House in November 2000. The Bush entourage had quite different foreign policy priorities—was deeply suspicious of the UN, and far more interested in Asia as a locus of America’s vital interests. Bush (and his Secretary of State Colin Powell) tended to leave the initiative in Balkan affairs once again to the Europeans, running down American involvement both in Bosnia and in Kosovo. The ICTY remained useful as a stick with which to beat recalcitrant Balkan states who were making less than adequate progress towards democratisation and the advancement of a free market economy. In that respect, however, American attitudes towards the Tribunal have shifted towards its being of secondary importance, and instrumental, rather than valuable in itself.

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<sup>2</sup> See Appendix 3 to this report provided by Richard M. Oloffson, in which he examines the various visions which guided the creation of the ICTY. In his published record of his involvement with the former Yugoslavia, Richard Holbrooke mentions also the important role played at this time, in relation to the formation of the ICTY, by John Shattock, Assistant Secretary of State for Humanitarian Affairs. Holbrooke, *To End a War*, p. 190.

<sup>3</sup> William Stuebner, formerly based at the ICTY and deputy head of the OSCE mission to Bosnia, kindly agreed to make available to the Group the text of a forthcoming article, “American cooperation with the International Criminal Tribunal for the former Yugoslavia, 1994-1999”. We are grateful for his assistance on this point.

The belief that the Tribunal is little more than an instrument of American foreign policy rests in large measure upon the ground that “he who pays the piper calls the tune”, and a widespread belief exists in the Balkans that the ICTY is paid for primarily from American sources. There is, however, a good deal of confusion in this area. Since its foundation the ICTY has been funded from two sources—the regular budget of the UN and a voluntary Trust to which governments and other organisations are invited to contribute. A consideration of the politics of the overall budget of the UN, and the attitude of successive United States governments towards that, would take us well beyond the reasonable limits of this report. Nevertheless, several points are worthy of note.

Leaving aside the six-month period in 1993 when provisional arrangements were made to support the Tribunal, its costs have been carried predominantly by the general budget of the UN. In relation to the US\$ 10.5 millions spent on the ICTY in 1994, the voluntary Trust provided US\$ 3.2 millions—around one third. By far the largest donors to that fund at that point were Italy, and two Muslim states, Malaysia and Pakistan. The USA did not become a substantial donor to the Trust fund until the second Clinton administration took office in 1997, when a grant of US\$ 2,485,000 was made. Since that date the USA has indeed been the largest single donor to the Trust, subscribing roughly 40% of the total of US\$ 42.2 millions which it has received.<sup>4</sup> It has to be remembered, however, that the total of *voluntary* contributions has been but a small fraction of the total cost of running the Tribunal, the budget of which amounted to US\$ 271.8 millions in 2004-5 alone. Here the USA has also been a very substantial donor, contributing roughly a third of the total between 1994 and 1999—although a reduced proportion since that date.<sup>5</sup>

The USA has given very substantial financial backing to the ICTY; and it is certainly the case that donations to the voluntary Trust can be considered as a reflection of national sympathy for the Tribunal’s work—as in the case of the large contributions made by Malaysia and Pakistan in its early years, or by the Netherlands in the wake of the Srebrenica massacre. It is another matter to go beyond this, however, to assume that any individual state exercises a sufficiently powerful financial leverage over the ICTY to shape its policies by those means. Whether and in what respects the USA has ever exercised that potential leverage has yet to be demonstrated. Although there is no evidence to date that the American administration has consistently or exclusively used financial leverage to ensure that the ICTY worked in favour of one or another of

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<sup>4</sup> These figures do not include the value of contributions in kind, some of which have been quite substantial. They have not been of such a size as to invalidate the argument here. These figures are calculated from the *Annual Reports* of the ICTY, available on its website.

<sup>5</sup> Stuebner, “American cooperation”, pp. 3-4.

the ex-Yugoslav states, *all* have been subjected to this kind of persuasion to ensure their cooperation with The Hague.

### ***Great Britain***

Great Britain, similarly, has had two Prime Ministers in the relevant period (John Major and Tony Blair) together with four Foreign Secretaries (Douglas Hurd and Malcolm Rifkind under the former; Robin Cook and Jack Straw under the latter). There have been perhaps even more dramatic contrasts in the view of Yugoslavia taken within British political circles—particularly if one considers the role of David Owen—than in the American context.

The Major government seemed to regard limiting its involvement in the Balkans as its primary goal in the region. John Major himself seems to have been mystified by the Yugoslav situation. His only remark about it in his autobiography concerns his perception of the “complexity” of the Balkan situation, when initially briefed on the deteriorating Yugoslav crisis.<sup>6</sup> Neither his autobiography nor the important biography written by Anthony Seldon makes any mention of the ICTY at all.<sup>7</sup> Douglas Hurd, Major’s Foreign Secretary until 1995, similarly passes over the existence of the Tribunal in complete silence in his *The Search for Peace*.<sup>8</sup>

The attitude of the Conservative government consistently was to back international efforts to negotiate peace deals in the Yugoslav region, convinced that the problem was both too complex and too dangerous to permit a direct attempt to enforce an end to hostilities. In relation to the parties to conflict in the region it took a nominally relativistic stance, although its determined opposition to lifting the arms embargo in effect favoured the Serbs.<sup>9</sup> Carole Hodge has argued vigorously the case that an effective “Serb lobby” in Britain consistently succeeded in orienting policy in favour of Belgrade.<sup>10</sup> She does not always distinguish carefully enough between, unwitting and uncritical absorption of pro-Serb propaganda, active lobbying, and government policy, and does not give adequate recognition of the change which took place in British government policy after 1997. Nevertheless, the fact that Douglas Hurd accepted an

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<sup>6</sup> John Major, *John Major: The Autobiography*. London: Harper Collins, 1999, pp. 532-3.

<sup>7</sup> Anthony Seldon, *Major: a political life*. London: Phoenix, 1997.

<sup>8</sup> Douglas Hurd, *The Search for Peace: a century of peace diplomacy*. London: Warner Books, 1997.

<sup>9</sup> The principal study of British foreign policy towards the region conducted to date has been Brendan Simms, *Unfinest Hour: Britain and the destruction of Bosnia*. London: Allen Lane, 2001.

<sup>10</sup> Carole Hodge, *The Serb Lobby in the United Kingdom*. Washington: Donald W. Treadgold Papers, No. 22, September 1999.

appointment as a non-executive director of the National Westminster Bank, after his retirement as Foreign Secretary in 1995, and was believed to have been involved in a project relating to Serbian public finances, suggests either that in some respects at least lobbying might have been effective, or that the “lobby” found a sympathetic ear in one who was already convinced.<sup>11</sup>

British diplomats were at first cautious towards the foundation of the ICTY. Replacing Lord Peter Carrington as the European Union’s chief negotiator in Yugoslavia in August 1992, David Owen was consistently hostile to the idea of war crimes trials. He saw the attempt to create the Tribunal as not only a distraction from peace negotiation, but as a line of action which could potentially subvert such efforts. It would be difficult to negotiate properly with indicted war criminals, and there would be considerable disincentives to their reaching an agreement which might then expose them to arrest and trial.<sup>12</sup> In a speech to the Foreign Affairs Council of the European Union, in June 1993 (shortly after the creation of the Tribunal) he commented that without substantial military commitment to enforce it, the ICTY would be a “sick joke”.<sup>13</sup> Given the fact that, at this stage, he was convinced that such intervention was unlikely, the remark is eloquent. The Foreign Office also had its doubts about the practicalities of capturing those accused of war crimes.<sup>14</sup> Nevertheless, Britain did sponsor the appropriate resolutions in the Security Council.

British official attitudes towards The Hague changed radically with the election of the Labour government in 1997, and with the accession of Robin Cook to the post of Foreign Secretary. The latter’s advocacy of an “ethical foreign policy”, which would make clear the distance between “New Labour” and the Tories, found a remarkably useful symbol in the ICTY, which British diplomacy supported henceforth. In 1997 the British government undertook to pay the costs of constructing a second courtroom in The Hague, at a cost of some US\$ 500,000. With contributions to the voluntary Trust amounting since then to more than US\$ 4.7 millions, the British government has been the second largest subscriber to this fund.

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<sup>11</sup> The episode was highly controversial in Britain, because his appointment in September 1995 took place only three months after his resignation as Foreign Secretary. The conventions adopted after the Nolan Committee had recommended a code of practice relating to the good conduct of public servants required a gap of two years before accepting such appointments. *Keesings Record of World Events*, 1995, 40744-5.

<sup>12</sup> This is a view which, to some extent, was shared by Richard Holbrooke. See his *To End a War*, pp. 107-8.

<sup>13</sup> David Owen, *Balkan Odyssey*. London: Victor Gollancz, 1995, pp. 180-1. His sparse comments on the ICTY throughout are suggestive. It is worth noting, however, that the book was published in 1995, when the Tribunal was still barely functioning.

<sup>14</sup> Oloffson, p. 102.

By this time also the Tribunal had begun to deliver verdicts, demonstrating that it could be a real and not only a nominal feature of the international scene. The Blair government actively supported the NATO bombing campaign against Serbia in 1999, and both government circles and the press welcomed the fall of Milošević, and were strongly in support of his transfer to The Hague.

An important British foreign policy goal under Labour has been support for the enlargement of the European Union, to include the countries of the Balkans and the former Soviet satellites of central Europe. In pursuit of this, the active cooperation of the former Yugoslav states with the ICTY has been used regularly as a test of their suitability for sponsorship. This certainly appears to have been the case with the negotiations over Croatian accession, successfully concluded in 2005.<sup>15</sup>

### ***France***

France too has been far from united in its view of the Tribunal. The French have had a lively awareness of the issues—refracted not only through the experience of the Holocaust, but also that of Algeria. Several eminent and articulate French intellectuals (most notably Alain Finkelkraut and Bernard-Henri Lévy) were supportive of a much more interventionist stance than the government was prepared to contemplate.<sup>16</sup> The public also was generally positive about the foundation of the ICTY, whereas President Mitterrand was inclined to oppose it.

It has been widely recognised that French official opinion from the outset of the conflict was fairly strongly pro-Serb. Indeed, Thierry Tardy writes of a policy of “appeasement”, even faced with the discovery of the detention camps in the summer of 1992. “Reluctant to condemn the Serbs, and rejecting any coercive intervention, France found itself in the front rank of this policy (of appeasement).”<sup>17</sup> The Quai d’Orsay stuck firmly to its insistence upon the primary role of military force to protect humanitarian intervention.

France did vote for the creation of the Tribunal in the Security Council, but give little active official support to its workings. French reluctance to give whole-hearted support for the Tribunal seems to have stemmed in part from the desire not to become too closely attached to a project which the US State Department pushed for! A major issue in French foreign policy at this

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<sup>15</sup> This question is examined more fully in Section IV, below.

<sup>16</sup> See Thierry Tardy, *La France et la gestion des conflits yougoslave (1991-1995): enjeux et leçons de maintien de la paix de l’ONU*. Bruxelles: Bruylant, 1991, esp. p. 214.

<sup>17</sup> Tardy, *La France et la gestion des conflits yougoslave* p. 161.

time was the question of the French relationship to NATO. More seriously, they were hesitant about the *ad hoc* nature of a Tribunal devoted solely to the Yugoslav situation.<sup>18</sup> A central motivating factor here was made clear in the discussion over the subsequent formation of the International Criminal Court, despite its possibly uncomfortable implications. “France feared that an international jurisdiction might, in the future .... call into question its officers for actions committed in the course of multi-national ‘peace-keeping’ operations.”<sup>19</sup> In other words, France might be held responsible for the actions of its military personnel while they were actually under the command of officers from other states.

François Mitterrand was replaced by Jacques Chirac in 1995, who was much less pro-Serb in his attitudes, although in the light of the manner in which Dutch UN forces were exposed to criticism in connection with the fall of Srebrenica at that time, French caution about the possible risks posed by the ICTY was reinforced. The continuation of official French pro-Serb attitudes has been construed widely as partly responsible for the small number detentions of indictees in areas of Bosnia controlled by the French contingent. It has emerged in this respect, however, that these attitudes have been far stronger among serving officers in the field than among politicians. This problem reached the level of scandal when, on 28 February 2002 a serving French officer was accused of having warned Radovan Karadžić of an attempt to capture him by British units of SFOR.<sup>20</sup>

The replacement of Mitterrand by Chirac saw a redefinition of French foreign policy in another relevant respect, namely a reinforcement of France’s determination to sustain an independent stance, and to resist either diminution of French identity in relation to the European Union, or subordination to the dominance of the USA as the only remaining super-power. Before the signing of the Dayton Agreements, these questions had been shelved, but came onto the agenda again after 1995. Joyce Kaufman refers to the “preoccupation” of NATO with France in the mid-1990s—a concern which was certainly reciprocated.<sup>21</sup> One expression of this has been continuing coolness towards the ICTY. The French government does not, and never has, subscribed a voluntary contribution to the support of the Tribunal, unlike its European partners—

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<sup>18</sup> Oloffson, p. 102.

<sup>19</sup> Tardy, *La France et la gestion des conflits yougoslave*, p. 321. Note that this is significantly different from the position of the USA, which has similarly refused to associate itself with the ICC.

<sup>20</sup> *Keesings*, 2002, 44684-5.

<sup>21</sup> Joyce P. Kaufman, *NATO and the former Yugoslavia. Crisis, conflict and the Atlantic alliance*. Lenham (MD): Rowman and Littlefield, 2002, pp. 141-2.

Britain, Italy the Netherlands and the European Commission being among the largest donors.<sup>22</sup> It is interesting to note that although France has been among the international actors most heavily and consistently involved in the Yugoslav crisis, at every stage the ICTY has been marginal to French government policies.

### ***Russia***

Throughout the Yugoslav crisis there has been frequent reference to the supposed historical sympathy of Russia for the Serbs—typically citing as its basis their common Slavic and Orthodox heritage. This has surfaced as a taken-for-granted assumption at various moments throughout the development of the Balkan drama. Although western governments have repeatedly insisted that they had no “vital interests” in the Yugoslav region, it has been tacitly recognised that the Russians do. Perhaps, as a consequence, it would have been unsurprising in relation to discussion of the supposed bias of international actors towards the war crimes trials, to find mention regularly made of Russian partiality towards the Serb cause. It is worth noting, however, even if only in passing, that Russian intervention in the creation and operation of the ICTY appears to have been insignificant.

As Richard Ullman has observed: “in its involvement with Yugoslavia, Russia has behaved less like a state seeking primacy than one which wants to be seen to be consulted, a member of the innermost circle”.<sup>23</sup> Thus Russia has been eager to be included in the “contact group” of mediators, and in that respect Vitaly Churkin played a particularly active role. A Russian contingent was included in UNPROFOR, and in a spectacular *coup de théâtre*, Russian troops asserted their claim to be included in the international peace-keeping force in Kosovo, setting up a base unexpectedly in Priština airport in mid-July 1999.

As with membership of the “contact group”, however, the government of Boris Yeltsin in Moscow seemed to want at least some military presence in the former Yugoslavia not because it had its own well-defined Balkan agenda but simply for the purpose of “being there”.<sup>24</sup>

Despite the fact that from time to time the American news media have played up the instances when Russia has cast its vote in the Security Council against American preferences, “in every

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<sup>22</sup> The French government did make two small contributions of equipment (vehicles and video equipment) in 1996 and 1997.

<sup>23</sup> Richard H. Ullman, *The World and Yugoslavia's Wars*, p. 30. This section of our report relies heavily upon his discussion, pp. 27-31.

<sup>24</sup> Ullman, *The World and Yugoslavia's Wars*, p. 30.

instance but one .... the United Kingdom and France have been on the same side as Russia.”<sup>25</sup> In this vein, while Moscow has refrained from providing active support for the ICTY, there has been no occasion upon which it has intervened directly to oppose its creation, or influence effectively its course of action. Among all of the “Great Powers” the Russian stance with respect to the ICTY has been the most consistent—but Russia has been the one least open to accusations of attempting to influence its formation or its activities.

### ***The UN as a political actor***

At the beginning of our discussion of the history of the ICTY we noted the importance of the end of the Cold War as a significant feature of the general context to that event.<sup>26</sup> As Thierry Tardy has pointed out, the new climate of cooperation between formerly opposed super-powers after 1989 created a climate of opinion in which it was possible for the UN to act in a much more interventionist spirit in general. He observes that between its foundation in 1945 and 1988, the UN authorised 13 major peace-keeping and similar operations: 33 were undertaken after that date.<sup>27</sup> Whereas only five such missions had been in operation in 1985, no fewer than 17 were current in December 1995. In understanding the ICTY, therefore, it is perhaps important to place it within an international climate which was in any case somewhat unusually favourable to international intervention, and which accorded to the UN an influence which in other times it might not have possessed.

As with the individual states which have played a part in the development of the Yugoslav crisis, the UN also has tended to change both the degree of priority it has accorded to this issue, and its preferred manner of dealing with it. In this respect the changing leadership of the organisation might be taken as indicative. The disintegration of Yugoslavia coincided with the appointment of Boutros Boutros Ghali to the post of UN Secretary General, in 1992. Unlike his predecessor, Javier Perez de Cuellar, Boutros Ghali was not a career diplomat but an international lawyer by training.<sup>28</sup> He brought to the job a strong commitment to strict legality,

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<sup>25</sup> Ullman, *The World and Yugoslavia's Wars*, p. 29.

<sup>26</sup> See above, pp. 8-9, and below, p. 97.

<sup>27</sup> Tardy, *La France et la gestion des conflits yougoslave*, pp. 39-41.

<sup>28</sup> His Ph.D. was gained at the University of Paris. His continuing links with the French-speaking world are indicated by the fact that, following his term of office at the UN, he became the Secretary General of *Francophonie*—the organisation of French-speaking states. His supposed closeness to the French outlook on the Balkan situation has been suggested as contributing to the unfavourable view taken of him in the State Department, but this remains speculative. Critics of his conduct of UN policy with respect to Yugoslavia have also posited a link between his commitment to Coptic Christianity and sympathy for the Orthodox Serbs. To our knowledge, no evidence has ever been produced to support this assertion.



which was perceived by many as at best cautious and at worst obstructive. For these reasons his role in the international response to the Yugoslav wars has been thoroughly controversial.

At least a part of the hostility which he aroused seems to have to do with the fact that, as a North African Arab he did not always share the sense of priorities about world issues held by European and North American interlocutors. When his name was considered for re-election at the end of his term of office, in 1996, although sponsored by a group of African states, the USA threatened to veto his reappointment, and he withdrew. Although this episode has not been the subject of the detailed academic analysis which it merits, it does seem likely that his handling of the Yugoslav situation contributed directly to his downfall. The major point of controversy, however, was probably his attitude towards military intervention rather than his position with respect to The Hague tribunal.

As Abraham and Antonia Chayes have observed: “the United Nations .... has invested significant political capital in the effort to ensure that those responsible for crimes against humanity are brought to justice”.<sup>29</sup> The character of that investment has changed, however, and the perception of the ICTY has shifted since the departure of Boutros Ghali. Whereas initially it was refracted through the lens of war in the Balkans, and evaluated within the UN as a means by which it might be possible to bring about an end to war, and contribute to “peace and security” in the region, subsequently it has been viewed in relation to the creation of the International Criminal Court, and its possible significance as a precursor to a permanent international penal institution. In that context, its perceived value has been enhanced (witness the leap in its regular budget, from US\$ 96.4 millions in 2001 to US\$ 223.2 millions the following year) whereas the pressure upon the Tribunal to wind up its work by its target date of 2008 has increased.

Finally, the United Nations is a world-wide organisation with 191 member-states. Not all of these are “Western”, and even fewer have any direct interest in the outcome of the Yugoslav conflicts. In this light it is very difficult to discern a “UN attitude” towards developments in the Balkans, and to the extent that member-states have formed policies concerning the future of the region, these will be rooted in a variety of reasons, including historical solidarities with the Non-Aligned Movement, the desire to protect trading interests, or a sense of religious community with one or another of the region’s peoples. The stance which many of them have taken towards the ICTY will, in many cases, have more to do with their expectations about a future International Criminal Court, than with any specific features of the Balkan situation.

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<sup>29</sup> In Ullman ed. *The World and Yugoslavia's Wars*, p. 212.

## ***Conclusions***

Conspiracy theories are always attractive, because they promise a simplification of the explanations which we bring to a complex world. The notion that the ICTY was not only created but that it has continued to operate largely as the instrument of an international conspiracy has perhaps been popular in the Balkans for this reason. It has the added attraction, of course, of lending a sense of importance to those who are identified as being worthy of the attentions and energies of powerful conspirators.

The variety of theories of this kind which have circulated in “the Yugoslav space” appear to possess these attributes. A great deal more historical research remains to be done on the evolution of international relations over the past two decades. Nevertheless, it does seem to be the case that attempts to interpret the ICTY in terms of the outcome of the manipulative intentions of the powerful few are not helpful to academic understanding. The intentions of the major policy players in the field have both altered over time, and have in significant respects run counter to each other, so that a far more complex narrative will eventually need to be devised. As Richard Oloffson insists: “The creation of the ... ICTY was the result of many competing philosophies”.<sup>30</sup> A configuration of changing and competing interests, as well as philosophies, also needs to be taken into consideration.

This report does cast doubt upon the view that the Tribunal can be regarded simply as the creature of any of the principal international actors. We do endorse the view, however, that not only in its creation but also in the climate of politics within which it has subsequently been made to operate, the ICTY has been compelled to respond to the changing features of an external system over which it has no control, and indeed little influence. Nevertheless, the organisation itself cannot be reduced to the status of a totally passive victim of the international system. The structure and mode of operation of the ICTY itself are relevant factors in understanding both its role in international affairs and the manner in which it has come to be perceived in the region. We now turn to a brief consideration of these matters.

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<sup>30</sup> Oloffson, p. 101. Rachel Kerr is less complimentary. “The international community as a whole followed a course that was characterised by inconsistency and lack of will.” Rachel Kerr, “International juridical intervention: the International Criminal Tribunal for the former Yugoslavia,” *International Relations*, XV(2) 2000, p. 18.

### ***III: The Structure and Operation of the Tribunal***

The manner in which the operation of the ICTY has acquired political relevance has been shaped closely by its own structure and mode of operation. Like all large organisations the Tribunal is internally differentiated, and its diverse parts have markedly different interfaces with the outside world, either as political agents or as the objects of attempted political pressure. In examining its political relevance, therefore, it will be both logical and helpful to organise that discussion in terms of the several components of the organisation. Despite this internal differentiation, however, it can be said to be the case that the Tribunal as a whole has tended to view the Yugoslav region and its needs for justice from the standpoint of the external political environment, rather than the Balkan region itself.

The structure of the ICTY and its terms of reference are set out in its Statute, enacted as Resolution 827 of the UN Security Council. This specifies its competence (Article 1), and identifies the body of law relating to the Geneva Conventions, the “laws or customs of war”, genocide and crimes against humanity, which it will be responsible for enforcing (Articles 2-5). Its jurisdiction is specified (Articles 6-10). In Articles 11-17 the organisation of the Tribunal into three elements is described—the Trial Chambers, the Office of the Prosecutor and the Registry. It is responsible, through its president, to the Secretary General, who in turn reports annually to the Security Council of the UN. Finally, in Articles 18-34 other matters relating to its procedure are specified. It will be useful to comment on each of these principal areas in turn.<sup>1</sup>

#### ***The ICTY and international humanitarian law***

As noted above, the ICTY was expressly set up in order to *apply* existing international law, and not to *create* it. This was an important consideration in its founding, as it was necessary to avoid the accusations levelled at the Nuremberg and Tokyo tribunals that their inadequately secure foundation in established international law resulted in their imposing “victors’ justice”.<sup>2</sup> For this reason, Articles 2-5 of the Tribunal’s Statute confine its activities to international conventions

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<sup>1</sup> The following information draws heavily upon the ICTY web-site: [www.un.org/icty](http://www.un.org/icty), although the Statute of the Tribunal has been widely reprinted.

<sup>2</sup> A very significant but often under-recognised difference between the ICTY and Nuremberg and Tokyo is that the latter were *military* tribunals, whereas the former is a civilian court of law.

already agreed before its creation, and indeed, subscribed to by the government of the former Yugoslav federation.<sup>3</sup>

There is always an element of legal progressivism in any system, whereby the *interpretation* of existing written law qualifies it in unforeseen directions. A feature of great significance in relation to any law is that it only becomes a reality when it is interpreted and tested in court. This has been particularly the case in relation to the Genocide Convention, which had not previously been tested in any court. The legal relevance of distinction between “war” and “civil war”, which had certainly been taken for granted in popular parlance but never securely established in international law, was successfully questioned in the Tadić case.<sup>4</sup> A particularly important element of judicial innovation was undertaken by the Tribunal in its determination of the status of the law relating to rape.<sup>5</sup>

There have been several legal challenges to the determinations reached by the Trial Chambers in The Hague, notably those relating to the concept of “civil war”, and the possible immunity to prosecution of a former head of state. The appropriateness of the use of Chapter VII of the UN Charter as the mechanism for the creation of the Tribunal has also been called into question. Whereas these points of challenge have to do with the *interpretation* of international law, they have rested upon a general acceptance of the validity of the legal conventions themselves. This report will not, therefore, explore legal issues of that kind, which for our purposes will be taken as now settled.<sup>6</sup>

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<sup>3</sup> An important consideration here is the need to respect the established general legal principal of *nulla crimen sine lege*—literally, “no crime without a law”. It is not legitimate to punish an action which was not contrary to law at the time it was commissioned. (We are grateful to Joseph Krulić for this observation.) Vojin Dimitrijević, in relation to this point, has noted the argument that the claim to legitimacy of the ICTY might have been even stronger if it had written into its Statute direct reference to relevant articles of the SFRJ Penal Code, on the ground that: “It would have been more precise and easily understandable to Yugoslavian lawyers.” Vojin Dimitrijević, “Discussing The Hague war crimes tribunal in the Yugoslavian environment”. Unpublished TS.

<sup>4</sup> See, Diane F. Orentlicher, “Internationalizing Civil War”, in Belinda Cooper ed. *War Crimes: the legacy of Nuremberg*. New York: TV Books, 1999, pp. 154-158.

<sup>5</sup> This is dealt with in full in Appendix 6, below. For an earlier exploration of some of the issues, see also: Patricia Viseur-Sellers, “Rape under international law”, in Cooper ed. *War Crimes*, pp. 159-167.

<sup>6</sup> A wide-ranging and thorough review of some relevant issues, including a comprehensive bibliography to the date of publication is provided by: Anne-Marie La Rosa, *Juridictions pénales internationales: la procédure et le preuve*. Paris: Presses Universitaires de France, 2003.

### ***The Trial Chambers***

The Trial Chambers constitute the core of the Court—the judges.

The Chambers consist of 16 permanent judges and a maximum at any one time of nine *ad litem* judges. The 16 permanent judges are elected by the General Assembly of the United Nations for a term of four years. They can be re-elected.

The *ad litem* judges are drawn from a pool of 27 judges. They are also elected by the General Assembly of the United Nations for a term of four years, but they are not eligible for re-election.<sup>7</sup>

At the time of writing, the members of Chambers were drawn from 22 different countries, the President coming from the Italy (Fausto Pocar) and the Vice-President from Australia (Kevin Parker) both of whom are elected by and from among the judges.

The judges are divided between three Trial Chambers, each of which elects a “presiding judge”, and the Appeals Chamber. Each trial is heard by a panel of three judges, of which at least one must be selected from among the permanent judges. The Appeals Chamber is in common with the International Criminal Tribunal for Rwanda (ICTR), and consists of seven permanent judges: five from the permanent judges of the ICTY, and two from the 11 permanent judges of the ICTR. Each appeal is heard and decided by five judges. The judges in Chambers are collectively responsible, under Article 15 of the Statute, for the determination of their own rules of procedure and evidence.

The permanent judges also have important “regulatory functions” in relation to the work of the Tribunal, exercising collegiate responsibility under the President. They draft and adopt the legal instruments regulating the functioning of the ICTY, such as the Rules of Procedure and Evidence.<sup>8</sup>

There is a sense in which the Chambers can be said to operate as a kind of hermetically sealed element in relation to the rest of the Tribunal’s work. This is an important factor in supporting its legitimacy: at the same time, however, it has resulted in some of the most serious public misunderstandings about the nature of the Tribunal and its work, as we shall see below.

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<sup>7</sup> An *ad litem* judge can only serve at the ICTY following his/her appointment by the Secretary-General on the recommendation of the President of the Tribunal in order to sit on one or several specific trials for a period of up to three years. Note that the details presented here differ from Articles 12 and 13 of the original Statute of the Tribunal. A third trial chamber was created by UNSC Resolution 1166, on 13 May 1998, and the category of *ad litem* judges added by UNSC Resolution 1329, on 30 November 2000. The intention of both of these changes was to enable the Tribunal to meet its notional target of completing its work by the end of 2008.

<sup>8</sup> Statute of the ICTY, Article 15. The Rules of Evidence and Procedure are also available on the ICTY website, although they are not examined here.

Care is taken to ensure that judges do not sit on cases in which they might be expected to have an interested position. The sense of the independence of the Tribunal is maintained strenuously.

The question of the appointment of judges by the General Assembly is potentially controversial, and indeed Michael Scharf affirms that the process of selecting the first cohort of judges (in September 1993) ran to “ten contentious rounds of voting over three days”.<sup>9</sup> Since that date, however, by agreement the Secretary General is permitted to fill vacancies unilaterally. This suggests that, as the members of Chambers are drawn systematically from so many states the question of patronage has not been identified as a persisting and systematic political issue, although during the first rounds of voting great concern was expressed as to the adequacy or otherwise of the representation of Muslim countries.<sup>10</sup> The composition of the Chambers is controversial in that it has sometimes been the case that appointees have been eminent academic specialists in international law, or even ambassadors with legal training, but have lacked direct experience of court work.<sup>11</sup> In this respect, however, it is their practical competence and not their partiality which has been at issue.

The Court met for the first time at The Hague on 17 November 1993, and by mid-February 1994 they were able to reach accord on the rules of evidence and procedure.<sup>12</sup> As a court the members of which have been drawn from a very wide variety of countries and differing legal systems, and a range of models was available to them. The task of synthesising a coherent and workable practice from these diverse elements has been far from easy.

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<sup>9</sup> Scharf, *Balkan Justice*, pp. 63-66, provides a detailed account of this. It is interesting to note that even Russian and Chinese judges have been proposed, which is perhaps a tacit endorsement of the wide acceptance of the ICTY.

<sup>10</sup> See, Scharf, *Balkan Justice*, pp. 64-65. It is possible that lobbying takes place within specific countries in order to secure the nominations of individual judges submitted to the General Assembly. I have encountered no suggestion that, if this has taken place, it has resulted in the formation of any kind of systematic bias or representation of interest among the judges. At the time of the formation of the ICTY, however, there was considerable competition between the elected judges as to which of them were to occupy positions in the Appeals Chamber—perceived as being of greater prestige than the Trial Chambers. To some extent this has been resolved by adopting the practice of rotation, which is not actually provided for in the Statute of the ICTY. Although Cherif Bassiouni had been responsible for a great deal of the preparatory work in setting up the ICTY, he was not accepted as its first Prosecutor, and the grounds for that appear to have included his Egyptian origins, which were assumed by some to make him partial to the Muslim cause. (See, Edina Bećirević, *International Criminal Court: between ideals and reality*. Sarajevo: Arka Press, 2003, pp.175-7.)

<sup>11</sup> Banning and Koning, *Balkan aan de Noordzee*, p.p. 176-7. Comment by Judge Wolfgang Schomburg, interviewed for the film made, written and directed by Aldin Arnautović and Refik Hodžić, *Justice Unseen/Slijepa prava*. Sarajevo: XY Films, 2004. Hodžić formerly worked for the Outreach Department. [NB. A better translation of the original title would have been “blind justice”.]

<sup>12</sup> Scharf, *Balkan Justice*, p. 67.

In the event, a large part of the practice of the Tribunal has been adopted from “common law” (as opposed to “civil law”) systems.<sup>13</sup> A key difference here is between the “adversarial” confrontation between prosecution and defence counsel before the judge(s) and jury, which is characteristic of the former, and the primacy of the “investigating magistrate(s)”, charged with the independent pursuit of the truth, typical of the latter. There were good legal reasons for this decision, in that the adversarial system permitted the public debate of the issues, the open interrogation of witnesses and the dissection of argument.<sup>14</sup> It has been suggested that, in this way, it is more likely that justice would “be seen to be done”. Nevertheless, the status of the Chambers as a “hermetically sealed element” has meant that they have been slow to realise the importance of explaining clearly to the outside world the nature and significance of their decisions. It is possible to cite several instances when important differences between legal traditions, and the selection of some over others by the judges, have led to serious misperceptions of the Tribunal’s work.

The concept of an “indictment”, for example, which is familiar within the American system, is not necessarily commonly understood—particularly the difference between indicting somebody for an offence (which takes place *before* the trial) and actually finding them guilty, after the evidence has been heard and weighed.

An important point upon which the Chambers have found themselves exciting wider political controversy has been “Rule 61”. Article 21:4(d) of the Tribunal’s Statute confirms the right of the accused “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”. Trials *in absentia* are thereby expressly forbidden. Rule 61 provides, however, for a “revision of the indictment”, in the event of a prolonged failure to produce the accused in court following the original indictment. On this occasion the Prosecutor is able:

to introduce in open court (and thus preserve) testimony of witnesses, documentation, physical evidence, and video recordings of witness interviews. The trial chamber would then request the prosecutor to provide an account of the efforts made to arrest the accused. If a majority of the three trial chamber judges determined that the information presented a *prima facie* case of guilt and that the warrant was not executed due to a refusal to cooperate

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<sup>13</sup> A useful brief summary of the difference between these approaches is given in Scharf, *Balkan Justice*, pp. 6-7.

<sup>14</sup> The practicalities of mounting jury trials also dictated that this element of common law practice was abandoned.

by the state concerned, it would transmit a certification of this to the Security Council as a basis for possible sanctions.<sup>15</sup>

Whereas the purpose of this measure is clear—placing states under pressure not to conceal or protect those accused of serious crimes—Rule 61 has been interpreted not only as providing for trials *in absentia*, but as implicating the Chambers in political matters which are more properly left to others, and above all as aligning the judges with the work of the Prosecutor, from whose office they are supposed to be clearly independent. Taken together with the propensity to misinterpret “indictments”, without further explanation these procedural devices are open to lay interpretation as the determination of guilt before a trial has taken place.<sup>16</sup>

The penalties which the court may award are limited, by Article 24 of the Statute, to imprisonment; and para. 1 specifies that “the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”. This leaves room for considerable interpretation, however, and judges from different countries have brought to their task quite different standards of appropriateness. Western European interpretations, for example, of a “life sentence” can appear astonishingly lenient both in relation to American and Yugoslav practice. The multi-national composition of the Trial Chambers, not surprisingly under these conditions, has resulted in difficulties in ensuring consistency and comparability between sentences, not all of which have been settled on appeal.<sup>17</sup>

One of the most contentious areas of the practice of the Trial Chambers has been questions relating to plea-bargaining. The practice known as “plea-bargaining”, which is well-established in the USA, is regarded with mixed feelings elsewhere. The decision to (perhaps) set aside some counts on the original indictment in return for cooperation on the part of those indicted can be subject to conflicting interpretations.<sup>18</sup> Is this measuring justice by the standard of its economy? Is the accused able, to some extent, to escape justice by agreeing to give the Prosecutor a relatively easy time? This is perhaps to misunderstand the situation. The

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<sup>15</sup> Scharf, *Balkan Justice*, p. 68.

<sup>16</sup> This section relies in substantial measure upon informal interviews with staff at the ICTY.

<sup>17</sup> It is clear from the film *Justice Unseen* that sentencing issues are highly contentious not only among lay observers of The Hague, but among its legal personnel also. Prosecutor Carla Del Ponte remarks (in her interview for the film) that in her opinion, sentences are generally too low. The experienced Tribunal journalist Emir Suljagić comments that “sentencing policy does not exist”. This issue has also been commented upon by former Bosnian High Representative Carl Bildt, in his *Peace Journey: the struggle for peace in Bosnia*. London: Weidenfeld and Nicolson, 1998, p. 379.

<sup>18</sup> Judge Schomburg, interviewed for *Justice Unseen*, remarks that: “Truth can’t be found in a plea agreement”. Former Chief Prosecutor Louise Arbour also comments in the same film on the contentious nature of plea-bargaining. Vice Vukojević, a leading member of the Croatian HDZ, was even sharper in his comment during an interview for *Feral Tribune*. “This is nothing but a deal between the sheriff and the bandit who accuses others to save his own skin”. Cited in: Vojin Dimitrijević, “The ‘public relations’ problems of international criminal courts”. Unpublished TS, p. 3.



indictments are often extremely long and complex, and often issued at an early stage of investigation. Whereas it is undoubtedly in the interests of the court to conserve its resources by focussing upon a few of the original counts (those which can be best-supported by evidence) it is also in the interests of the prisoner to be faced with a shorter and less traumatic trial. Consequently it can be in the interests of both sides to proceed to trial on a highly simplified indictment. In all of these areas it has been noteworthy that the Tribunal has suffered from its own failure to explain adequately to the outside world aspects of its practice.<sup>19</sup>

Nevertheless, on the whole the Chambers have managed to preserve respect for their political independence, and where allegations of political engagement have been levelled against the Tribunal, these have been directed to the Office of the Prosecutor. If the Trial Chambers can be said collectively to be “looking over their shoulder” in anticipation of the approbation or disapproval of any particular constituency, their regard is directed towards the constituency of their peers in the profession of law, and not towards formally political actors. Rachel Kerr defends strongly the record of political independence of the Chambers. “Whilst politics permeates every other aspect of the Tribunal, including its very existence, it does not enter the courtroom and impinge upon due process of law.”<sup>20</sup> While accepting this judgement, it is worth remarking that the most significant “political” consequence of the actions of the judges can be seen to flow *unintentionally* precisely from their determined de-politicisation, and their refusal to take into account extra-legal considerations.

### ***The Registry***

Like the President of the Trial Chambers, the Registrar is a highly-placed and powerful functionary, appointed by the General Assembly after consultation with the President. This position carries the status and privileges of an Assistant Secretary-General of the UN.<sup>21</sup> The Registry is responsible for the administration and judicial support services of the Tribunal, including the translation of documents, the interpretation of court proceedings, and the maintenance of records of evidence and material which is potentially available as evidence. The Registry’s judicial responsibilities cover the organisation of the hearings, the legal files and archives, the operation of the legal aid programme for indigent defendants, the provision of

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<sup>19</sup> See the discussion of the “Outreach” programme, below, for further treatment of this issue. Note that the agreement of the accused to cooperate with the Tribunal has resulted in release from custody pending trial, but *not* in a reduction of sentence from those offences *for which a guilty verdict is subsequently returned*. This issue was especially controversial in the case of Biljana Plavšić.

<sup>20</sup> Kerr, “International judicial intervention”, p. 24.

<sup>21</sup> Article 17 of the Statute of the ICTY.

assistance and protection to witnesses, the management of the Tribunal's own Detention Unit at Scheveningen, and the provision of internal security. The Registrar is also in charge of all communications to and from the Tribunal. It might be said that the Registry is the administrative back-bone of the ICTY.

To the Registrar falls a good deal of the diplomatic work of the Tribunal: but whereas the President is largely concerned with the specifically judicial aspects of its work, the Registrar is responsible for a good deal of the sensitive negotiation required in order to secure its budget. The Registry serves the needs of all other major elements of the Tribunal—the Trial Chambers, the Prosecutor's office and defence counsel. Consequently, as the principal manager of the resources of the organisation, the Registrar's functions may be said to be highly "political", but mainly with reference to the *internal* politics of the ICTY.

The total silence of commentators on the ICTY regarding the work of the Registry might well be taken as an indication of its politically uncontroversial status with respect to the outside world. This silence, however, ought to be taken as reflecting scholarly neglect, and not the lack of need to scrutinise the Registry. There is at least one area in which the conduct of the Registry can be seen as having significant political consequences, although of a quite different character from issues relating to its possible accessibility to outside pressure. This has to do with the belatedness and limited nature of its provision for communication with the outside world.

The "Outreach" section of the Tribunal (part of the Registry) was not created until the end of 1999, by the efforts of Judge Gabrielle Kirk McDonald (at that time President of the Tribunal). Before then there was a very small press office, the activities of which were confined largely to The Hague. Prior to that date official communication had also been limited to the English and French languages.<sup>22</sup> In other words, initially the Press Office's conception of its work was restricted to waiting for enquirers to come to it in search of information—and these enquirers were assumed to come predominantly from an amorphous "international community", which dealt in the traditional languages of international communication, and not the general public within the former Yugoslavia.

Having been established, the "Outreach" section initially saw its task as directed primarily to improving the information available to the legal profession, and to journalists. As a result, its effort tended to address public opinion only very indirectly, and through institutions which either had an interest in the issues, or which had already formed their views within a specific institutional/political context—often hostile to the ICTY. The video presentation of the

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<sup>22</sup> Initially the Outreach office had to be funded by money raised specially from independent foundations, and not from the main budget of the Tribunal. Information in this section is based in part upon interviews with a current and a former official of the Outreach office.

work of the Tribunal, *Justice at Work*,<sup>23</sup> which provides an overview of the Tribunal's structure and operations, was not produced until 2001. Facilities for the regular television coverage of the trials were only introduced with the Milošević trial, in February 2002, and then largely in the form of indigestible, unmediated verbatim coverage. Other efforts to familiarise people in the region with the Statute, procedures and operations of the ICTY have been produced mostly by outside researchers, rather than by Tribunal staff.<sup>24</sup> It is still the case that the source most heavily relied-upon by journalists covering the affairs of the Tribunal is the *Tribunal Update*, produced regularly by an independent charity, the Institute for War and Peace Reporting.<sup>25</sup>

A significant illustration of the failure of the "Outreach" programme, which might otherwise have helped to correct perceptions of the "bias" of the Tribunal can be seen in the controversy surrounding the transfer of former Yugoslav President Slobodan Milošević to The Hague. His successor, Vojislav Koštunica, openly accused the Serbian Prime Minister Zoran Djindjić of illegality, in complying for the request for his transfer, on the ground that Yugoslavia had no treaty of extradition with The Hague. This was a significant misunderstanding (if not a misrepresentation) of the situation. Article 29 of its Statute obliges states to "cooperate with the International Tribunal" in a variety of ways, and specifically mentions "the arrest or detention of persons" and "the surrender or transfer of the accused to the International Tribunal". The transfer of Milošević took place under these provisions of the ICTY's own Statute, and did not require a separate treaty of extradition. A clear public rebuttal of Koštunica might have gone some way towards mollifying certain sections of Serbian public opinion.<sup>26</sup>

The Tribunal has been until very recently, tardy in its appreciation that it had a job to do in explaining the basics of its intentions and operations, let alone in defending its legitimacy. This is, of course, far from exceptional, in that courts normally work in situations where their legitimacy can be taken-for-granted, and if they do see the need to explain themselves this is likely to be at the level of information rather than legitimation. The result of this is that, whereas the Registry has been far from "political" in the sense of its pursuing either its own goals or those

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<sup>23</sup> The film was produced by ICTY for publicity purposes and is available for viewing online at [http://www.un.org/icty/bhs/outreach/outreach\\_info.htm](http://www.un.org/icty/bhs/outreach/outreach_info.htm). It is available in all of the languages of the Tribunal. A good deal of the comment in this section draws also upon interviews for *Justice Unseen*. See also, Dimitrijević, "The 'public relations' problems of international criminal courts".

<sup>24</sup> The most important early efforts to provide an authoritative and balanced treatment of ICTY include Vladan Vasiljević, *Medjunarodni krivični tribunal* (Belgrade: Biblioteka prava čoveka, 1996), and Edina Bećirević, *Medjunarodni krivični sud: Između ideala i stvarnosti* (Sarajevo: Arka, 2003). Refik Hodžić, who directed *Justice Unseen*, formerly worked for the Outreach Department.

<sup>25</sup> Its website can be consulted at: [www.iwpr.net](http://www.iwpr.net).

<sup>26</sup> We are grateful to James Gow for this point.

of powerful others in the Yugoslav region, its very indifference to the outside world has given to the Tribunal a blank facade upon which it has been possible for others to project assumed purposes, uncorrected by the institution itself.

### ***The Office of the Prosecutor***

When one examines the allegations that the ICTY is a “political” body, and in particular that it is biased, it becomes clear very rapidly that by far the greater part of these claims relate to the work of the Office of the Prosecutor (OTP). The OTP operates independently of the Security Council, of any State or international organisation and of the other organs of the ICTY. Its members are experienced police officers, crime experts, analysts, lawyers and trial attorneys. The Prosecutor’s office conducts investigations (by collecting evidence, identifying witnesses, exhuming mass graves), prepares indictments and presents prosecutions before the judges of the Tribunal.

As with the Trial Chambers, there are significant differences of approach taken by lawyers within the OTP coming from different traditions (especially the civil/common law divide).<sup>27</sup> Not all adapt equally well to operation in an organisation in which they are taken out of their accustomed contexts and required to adapt to eclectic working practices. What is more, the Balkan environment is incompletely understood by many of them, and there are differences in the level of competence of those involved. The organisation is composed of different professional specialists (such as researchers and the investigative teams as well as lawyers) who also do not necessarily see eye to eye. Consequently, in this department as elsewhere, the course of development of the ICTY can be viewed as shaped in part by the course of *internal* conflicts. Generally speaking, however, these factors have little bearing upon external perceptions of the Tribunal, and only figure in accusations of bias through their unintended consequences.

Problems arise in that the OTP is, in a number of respects, the political “front” of the organisation. Consequently, there have been three areas of its activity which have become the focus of allegations of bias: the supposed link between the financing of the Tribunal and the political compliance of the OTP; the pattern of detentions; and (most controversially) various aspects of policy relating to indictment.<sup>28</sup> Each of these will be considered briefly in turn,

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<sup>27</sup> This section has been based in some measure upon informal interviews with present and former ICTY personnel. Differences between the personalities and personal styles of successive Chief Prosecutors are perhaps also a subject worthy of subsequent study.

<sup>28</sup> The OTP has also come under strong criticism for the alleged mismanagement of trials—particularly that of Slobodan Milošević. (See for example, Vojin Dimitrijević, “Justice must be done and be seen to be done: the Milošević trial”, *East European Constitutional Review*, Winter/Spring 2002, pp. 65-68.) Since these criticisms relate only indirectly to the question of bias, and are directed primarily at the question of the *competence* of the Prosecution, we have not considered them here.

although it should be noted that for the most part, in each area, accusations of bias have not been a significant feature of the *academic* literature on the ICTY.

*i) Prosecution policy and the question of finance*

Finance has always been a sore point in relation to the Tribunal. In the early days of its existence it operated on a shoe-string—in the first year of its operation its budget was only US\$276,000. Banning and Koning inform us that it was necessary to rent judges’ robes from a theatrical costumier, and an early action of the President was to purchase two bicycles!<sup>29</sup> Although financial provision subsequently has become both more generous and more secure, the severity of early budgetary constraints has left a legacy of suspicion that, under these circumstances he who pays the piper must be in a position to call the tune. The USA has always provided a substantial proportion of the total financial resources of the ICTY, which laid it open to claims that there might be a link between its financial viability and the policy of prosecution.<sup>30</sup> No clear evidence has emerged, however, which substantiates the view that prosecutions have been politically interested by virtue of the financial dependence of the Tribunal upon influential states.

The Regular Budget of the ICTY: 1993-2005				
1993	1994	1995	1996	1997
\$276,000	\$10,800,000	\$25,300,000	\$35,430,622	\$48,587,000
1998	1999	2000	2001	2002-2003
\$64,775,300	\$94,103,800	\$95,942,600	\$96,443,900	\$223,169,800
2004-2005				
\$271,854,600				

*Source:* ICTY website.

An additional area of controversy relating to the Tribunal’s finances has arisen in connection to the costs of defence. Article 21 of the Statute insists that “the accused shall be entitled to the following minimum guarantees, in full equality:”

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

(d) .... If he does not have legal assistance... to have legal assistance assigned to him, in

<sup>29</sup> Leydesdorff summary of *Balkan aan de Noordzee*, Chap. 3.

<sup>30</sup> See above, p. 26. The Netherlands and Italy were also substantial early sponsors of the Tribunal. Britain provided computer equipment. France, Germany and Belgium declined to offer support. Since the early years the Tribunal’s finance has become more securely and regularly integrated with the budget of the UN in general. Leydesdorff summary of *Balkan aan de Noordzee*, Chap. 3.

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.

Similarly, Article 22 allows for provision to be made under the rules of procedure for the care of witnesses, and within the Registry a “Victims and Witnesses Support Unit” has been created for this purpose. Legal aid is available to ensure that defendants are adequately represented, and that witnesses and evidence can support their cases.

Not all defendants have taken advantage of these provisions. During the period of office of Croatian President Franjo Tudjman, defendants of Croatian national identity were supported by the Croatian state. Conspicuously also, former Yugoslav President Slobodan Milošević initially declined to recognise the court, and prepared and conducted his own defence. Actions of this kind are, of course, profoundly political in their intention, and are expected to create and reinforce the impression that defendants are themselves victims of the judicial system, who either require support from their friends or who courageously stand alone in defiance of it. Clearly it is the case that if the ICTY is open to accusations of political manipulation in connection with its financing, it is not only the OTP itself which merits scrutiny.

#### *ii) The pattern of detentions*

The Tribunal has been criticised repeatedly in relation to the detention (or failure to detain) of those who have been indicted by the OTP. To a large extent these criticisms have been misplaced, particularly in that the Tribunal itself does not have any agency which could be responsible for the detention of suspects under its control.<sup>31</sup> It is entirely dependent in this respect upon the services of military or police forces which are either attached to specific states, or part of the international forces operating within the region. Article 29 of the Tribunal’s Statute enjoins all states to cooperate with it in a number of respects, including the “arrest or detention of persons”. Whether or not they do so, and the circumstances under which they comply with the terms of Article 29, are not under the control of the Prosecutor.

Patterns of detainment are believed to be the objects of political pressure from one state or another. There has been widespread speculation to the effect that French units within the international forces in Bosnia have been generally reluctant to undertake detentions. The reason for this is believed to be the positive attitude towards the Serbs held by senior members of the French military, to the extent that the areas of Bosnia under French supervision have come to be regarded as virtually a “safe haven” for Serbs under indictment. It has even been claimed that the

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<sup>31</sup> We are grateful at this point for the assistance of Majbritt Lyck, a doctoral candidate at the University of Bradford.

failure to detain Radovan Karadžić has been due largely to French collaboration.<sup>32</sup> It has similarly been affirmed that a plan to conduct a mass detainment of around 80 suspects on a single night, supported by American and German forces, was obstructed by their British counterparts—apparently on the insistence of the High Representative in Bosnia, Lord Paddy Ashdown.<sup>33</sup>

Although to some extent this remains speculative, there seem to have been significant differences in the pattern of detainment between different zones of control within Bosnia, which to some extent might support the notion that detainments take place as a reflection of policy, and not by chance. Between July 1997 and April 2003, only two of the 33 detainments in Bosnia and Herzegovina involved French and German units of SFOR.<sup>34</sup> There have been radically divergent interpretations of their rules of engagement by local commanders, even working within the same national contingents, as a consequence of which suspicions of complicity have flourished.

Although detainment has been a highly controversial matter, therefore, it should not be taken as supporting in one way or another the notion that the Prosecutor's office itself is biased. For the most part, informal indications gleaned from interviews with ICTY personnel suggest that their passive dependence upon other forces in this way is experienced by the OTP as very frustrating.<sup>35</sup> In relation to the suspicion that the ICTY is expressly "anti-Serb" in its intentions and conduct, it should be noted that such evidence as there is points towards the tacit *protection* of Serb indictees by international agents, not that they are systematically targeted. It is in the nature of the case, however, that this configuration of problems should not be easily available to investigation by scholars, as it involves knowledge about the operations of various security services.

Detainments have become one of the most regularly controversial aspects of the activities of successive Chief Prosecutors, as they have attempted to use international pressure to ensure transfers to The Hague, linking these to the promise of diplomatic support, or the withdrawal of aid. Introducing a collection dealing with aspects of international intervention in the Balkans since 1995, Peter Siani-Davies observes that:

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<sup>32</sup> Leydesdorff, summary of Banning and Koning, *Balkan aan de Noordzee*, Chap. 10. See above also, p. 30.

<sup>33</sup> Leydesdorff, summary of Banning and Koning, *Balkan aan de Noordzee*, Chap. 11.

<sup>34</sup> Information tabulated by Majbritt Lyck. Of the total of 33 detainments, 33 took place in the South-West Division, and only 8 each in the North and South-East Divisions.

<sup>35</sup> The fact that forces acting on the Tribunal's behalf have been responsible for two cases of mistaken identity, and two killings of suspects in the course of arrest, unfortunately has not helped the ICTY's image.

Today, much assistance is .... conditional on a state undertaking certain political and economic measures. If these are not fulfilled, then the offer of assistance can be withdrawn. The coercive element was clearly evident in the demand that Yugoslavia extradite (*sic*) Slobodan Milošević to the International Criminal Tribunal at The Hague before aid was released but this is just a particularly newsworthy example of a widespread practice, since the EU and International Financial Institutions (IFIs) invariably apply some degree of conditionality.<sup>36</sup>

Although this kind of pressure upon local governments to undertake detainments, or to persuade those indicted to surrender themselves, is valued by the international agencies themselves as a useful lever by means of which compliance with their own terms can be enforced in the region, its use is determined by these agencies. Its use is likely to be welcomed by the Office of the Prosecutor: but it cannot be used as evidence that the OTP itself adopts a position of systematic bias against any state which is on the receiving end of it.

*iii) Issues relating to indictment policy*

Ever since the Tribunal began its work the pattern of indictments issued by the OTP has been the object of critical scrutiny, particularly in relation to their ethnic balance. The majority of indictments (more than two thirds) have been issued against ethnic Serbs.<sup>37</sup> There have been counter-allegations, however, that given the pattern of crimes and the level of their seriousness the balance ought to have been more weighted in that direction.

As Marko Attila Hoare has argued vigorously, there appear to be some important inconsistencies in the area of the issue of indictments, particularly in that ethnic groups other than Serbs may have been targeted in order to make the Tribunal appear to be more even-handed.<sup>38</sup> Whereas it is possible that there is some basis for this, his argument clearly applies only to individuals in positions of *leadership*, and relates only to a fraction of the overall number of indictments. He asserts, perhaps with some validity, that this policy of even-handedness rests

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<sup>36</sup> Peter Siani-Davies ed. *International Intervention in the Balkans since 1995*. London: Routledge, 2003, p. 4. See for further comment, Section IV below.

<sup>37</sup> Slightly over half of the remainder have been against ethnic Croats, and the remainder divided between Kosovar Albanians, Bošnjaci and Macedonians. These figures should be treated with considerable caution for several reasons. The ICTY documents carefully refrain from identifying the ethnicity of those indicted, and it cannot be guaranteed that this is always evident from the context. Some individuals have been acquitted when brought to trial, and some indictments have been abandoned on revision. It might well be possible to produce more refined figures after very careful cross-checking, but at the time of writing we have not been able to undertake this. Since broad comparisons are sufficient to make the point in this context, however, and little would be added by an attempt at refined statistical analysis, it seems to be acceptable to leave the matter at this stage.

<sup>38</sup> Marko Attila Hoare, "Capitulation of the Hague Tribunal". *Bosnia Report*, 45-46, May-Aug. 2005, pp. 19-20.



upon a view of the character and origins of the Yugoslav wars, which have been depicted in international diplomatic circles as a conflict between ethnic “factions”, resulting from their historic mutual antagonisms, in which configuration none is more blameworthy than the others. There is some indication that this view has been institutionalised within the OTP. If this is the case, however, it militates directly against any belief that the ICTY is biased against any individual ethnic group, and certainly not against Serbs. An equally plausible explanation for his illustrative cases (which is impossible to test at the moment) is that the OTP has decided to make examples of a few prominent members of each of the ethnic groups involved precisely in order to protect itself against allegations of ethnic partiality, and not because it subscribes to any specific explanation for the break-up of Yugoslavia.

There are, however, other conspicuous puzzles about the pattern of indictments, considered *prima facie*, for which no explanations are currently forthcoming. Numerous instances of this kind of oversight have been reported, and it is necessary perhaps only to cite one here, by way of illustration. On the morning of 22 September 1992 the village of Novoseoce, near Sokolac, was surrounded by Serbian armed forces, and “ethnically cleansed”. This latter consisted (as in the better-known case of Srebrenica) in the removal of the women and children, and the summary execution of the men—a total of 46 of them.<sup>39</sup> No indictments have been issued in direct connection with this case, and at this stage of events it looks as if none will be. Those responsible for the killings have been identified to journalists by the survivors, and yet the determined attachment of The Hague to the pursuit of senior military and political figures means that the actual perpetrators of this horrifying act have remained free, and with no immediate prospect of detention. Not surprisingly, investigators from the press report strong local feelings that the Tribunal has failed to deliver justice.

Similar questions have been asked as to why no indictments were ever issued against Borisav Jović, Veljko Kadijević and Blagoje Adžić, on the grounds of their possible participation in command responsibility.<sup>40</sup> Similarly, although other leaders of nationalist paramilitary groups were indicted and brought to trial, Dobroslav Paraga was never asked to account for his actions.<sup>41</sup>

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<sup>39</sup> Nerma Jelačić and Hugh Griffiths, “Justice yet to be done”. *Balkan Crisis Report*, 546, 11. March 2005. (Reprinted in *Bosnia Report*, 46-46, May-August 2005, pp. 21-24.)

<sup>40</sup> It is understood that their deaths interrupted the process of preparing indictments also against Alija Izetbegović, Gojko Sušak and Franjo Tudjman.

<sup>41</sup> Paraga was the creator of the Croatian Party of Right (*Hrvatska Stranka Prava*—HSP), which subsequently fielded its own militia, the Croatian Defence Force (*Hrvatska Obrambena Snaga*—HOS), which was active principally in western Hercegovina in the early part of the war. When I served as an expert witness for the OTP in the case of Dario Kordić, my draft report mentioned Paraga’s activity, and I was asked by the trial attorney to remove this reference to him. To quote Bob Dylan: “Something is happening, but you don’t know what it is, do you, Mr. Jones?” (JBA)

The emphasis upon “command responsibility” is one of the most problematic aspects of the indictment policy of the OTP. Whereas this idea is rooted in Article 7(3) of the Tribunal’s Statute, so that prosecution under this head is in accordance with the law, the effect of “over-reliance” upon it is possibly counter-productive. The Documentation Centre in Sarajevo, responsible for a detailed audit of the casualties in Bosnia and Hercegovina during the Yugoslav wars, has definitely identified more than 93,000 deaths.<sup>42</sup> In the light of the fact that it is practically difficult to ever ensure that individuals are brought to account for more than a fraction of these, it has been necessary for the OTP to adopt a principle of selection. Whereas the policy of “ascending the ladder of responsibility” may indeed help to ensure that the architects of “ethnic cleansing” or the directors of mass murder are brought to trial, it is still the case that many thousands of “small fish” actually responsible for specific acts of barbarity, are left to return to open public life, often in the communities formerly terrorised by them. It is hardly surprising, under these circumstances, that the Tribunal is seen as falling short of local expectations of justice.<sup>43</sup>

A further, and more dangerous, consequence of the policy of prosecuting on the basis of command responsibility is that it can be perceived as undermining the essential principle, enshrined in the Tribunal’s own Statute—that only *individuals* are to be held responsible for crimes. Michael Humphrey has argued, nevertheless, that the prosecution of leading military and political figures, challenging impunity, in the case of the most serious “crimes against humanity” brings with it a special danger. “The application of criminal law to mass atrocity (he states) necessarily engenders a process of selective prosecution producing a symbolic economy of justice.”<sup>44</sup>

Usually crime is prosecuted in the context of a normative legal order and moral community. Criminal law is applied to transgressive acts in a normative context in which criminal acts are the exception. Prosecution proceeds by seeking to individualise responsibility for criminal acts thereby establishing right from wrong and innocent from

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<sup>42</sup> Information from Mirsad Tokača, Director of the Centre. His estimate is that the final total will approach 100,000, including both military and civilian casualties.

<sup>43</sup> Hugh Griffiths, “Bosnia: war crimes lottery”, *Balkan Crisis Report*, 544, 4 March 2005. Somewhere in the region of 9,000 criminal acts which could possibly be prosecuted under the terms of the ICTY’s Statute have been identified during the war in Bosnia alone. (*Justice Unseen*. This issue features prominently in the film)

<sup>44</sup> Michael Humphrey, “The International prosecution of atrocity and national reconciliation: the ICTY and ICTR compared”. Paper read to the conference *Law and Justice under Fire: the legal lessons of the Yugoslav wars*, Inter-University Centre, Dubrovnik, June 2001, pp. 7-8.

guilty with respect to a witnessing moral public. However in societies where mass atrocity occurs the normative order itself is criminal.

Under these circumstances, where in an important sense leaders “stand for” the community, it becomes hard to avoid turning “prosecutions into politically and symbolically managed events” in which the community itself is on trial. In other words, while setting out precisely to challenge popular discourse about atrocity in terms of collective guilt, and insisting upon individual responsibility, the judicial process implicitly places the collectivity in the dock.

Whereas this is a theoretical, if not speculative argument, it helps to make sense of the dogged persistence of allegations within the Yugoslav region that the ICTY does, in fact, entertain notions of collective guilt, and places “the nation” on trial.<sup>45</sup> A corollary of this argument, however, is that the “symbolic economy of justice” which it implies will not be specific to any particular ethnic group—all will be tainted with the suspicion of collective guilt.

The process by which indictments emerge, which has figured as one of the primary foundations upon which allegations of bias have rested, remains in many respects a mystery. Several factors appear to account for its irrationalities—the opportunism characteristic of the early days of the Tribunal’s operation, before clear guidelines were developed; inconsistent and uncritical application of the concept of “command responsibility”; the deficiencies of investigating teams, and their dependence upon information which is sometimes faulty; and the judgement (professional or political) of the Prosecutor—all perhaps have had their part to play. The extent to which these features can be held responsible for the vagaries of indictment, however, cannot be judged in the present state of access to information: but it is unlikely that the Tribunal can be considered to have acted with a consistent bias against any specific ethnic group.<sup>46</sup>

The most controversial area of this discussion relates to the possibility of the issue of indictments against NATO personnel, for offences alleged to have been committed during the air campaign against Serbia. In two respects this campaign have been claimed to constitute

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<sup>45</sup> There are general problems which attach to the notion of command responsibility which cannot be addressed here. See: Ilias Banketas, “The contemporary law of superior responsibility”, *American Journal of International Law*, 93(3) July 1999.

<sup>46</sup> It is perhaps appropriate at this juncture to comment briefly upon one issue which has been signalled as significant on several occasions from within the OTP. Governments involved in the Balkan situation—even those supposedly committed to assisting the ICTY—have been criticised from their unwillingness to supply intelligence material. Thus, it is claimed, the preparation and eventual prosecution of indictments has been prejudiced through lack of the relevant information. This is a complex question which cannot be explored fully here. It does seem, however, that the Tribunal is inclined to blame the governments concerned for not volunteering information, whereas the latter tend to blame the ICTY for being unclear and unspecific in its requests. Given the fact that the material in question is by definition secret, it is hard to see a way out of that one!

“violations of the laws or customs of war”. Article 3 of the Tribunal’s Statute, which deals with this area, prohibits, in para. (a), “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering”, and para. (b) prohibits “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”. The deployment of munitions incorporating depleted uranium has been held to constitute an infraction of the first of these, and several features of the selection of targets, infractions of the second.<sup>47</sup> Given the fact that Article 1 of the Statute gives to the ICTY “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991” this possibility would seem not to be *excluded* from its competence, though not positively indicated.

The Tribunal took very seriously the need to confront this issue; and it was certainly discussed within the organisation, which eventually decided not to proceed with action against NATO personnel.<sup>48</sup> This, decision, whether soundly-based in law or a triumph of prudence over principle, has had enormous political consequences, not only by reinforcing the idea that the ICTY is inherently anti-Serb and a creature of the USA, but also in entrenching US opposition to the International Criminal Court.

Finally, it is necessary to enquire to what extent a strategic error has been made, in relation to public acceptance of the ICTY, by the fact that to all intents and purposes the public “front” of the court is the OTP, and not the President. The express function of the Prosecutor is to prosecute, whereas the Trial Chambers (headed by the President) are charged with determining the truth in the light of evidence and argument submitted by both the prosecution and the defence. It is a vital question (although admittedly hypothetical and speculative) just what difference might have been made to the frame within which the Tribunal came to be defined, had its most prominent public representative been seen as more obviously neutral in relation to the task of issuing indictments and prosecuting the accused.<sup>49</sup>

## ***Conclusions***

An examination of the structure and mode of operation of the ICTY is important in reaching an understanding of how perceptions of its bias have been generated and sustained. With the

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<sup>47</sup> For some insight into the substantial controversy which raged over the use of depleted uranium munitions see: *The Health Hazards of Depleted Uranium Munitions*. London: The Royal Society, Part 1, 2001 and Part 2, 2002. Also: the *Regional Environmental Report of the EC*, Centre for Central and Eastern Europe, July 1999.

<sup>48</sup> Information at this point has been supplied in interviews with former ICTY personnel.

<sup>49</sup> In raising this hypothetical possibility it has to be admitted that there may well be legal reasons why the Tribunal could not have been constituted in this way.

possible exception of the controversy over the feasibility/advisability of introducing indictments for NATO personnel, following the Kosovo campaign, the closer one gets to the ICTY the less plausible appears the idea that it simply acts at somebody's behest. It is striking that allegations of bias cut in *all* directions—it is not only perceived as anti-Serb.<sup>50</sup> There are, no doubt, questions to be asked, as we have indicated, concerning the policy of the issue of indictments—and it could well be the case that these are not determined solely by questions of available evidence.

The most likely explanation for the lack of transparency and consistency here, however, is that the OTP does have to navigate a difficult path between competing pressures, and within limited resources (including the competence of its personnel) and that a measure of compromise is occasionally necessary in order to advance its main purposes effectively and economically.<sup>51</sup> In the pursuit of these ends, Prosecutors (not unnaturally) make enemies as well as friends. It is striking, however, that, talking to people engaged in the institution, some of the strongest complaints of those involved are directed at the UN, not at particular governments, and stem from frustration consequent upon its inefficiency as an extremely large and complex international organisation.

Questions relating to the bias in the ICTY's operations have been so persistent, and sustained so strongly, however, that they do deserve additional consideration. When Research Group 10 set out on its task, it rapidly became apparent that hostility to the Tribunal was not random. It was patterned, and in such a way as to relate systematically to features of the political cultures of the different states which emerged from the former Yugoslavia. To dismiss the phenomenon as simple error was to pass up an opportunity, through an investigation of how the ICTY articulated with the politics of these states, to learn something about the nature of the post-Yugoslav states. Criticism of the ICTY has a definite diagnostic value, even if it is not to be taken at face-value. It is to this task that we now turn in Section IV.

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<sup>50</sup> As we will see in the following section, dealing with local perceptions.

<sup>51</sup> Differences between the personalities of successive Chief Prosecutors may well have been a factor relevant to this discussion, but it has not been possible at the time of writing to explore these.

#### ***IV: Bias and the perception of bias—the ICTY and the region***

The initial reception of the ICTY in the former Yugoslavia was characterised by indifference. Its movement from preparation to activity, however, coincided with the conclusion of the war in Bosnia and Hercegovina and the signing of the Dayton Agreements, on 14 December 1995. Article IX of the “General Framework Agreement” required the signatories to “cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law”. Although the Dayton settlement in Bosnia has been widely criticised as supporting rather feebly the war crimes process, it rapidly emerged that the most significant international actors were prepared to make compliance with the requests of the Tribunal a litmus test of the rehabilitation of the post-Yugoslav states. At this stage, therefore, the ICTY could be seen to take on importance as a political issue *within* these states.

Discussion of the Balkan states often is afflicted by two contradictory tendencies. The first of these is to reduce them to homogeneity—“The Balkans”, rather in the manner of a new variant of Edward Said’s “Orientalism”.<sup>1</sup> The other is to emphasise their irreconcilable mutual difference, by resort to variations on the theme of Samuel Huntington’s “clash of civilizations”.<sup>2</sup> Both of these approaches are equally mistaken—although of course the countries of the region are characterised both by similarities and differences.

The significant similarities in their responses flowed from the characteristics of the Tribunal itself, and from the features of its international context, as reviewed in the previous sections of this report. Although it was presented as a response to the problems of the Yugoslav region, the ICTY reflected much more directly the needs and perceptions of its international constituency. The founding resolutions in the Security Council aspired to put an end to “widespread violations of international humanitarian law”, and the pretext for its establishment, under Chapter VII of the UN Charter, was concern for the “peace and security” of a region which acquired heightened importance within the context of the confused security system left by the end of the Cold War. The remit given to the Tribunal was dependent upon a framework of international humanitarian law, the evolution of which had taken place entirely without reference to the region. Its form was reliant upon legal traditions which were

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<sup>1</sup> Said, *Orientalism*. For a critique of Said’s approach in relation to the Balkans, see John B. Allcock, “Constructing ‘The Balkans’”, in John B. Allcock, and Antonia Young, eds., *Black Lambs and Grey Falcons: women travelling in the Balkans*. New York and Oxford: Berghahn Books 2<sup>nd</sup> ed., 2000.

<sup>2</sup> Huntington, Samuel P. *The Clash of Civilizations*. London and New York: Simon and Schuster, 1997. For a critical discussion of the relevance of Huntington’s thesis to the Balkans, see: John B. Allcock, ‘Huntington, “Civilizations” and Bosnia and Hercegovina: a sociological critique’, *Sociological Imagination*, 36(2/3):1999, pp. 129-142.

generally foreign to the Balkan states. Against the background of the NATO military intervention, and the ensuing Dayton and Rambouillet agreements, the transformation of the ICTY from a concept to a functioning institution came to be perceived essentially as an *external* imposition. That sense of alienation was reinforced by the lack of attention paid by the Tribunal to the need to explain and legitimate itself in the eyes of people in the former Yugoslav states.<sup>3</sup>

The blankness of the façade which the ICTY presented to the region permitted the projection onto it of images which had little to do with the originating purposes of the institution, and which bore little relation to the manner in which it actually functioned, either as a court of law or as an element of the international political environment. Not surprisingly, under these conditions, nationalist politicians who had succeeded in occupying the larger part of the ideological space in the ex-Yugoslav states, found the opportunity to write their own narratives on this blank façade, as elaborations of their own “proprietary myths” of recent history.

For the ICTY’s Office of the Prosecutor (OTP), the question of legitimacy is regarded as a *legal* question which has been settled by the Tribunal’s own Chamber of Appeal as well as by courts in the Netherlands and Germany. The lawyers in The Hague do accept that several issues of policy and practice are still open to debate, but treat the matter of legitimacy as settled. Domestic audiences, however, focus instead on *political* aspects such as the funding and operation of the ICTY, and on *ethical* questions related to the legitimacy and conduct of the wars of succession in the former Yugoslavia, and the political responsibility for war of the successor states.

The perception of domestic audiences has been shaped by a number of features of the Tribunal, which are considered not far short of disastrous from the perspective of public relations. As a consequence, in contrast with the legalistic focus of international and professional actors on the punishment of *crimes*, local expectations are based upon reporting which portrays the *court* and the *accused* as controversial, but has little to say about the crimes.<sup>4</sup>

This report has argued that the various versions of the account of The Hague tribunal as essentially “biased” have had their common origin in these circumstances. The reception of the ICTY across the region has not been uniform.<sup>5</sup> If we are to understand how these

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<sup>3</sup> Comment upon the state of public opinion in the region, in relation to the Tribunal, relies heavily upon material collected in Appendices 4 and 5 to this Report, prepared by Mikloš Biro and Julie Mertus.

<sup>4</sup> For a discussion of rejectionist approaches to crimes and legal rules, see Vojin Dimitrijević, “Two Assumptions of the Rejection of Responsibility: Denial of the Act and Denial of the Rule,” *SSRC Global Security and Cooperation Quarterly*, No. 8 (Spring 2003). The article is available online at: [http://www.ssrc.org/programs/gsc/gsc\\_quarterly/newsletter8/](http://www.ssrc.org/programs/gsc/gsc_quarterly/newsletter8/)

<sup>5</sup> Something of this diversity is indicated in Appendix 4, p. 43 note 2.

differing (and largely inconsistent) accounts of bias have flourished, however, we need to go beyond resort to the Machiavellian intentions of local politicians, and consider a wider range of significant features of the political institutions and cultures of the former Yugoslav states. In this endeavour, of prime concern to this study is also the matter of *identity*.

One of the frequently-stated goals of prosecuting individuals for violations of international humanitarian law through the ICTY is to lift the burden of collective guilt from the nations in whose names violations were carried out, by tying the violations to specific individuals who bear criminal responsibility. In this sense, identity stands at the very center of the ICTY's stated purpose. This raises two important political questions. First, do legal institutions in general offer an appropriate arena for the resolution of issues relating to national identity and guilt? Second, is the way in which the ICTY functions effectively decoupling national identities from the notion of collective responsibility? Answering these questions is complicated when, as in the former Yugoslavia, national identities have been both instruments and objects of political conflict.

In the successor states of Yugoslavia, national identities came to be defined dialectically, in relation to one another—a process which contributed to the dissolution of the federal state, and arguably determined some of the most violent aspects of the way this dissolution took place. The ICTY has come to play the role of a medium through which the relationships between national identities are played out. Issues such as the commensurability of guilt and the question of responsibility for the war remain important in the post-war period. It is still the case that relations between the states and regions of the former Yugoslavia are being defined to some extent through competing discourses about war crimes. This project seeks to help document and explain the impact of the ICTY on these processes. To this end, we now examine briefly the reception of the Tribunal in Croatia, Serbia and Bosnia and Hercegovina.<sup>6</sup>

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<sup>6</sup> An earlier and partial version of the following section has appeared as: John B. Allcock, "International law and the former Yugoslavia", in Alan Carling ed. *Globalisation and Identity: development and integration in a changing world*. London: I. B. Tauris, 2006. The account which follows does not deal with Kosovo, Montenegro or Macedonia. Our coverage is less than complete in this respect. Most seriously, we do not address systematically the specific characteristics of the situation in Kosovo. Whereas the former omissions might be justifiable on the ground of their relative marginality to the main events, our inability to give fuller consideration to Kosovo is unfortunate. (Although, note that one indictment issued by the Tribunal does concern events in Macedonia—the Boskoski and Tarčuloski indictment: IT-04-82.) Our original hope was to cover Kosovo more centrally, but two things have undermined that intention—the lack of time, and that fact that no member of the team has a knowledge of Albanian. It is important to point out, however, that the three cases considered here simply make a *general* point, about the manner in which the reception of the ICTY in the region is refracted through local politics. We do not believe that this general claim would be invalidated by discussion of Kosovo—only illustrated differently. (For some discussion of issues relating to Kosovo, however, see: James Gow and Ivan Zveržanovski, "The Milošević trial: purposes and performance", *Nationalities Papers*, 32(4) December 2004, pp. 897-919. It was anticipated in an earlier stage of the production of this report that three background papers prepared on Croatia, Serbia and Bosnia would be attached to it as Appendices. To avoid making the document too cumbersome, these have been withheld, but are available on request from the editor.



### *Croatia and the ICTY*

“No issue has polarised the post-authoritarian Croatian political scene as much as the issue of cooperation with the International Criminal Tribunal for the Former Yugoslavia”, write Victor Peskin and Mieczysław Boduszyński.<sup>7</sup> There was always an element of suspicion in Croatia, towards the ICTY, reflected initially in the almost complete silence of the press regarding the foundation of the Tribunal. The first indictments, however, were all against ethnic Serbs: and indeed, up until November 1995 only one indictment was issued by the Tribunal against an ethnic Croat. That picture changed dramatically when, on 10 November, the first of 21 indictments were issued in connection with events in west-central Bosnia—all against ethnic Croats. In fact, by March 1996, roughly a third of the indictments issued were against Croats. This was hardly consistent with the official Croatian view that the war had been a matter of Serb aggression against innocent parties, whose actions were invariably defensive in character.

Before March 1996 nearly all of the indictments issued by the Tribunal related to events in Bosnia. Whereas this reduced somewhat their salience with respect to Croatian politics, at the heart of President Franjo Tudjman’s anxiety about the ICTY was the issue of Bosnia and Hercegovina, at least parts of which he believed should belong by rights to Croatia.<sup>8</sup> The international settlement at Dayton, however, presumed the permanence of a Bosnian state—and hence its permanent alienation from Croatia. Tudjman needed to keep alive the question of the territory and population of “Croatia”, over which the activities of the ICTY regularly placed a question. For as long as he was at the helm, there were powerful ideological reasons for non-cooperation with the Tribunal.

In the cases against Tihomir Blaskić and Dario Kordić it became evident that the policy of prosecuting on the basis of “command responsibility” might eventually implicate President Tudjman himself, and his Minister of Defence Gojko Sušak.<sup>9</sup> It seems unsurprising, therefore, that there should have been tension between the ICTY and the Zagreb government, deteriorating from 1997 onwards. Under constant international pressure, culminating in the postponement of an agreement with the IMF, the government did pass a

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<sup>7</sup> Peskin, Victor and Mieczysław P. Boduszyński, “International justice and domestic politics: post-Tudjman Croatia and the International Criminal Tribunal for the former Yugoslavia”, *Europe-Asia Studies*, 55/7 (2003), pp. 1117-1142. See esp. p. 1117. The analysis offered in the following section is complemented in many respects by that of Peskin and Boduszyński (although this research was completed before the publication of their paper).

<sup>8</sup> The discussions between Tudjman and Milošević at Karadjordjevo, on the subject of the partition of Bosnia, and subsequent negotiations in Graz, have been well-documented, and are no longer regarded as contentious. What is still a matter of dispute, however, is the extent of the aspirations of the HDZ in this direction, particularly in the early days of the war.

<sup>9</sup> The Blaskić trial ran from 24 June 1997, ending on 30 July 1999, and the Kordić trial from 12 April 1999, ending in February 2001. Details of all indictments, trials and other relevant documents can be obtained from the ICTY official website: <http://www.un.org/icty/>.

law on cooperation with the ICTY, and in October 1997 ten Croats indicted for war crimes were transferred to The Hague by the Croatian authorities.<sup>10</sup>

Matters came to a head in January 1999. Following a speech by President Tudjman, in which he had criticised the ICTY, Chief Prosecutor Louise Arbour expressed her dissatisfaction with the Croatian government's record on cooperation with the Tribunal, which had been limited so far to "gestures". In early March of the same year, a US State Department report presented to the OECD, criticised Croatia's human rights record, and singled out for comment Croatia's non-cooperation with the ICTY.

Relations became particularly acrimonious over the requests for the detention and transfer of Vinko Martinović-Stela and Mladen Naletilić-Tuta, during the summer of 1999. Undoubtedly the Tudjman government cooperated with the greatest reluctance with the requests of the ICTY, although eventually complying with its requests. Circumscribed by a high degree of legal formalism, and responding to the leverage of possible international sanctions, Zagreb was finally persuaded to transfer both men to The Hague.<sup>11</sup>

In many respects that situation changed dramatically with the passing of Franjo Tudjman. Immediately it became clear that the new government would take a different position with respect to the ICTY. In his inauguration speech to the *Sabor* on 18 February 2000, President Stipe Mesić reiterated his desire to accelerate the country's admission into international organisations, and ultimately the European Union. This by implication meant accepting Croatia's obligations towards the Tribunal.<sup>12</sup> Concrete evidence of this change of direction was soon forthcoming. Large quantities of documentation were surrendered to The Hague in the coming months. Following a meeting between President Mesić and Chief Prosecutor Carla del Ponte on 4 April, the government acceded to a request from the Tribunal to examine a reported mass grave outside Gospić, believed to contain the bodies of Serbs killed in 1991.<sup>13</sup> Accordingly, Croatia was accepted officially into the Partnership for Peace programme on 25 May.

The new direction in policy soon landed the government in hot water. It created an opportunity for various nationalist groups to attack the policy of cooperation with the

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<sup>10</sup> "Croatia: facing up to war crimes", International Crisis Group, *Balkan Briefing*, Zagreb/Brussels, 16 October 2001, p.2.

<sup>11</sup> Croatian governments have been relatively willing to cooperate with the demands of the ICTY with respect to the surrender of documentary material, although much less willing to arrest and hand over those indicted to The Hague. See Peskin and Boduszyński, "Croatia and the ICTY", p. 1139, fn. 4.

<sup>12</sup> Stipe Mesić has backed his words with actions by appearing himself as a witness at the ICTY.

<sup>13</sup> It is understood that a part of the agreement reached between the ICTY and the Croatian government was a division of labour. Relatively high-ranking individuals, or those alleged to have committed particularly serious crimes, would be extradited to The Hague, whereas the government would take responsibility for the investigation and prosecution of lower profile or relatively minor offenders.

Tribunal. Matters were brought to a head on 28 August by the murder in Gospić of Milan Levar. Levar had served as a witness to the Tribunal in 1997, concerning reports of mass executions of Serbs in his home town—a Croat testifying against other Croats. The government was compelled to act, and initiated a wave of arrests of those accused of war crimes in a variety of areas. Those held included a number of military officers, as well as suspects in the Levar case. By 18 September a total of 62 people were in custody in Croatia on war crimes charges.

The result was a public uproar, led by sections of the Croatian Democratic Union (HDZ) and veterans' organisations, offended in particular by accusations directed against men who were considered to be war heroes.<sup>14</sup> The governing coalition immediately found its own cohesion under threat, as Prime Minister Račan's Social Democrats came under pressure from their partners, the nationalist Croatian Social Liberal Party (HSLs). A rift appeared to open also between Račan and President Mesić on this issue. A group of senior military officers sent an open letter of protest to the press agency HINA, claiming that the arrests were part of a politically motivated attempt to discredit the 1991-95 "Homeland War". On 28 September, Mesić dismissed the seven generals who had led the protest, insisting that the army should be depoliticised, and observing that the constitution forbade the public expression of political views by senior service personnel. Demonstrations against cooperation with The Hague continued over the following months.

Three events in particular presented a challenge to the new government's position, against which it has found it difficult to defend itself—the case of General Norac, the indictments issued against Generals Gotovina and Ademi, and that of General Janko Bobetko.

On 8 February 2001 the county court in Rijeka issued a warrant for the arrest of General Mirko Norac. He had been the commanding officer in the Gospić area in October 1991, and his name was linked to the disappearance of around 40 Serb civilians, believed to have been abducted and murdered by units of the police and army. Norac went into hiding, and the announcement was followed by further demonstrations led by nationalist groups and organisations of veterans. Having received assurances that he would be tried in Croatia and not handed over to the ICTY, Norac surrendered to the police, and on 5 March was formally indicted in Rijeka, upon which Mirko Kondić, head of the largest of the veterans' organisations, condemned the charges as "shameful and humiliating", and demanded an

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<sup>14</sup> There is an unfortunate asymmetry in our report, in that public opinion research from Croatia relating to the ICTY is not available. The absence of it here is a not a result of indolence on the part of the team members, but their failure to track down such material. (See, however, p. 61, n. 18 below.) Vojin Dimitrijević has conducted a partial survey of the Croatian press, which has been useful at this point, from which he quotes selectively in an unpublished paper: "The 'public relations' problems of international criminal courts", pp. 3-4.

amnesty for all Croatian veterans.<sup>15</sup> The strength of nationalistic opposition to cooperation with the ICTY was demonstrated dramatically when the organising committee of the annual *Alka* festival in the Dalmatian town of Sinj declined to offer the patronage of the event to President Mesić, as a consequence of his policy of cooperation with The Hague. This was the first occasion in the long history of the event in which the head of state had not been invited to take the position of patron.<sup>16</sup>

The cases of Gotovina and Ademi were in some respects even more controversial. Initially the government had resisted the invitation to transfer them. Following a visit to Zagreb by Carla del Ponte the previous day, at a meeting on 7 July the Cabinet agreed that the two should go to The Hague. The case immediately caused acute controversy in Croatia. Dražen Budiša, leader of the HSLS, and three ministerial colleagues, resigned from the coalition government, and Račan faced a motion of no confidence in the *Sabor* on 15 July, which he survived, and on 17 July successfully piloted a statement of the government's general policy towards the ICTY through the Chamber.

The events cited in the indictment against Ademi took place in September 1993, in the unsuccessful Croatian attempt to retake the “Medak pocket”. Those cited in the indictment against Gotovina concerned the conduct of “Operation Storm”, which had resulted in the successful recapture of the secessionist Serb *Krajina*, in August 1995. Ademi surrendered himself in full uniform to The Hague on 25 July. Gotovina went into hiding. The outrage expressed by some sections of the public and among certain professional soldiers and politicians was directed principally against the indictment of Gotovina.

Both of these indictments appeared to many Croats to constitute a direct attack on the Croatian army—and hence on Croatian statehood. The Gotovina case was especially sensitive. “Operation Storm” was directed at the task of recovering for the Croatian state an area over which it did not have effective control (the predominantly ethnic Serb *Krajina*) with or without its population. The very existence of the *Krajina* compromised Croatian statehood, and raised a question over the legitimacy of international recognition. So important was this that almost any action could be regarded (by some sections of public and official opinion) as justifiable if it led to the confirmation of Croatian statehood in this area. For nationalistic Croats the supreme importance of the end justified any means employed in its realisation: and to contemplate prosecuting Croatia's military heroes for war crimes was a

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<sup>15</sup> The trial has turned out to be an important test of the international acceptability of the Croatian judicial system. See Tihana Tomićić, “Croatian courts on trial”, *IWPR Tribunal Update*, No. 266, 13-18 May 2002.

<sup>16</sup> The “Alka” is an annual festival of military (especially equestrian) prowess, which dates back to the wars against the Ottoman Empire. Gen. Norac had held a leading position in its organisation. Norac was convicted of war crimes charges in March 2003, and sentenced to 12 years imprisonment. For further detail on the Norac case, see Peskin and Boduszyński, “Croatia and the ICTY”, pp. 1126-1128.

direct challenge both to the legitimacy of the “Homeland War” and the dignity of the state itself.<sup>17</sup>

A potentially greater embarrassment for the government attended the issue of an indictment against the former Croatian Chief of Staff, General Janko Bobetko, in September 2002. The continuing economic difficulties of the Račan government, and the fragility of its coalition, rendered it ever more sensitive to controversy. Opinion polls indicated the steady recovery of the popularity of the conservative nationalist HDZ.<sup>18</sup> Accordingly, a policy of temporizing was adopted, beginning with a challenge to the indictment in the Appeals Chamber of the ICTY itself. Britain and the Netherlands cancelled their ratification of the Stabilization and Association Agreement between the EU and Croatia, and it became clear that the prospect of entry to the EU was under threat.<sup>19</sup> An apparently irreconcilable confrontation between the ICTY and the Croatian government was avoided by the failing health of the 83-year old General, who died in April 2003.

The Social-Democratic government under Račan was defeated in the elections of November 2003, and an alliance headed by the HDZ returned to power, under Ivo Sanader. During its period in opposition the HDZ underwent a radical change of ideological orientation, accepting the necessity of confronting the war crimes issue, and the importance of cooperating with the Tribunal. The subsequent “normalisation” of relations between Zagreb and The Hague has been recognised to some extent by the willingness of the international agency to support the prosecution of some war crimes cases in Croatian courts.<sup>20</sup> The war crimes issue has remained one of the central areas of debate within Croatian political life, and

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<sup>17</sup> For additional material relating to the Gotovina case, see Peskin and Boduszyński, “Croatia and the ICTY”, pp. 1128-1131. On the centrality of statehood to the question of Croat identity, see Alex J. Bellamy, *The Formation of Croatian National identity: A Centuries-old Dream?* (Manchester and New York: Manchester University Press, 2003). Franjo Gregorić (a former Prime Minister of Croatia) is reported as having stated: “If, for instance, The Hague suspects General Stipetić, then I as a neutral citizen without too much information can conclude that the Croatian army is also suspected and, if the Croatian army is suspected, and the army was instrumental in the creation of the Croatian state, this means that the Croatian state is suspected too.” Dimitrijević, “The ‘public relations’ problems of international courts”, p. 4.

<sup>18</sup> For further detail of the Bobetko affair, see Peskin and Boduszyński, “Croatia and the ICTY”, pp. 1131-1135. They report that an opinion poll conducted in September 2002 indicated that “84% of Croatian citizens opposed sending Bobetko to The Hague; 71% retained the same attitude even under threat of economic sanctions” (p. 1133).

<sup>19</sup> “Croatia faces sanctions over Bobetko”, *Balkan Crisis Report*, 375, 21 October 2002.

<sup>20</sup> The issue of the willingness or otherwise of the international agencies to condone the use of local courts for the trial of war crimes cases has been extremely controversial, and several important issues hang upon it. Generally speaking opinion has moved in favour of this development, although not without misgivings. Unfortunately there is insufficient space in this context to explore these questions.

during negotiations over entry to the EU, in June 2005, featured as one of the principal points of conditionality.<sup>21</sup>

Although the circumstances surrounding this are unclear at the time of writing, the acceptance of Croatian candidacy was followed, on 7 December, by the arrest of Gotovina in Spain, and his subsequent transfer to The Hague.<sup>22</sup> The relative quietness with which this news was received in Croatia, even by nationalist parties, suggests that the consolidation of the secure status of the Croatian state, and its growing integration into the framework of European states, has reduced the sense of anxiety which has formerly hung over challenges to the sanctity of the “Homeland War”, and the threat these might be felt to pose to Croatian identity.

### *Serbia and the ICTY*

The initial response of the international community to the break-up of Yugoslavia—insisting upon the integrity of international boundaries—encouraged the Serbian leader Slobodan Milošević to believe that his attempt to ensure the integrity of Yugoslavia by military means would be supported. Indeed, despite the hostility towards Serbs expressed in sections of the Western press, the failure to impose a diplomatic and military solution on the Yugoslav crisis presented no challenge to the policy of Milošević and his associates. It was not difficult for the Yugoslav press to shrug off the formation of the ICTY in 1993 as an irrelevance.

This situation changed dramatically by 1995, however, when in August “Operation Storm” ejected Serb forces from the *Krajina*, and triggered in Bosnia a joint Croat-Muslim offensive which was eventually to threaten Banja Luka. International ineffectiveness and inaction was transformed dramatically into effective military intervention, in the form of NATO’s “Operation Deliberate Force”, in September. By the end of the year Milošević had been manoeuvred into pressuring the Bosnian Serb leadership into reluctant acceptance of the Dayton settlement.

The Tribunal took its place, not surprisingly, in the picture of hostile international encirclement which the Serbian leadership created, partly in order to explain this military and political collapse. This depiction of the ICTY as deliberately and unremittingly anti-Serb has persisted, and was intensified, by the events of the Kosovo crisis (following the Serbian rejection of the Rambouillet Plan, and the NATO bombing campaign which ended in June

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<sup>21</sup> “Gotovina blocks Croatia’s march to Brussels”, *Balkan Crisis Report*, 523, 29 October 2004.

<sup>22</sup> Helen Warrell, “Fugitive General to be tried for role in Operation Storm”, *IWPR Tribunal Update*, 433, 8 December 2005. Prosecutor Carla del Ponte, thanking the Croatian government, commented that they were now “cooperating fully”. Tim Judah, Dragana Nikolić Solomon and Dragutin Hedl, “Top Croatian war crimes suspect in custody”, *Balkan Investigative Reporting Network, Balkan Insight*, 13, 8 December 2005. The fact that Gotovina was arrested in Spain does suggest that accusations formerly directed against the Croatian government, that they were actively complicit in concealing him, may well have been unfounded.

1999) and the ensuing arrest and deportation to The Hague of Slobodan Milošević in October 2000.

Resistance to the ICTY has had less to do in Serbia with defence of *the state* (as in Croatia), and a great deal to do with defence of *the regime*. It was perceived as likely from the Karadžić-Mladić indictments (as early as July 1995) and from the “Vukovar” indictments of November, that if ever the accused were to grace the witness box the prosecution might attempt to expose their links to the Yugoslav leadership.<sup>23</sup> Delegitimation of the tribunal in The Hague through manipulative news management became for the leadership of the Socialist Party of Serbia (SPS) both an urgent practical as well as a central ideological objective.

The state manipulation of imagery of the war in general, and the role of the ICTY in particular, was easier to sustain in Serbia because for the most part war remained at a distance from the majority of the population.<sup>24</sup> It was not until NATO intervention over Kosovo that, for the most part, the population of Serbia itself had any direct experience of the war. The insistent demands of the Office of the Prosecutor for cooperation together with the continuing succession of indictments, trials and sentences of ethnic Serbs, facilitated the diffusion of an atmosphere of paranoia through the state-controlled media of communication.<sup>25</sup> This approach to explanation of Serb attitudes to the ICTY, however, can not be reduced to this single dimension.<sup>26</sup>

With the ousting of Milošević on 5-6 October 2000, international opinion anticipated a marked change of stance by the new leadership of the Democratic Opposition of Serbia (DOS). It rapidly became clear, however, that this was not a revolution, but a *putsch*, which replaced one set of leaders by another. The new ruling coalition was marked by extreme internal divisions. Vojislav Koštunica and Zoran Djindjić had little more in common than their desire to depose the SPS leadership. As in Croatia, therefore, the Serbian response to the ICTY became an internal political issue, although in very different ways. The question of the political significance of the ICTY within Serbia needs to be examined at two levels—that of internal elite politics, and its resonance with wider political culture.

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<sup>23</sup> This was perhaps an even greater risk in the case of the indictment against the paramilitary leader Željko Ražnjatović “Arkan”, in September 1997—subsequently assassinated.

<sup>24</sup> One must acknowledge important regional variations in this respect. See Đorđe Pavićević, “Zločini i odgovornost”, in Zagorka Golubović, Ivana Spasić and Đorđe Pavićević eds. *Politika i svakodnevni život: Srbija 1999-2002*. Belgrade: Institut za filozofiju i društvenu teoriju, 2003, esp. p. 141.

<sup>25</sup> The news media alone can not be held responsible for the dissemination of a predominantly negative view of “The Hague”. Kosta Čavoški, an influential member of the Serbian Academy, also wrote a direct attack on the Tribunal—*Hag protiv pravde* (The Hague against Justice). Belgrade, 1998. A number of established jurists in Serbia added their voices to the campaign. The significance of the communications media in relation to public opinion in Serbia is examined in detail in Appendix 4, below.

<sup>26</sup> In this respect perhaps Eric Gordy’s account of the “destruction of information alternatives” in the Serbian media rather over-states the case. See: Eric D. Gordy, *The Culture of Power in Serbia: nationalism and the destruction of alternatives*. University Park (PA): Pennsylvania State University Press, 1999.

The war in Serbia produced a mafia-style economic elite, entrenched in a war economy.<sup>27</sup> The new economic bosses were bound up closely with the old political bosses, to an extent not matched in Croatia. The new leadership inherited not only an assembly still dominated initially by the SPS, but an unchanged military leadership and a firmly entrenched stratum created by the old order who occupy the top echelons of the economy, state administration, the judiciary, and to a lesser extent the communications media.<sup>28</sup> This stratum was, in many respects, resistant to the kind of “transition” which Serbia was expected to make, and elite resistance was intimately bound up with the ways in which war criminality was intertwined with a range of other features of Serbian society, including the military and the “informal economy”. As a result of this internal resistance, compliance with the demands of the Tribunal generally has been secured only by the strenuous exercise of international diplomatic and economic leverage.

In mid-May of 2002, for example, a spate of arrests and self-surrenders took place involving Serbs indicted by the Tribunal. This followed a period of intensive diplomacy by the EU’s emissary, Javier Solana, beginning in November 2001. The central concern of his mission was the prospect of the further disintegration of Yugoslavia in the form of the secession of Montenegro. Having backed Montenegrin secessionist sentiment during the Milošević years, as a means of destabilising the Belgrade regime, the European Union now reversed its position, and put its weight vigorously behind the continuing unification of the two republics. A deal was signed on 14 March 2002, following which a new basis for a confederal structure was agreed (although its implications are still unclear).<sup>29</sup> International efforts to moderate Montenegrin demands for a fundamental restructuring of the union were secured at a price—cooperation with the ICTY.

Coincident with this constitutional agreement, the US government named a deadline for Serbian compliance with the ICTY indictments, threatening the loss of US\$ 150 millions in aid, on 31 March.<sup>30</sup> Relations between the Serbian and federal governments in Yugoslavia, already seriously tested by the arrest and extradition of Milošević, were placed under enormous strain. Although committed to cooperation, Zoran Djindjić invested a great effort

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<sup>27</sup> See, for example, Nir Rosen, “Mafia fuels Balkan crisis”, *IWPR Balkan Crisis Report*, No. 333, 26 April 2002, pp. 7-9. “Serbia after Djindjić”, *Balkans Report* No. 141, Belgrade/Brussels, 18 March 2003. See esp. pp. 2-5.

<sup>28</sup> See, for example, Bojan Dimitrijević, “Serbia: culture of secrecy persists”, *IWPR Tribunal Update*, No. 264, 15 May 2002, pp. 4-6. It is largely for these reasons that the relatively rapid movement towards ICTY support for the holding of war crimes trials in Croatia has not been evident in Serbia, where the competence of the judiciary is still not respected by the international community. See Slobodan Beljanski, “Could Serbia hold war crimes trials?” *IWPR Tribunal Update*, No. 238, 11 Oct. 2001, pp. 3-4.

<sup>29</sup> For the text of the agreement, see: [www.afebalk.org/balkans/accord14032002.html](http://www.afebalk.org/balkans/accord14032002.html).

<sup>30</sup> *IWPR Balkan Crisis Report* No. 327, 28 March 2002, pp. 5-7: “Serbia: Djindjić under pressure to begin extraditions”. Washington linked this demand to the release of Albanian prisoners held in Serbian prisons.



in attempting to persuade the indicted men to surrender “voluntarily” to The Hague. His efforts were hardly helped by Federal President Vojislav Koštunica’s remarks that deportations would lead to turmoil, and his admission in an interview with Radio-TV Serbia that “I feel sick to my stomach when I think about that court.”<sup>31</sup>

Having been defeated twice in the federal Assembly (in June 2001 and March 2002) a law was finally adopted making provision for the surrender of citizens to the ICTY.<sup>32</sup> Despite the deep ideological and complex political difficulties which have obstructed the development of relations between Serbia and the ICTY, as in Croatia, a degree of pragmatic accommodation was forthcoming when sufficient external leverage was applied.

The situation changed following the assassination of Prime Minister Djindjić, on 12 March 2003. During 2002 it had become evident that Djindjić was gradually winning the struggle between modernisers who accepted the necessity for accommodation to the West, and more conservative and nationalistically inclined groups, represented by Koštunica. It is generally accepted that Djindjić’s willingness to cooperate with the ICTY was one of the reasons behind his murder. Although the immediate responsibility for the assassination is still not clear, it is widely agreed that it was undertaken by agents acting for one of the large criminal organisations. Djindjić’s successor, Zoran Živković, immediately set in motion an energetic campaign to clean out the Augean stable of Serbian political life. A large number of arrests were made, not only in direct connection with the assassination, a reform of the judiciary was announced, and measures were undertaken to hand over several high profile indictees to the Hague Tribunal—notably Veselin Sljivančanin, long sought by the ICTY for his alleged part in mass murder in Vukovar at the collapse of the siege in November 1991.

Under these circumstances, the persistent pressures to cooperate with the ICTY from “the international community”, might even sometimes even been counterproductive. Jasna Dragović-Soso has argued that, just as the NATO bombing campaign to some extent promoted a sense of popular solidarity, so “the indictment of (General Dragoljub) Ojdanić and several other officials .... along with Milošević, merely raised the stakes of their political survival and closed ranks at the top”—promoting elite solidarity.<sup>33</sup>

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<sup>31</sup> *IWPR Balkan Crisis Report*, No. 327.

<sup>32</sup> The passage of this measure was strictly cosmetic in relation to international law, where the detention and transfer of suspects to the ICTY was already provided for, independently of any extradition treaties. See above, p. 43. See, however, *Zakon o saradnji SR Jugoslavije sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije*. Belgrade: Službeni Glasnik, 2002.

<sup>33</sup> Jasna Dragović-Soso, “Western policies and the Milošević regime”, in Peter Siani-Davies, ed. *International Intervention in the Balkans since 1995*. London: Routledge, 2003, pp. 120-135. See esp. p. 129.

The end of the Milošević era in Serbia has not seen the rapid advance of public acceptance of the ICTY, however, and the persistence of scepticism and even hostility towards the Tribunal clearly cannot be reduced to a matter of elite (and in particular media) manipulation.<sup>34</sup> The persistent demands of the “international community” for compliance produce a response on the part of many Serbs at two levels. It is essential to recall that, at the time of his extradition to The Hague, Milošević had been indicted already by Serbian courts on charges relating to his alleged economic misdemeanours. In the light of the decade of economic hardship which ordinary Serbs suffered while he was in power, the intervention of The Hague is perceived, not as the supervenience of a higher justice, but the setting aside of their proper grievances in favour of some distant interest and more abstract ideal.

Serb perceptions that their needs for justice are marginalized in this process resonates at a deeper level. Croats see “Europe” as playing an important part in their ideological self-definition. For Serbs, however, “Europe” does not play this positive role, and attitudes towards “Europe” are deeply ambivalent in two respects.<sup>35</sup> The Orthodox Christian tradition has always been deeply suspicious of “The West”, and it is common for Orthodox clergy to equate the perceived cultural and moral decline of Serbia with “Western” influence. Furthermore, an important strand in the fabric of Serbian self-definition emphasises the suffering and self-sacrifice of Serbs, defending “Christian Europe” from “The Turk” without ever receiving appropriate recognition for that achievement, or acknowledgement of its cost. Whereas, at one level therefore, Serbian culture is profoundly European, the relationship to “Europe” is shot through with an ambivalence which mingles xenophobia and resentment.

Although public opinion in Serbia gradually has come to accept that there are issues relating to war crimes which need to be addressed, attitudes towards these have to be contextualised in relation to the widespread sense that Serbs find themselves encircled by an unsympathetic and even hostile environment. Bearing in mind the enormous psychological shock of the NATO bombing campaign of 1999, it is possible to understand how it is that the ICTY takes its place as one element in this picture of national isolation and exclusion. This

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<sup>34</sup> A good deal of information is available concerning the development of public opinion in Serbia relating to the war crimes issue. From the condition of wholesale denial which characterised an earlier period, it is evident that there has been a gradual process of accommodation. This material reviewed in detail by Mikloš Biro, in Appendix 4, below. This also reveals very clearly the interesting extent to which general public perceptions of the ICTY in Serbia have been tied in with attitudes towards Milošević. The team has also had available a complementary and so far unpublished study written by Eric Gordy, “What is the state of public opinion?” Assertions made in this section should be read in the context of this material. The terms “scepticism” and “hostility” here would seem to be adequately justified if the material from our focus group study is representative. See Appendix 5, below. It is also important to note, in the light of the evidence presented in our Appendices, that these attitudes appear to be held much more diffusely in Serbia in relation to a wide range of public institutions, and not only towards the Tribunal.

<sup>35</sup> The view suggested here is based in part upon the work of Ivan Čolović. See his *The Politics of Symbol in Serbia: essays in political anthropology*. London: Hurst & Co., 2002.

rather paranoid image of the world can not be reduced to the factor of elite manipulation alone, but can be seen to be rooted also in far older strata of identity-formation.

### ***Bosnia and Hercegovina***

The experience of war in Bosnia and Hercegovina was markedly different from that of the other republics of the former Yugoslavia, in two important respects. Fighting touched directly the greater part of its population and territory; and the commission of war crimes was, to a greater or lesser extent, a key component of the strategy of contending forces rather than a set of incidental occurrences.

In Serbia, it was not until the Kosovo campaign that war affected the inhabitants of that republic directly. This is not to deny the magnitude of its *indirect* consequences: but it is important to acknowledge the fact that fighting did not take place within Serbia itself. Its population, therefore, did not become victims of war crimes, and those of its citizens who did take part in the fighting, whether as regular soldiers or paramilitaries, did so by going elsewhere—for the most part to Bosnia.

In Croatia also, although roughly a third of its territory was the subject of the attempted secession by its ethnic Serb population, military action did not spread across the entire republic. Armed conflict was rapidly contained and stabilised with the acceptance of the “Vance Plan”, and the arrival of UNPROFOR in early 1992. With relatively small exceptions, there was little open fighting until “Operation Flash” and “Operation Storm”, in May and August 1995 returned the Serb *krajina* to Croatian government control. Although in parts of Croatia fighting was fierce (around Pakrac, for example, and in eastern Slavonia) and several of the indictments issued by the ICTY have addressed events within Croatia, for the majority of Croats, and for most of the time between the end of 1991 and 1995, the indirect rather than the direct consequences of war were both more visible and more important.

In Bosnia and Hercegovina, on the other hand, there can have been very little of the territory and very few of its inhabitants upon whom the war did not directly impinge in one way or another. Perhaps the areas to come nearest to being islands of peace were the small number of municipalities in western Hercegovina which had massive ethnic Croat majorities, and where the dominance of the HVO was never subject to effective challenge by other forces. There were ethnic minorities present in every municipality of Bosnia and Hercegovina, so that at the very least, however relatively homogeneous their populations, they became the site of “ethnic cleansing”. It can surely not be an exaggeration, therefore, to say that, in one way or another, every locality in Bosnia and Hercegovina was touched directly by the war. Several areas, such as north-western Bosnia, the Brčko enclave, the Neretva valley, and parts of central Bosnia, were fought over repeatedly. Sarajevo was under siege for the best part of four years.

A closely related and equally important characteristic of Bosnian experience is the fact that war crimes were not incidental to the action, but intrinsic to and definitive of it. The commission of war crimes became, in Bosnia and Hercegovina, both a primary aim of war and among the principal means of achieving that aim. Only in this republic did one find created the network of detention camps designed as instruments for the relocation of populations, which became the sites for the commission of a succession of barbarities against those detained there.<sup>36</sup> For these reasons the character of the responses of the people of the region to the war crimes process in The Hague, has also been different.

In general, the communications media in Bosnia have devoted greater attention than elsewhere to war crimes issues, and Bosnians have had more information available to them, about the ICTY and its operation, than have the citizens of other post-Yugoslav states.<sup>37</sup> Nevertheless, it is probably true to say that within Bosnia opinion about the value and significance of the Tribunal is more sharply divided than elsewhere, particularly with respect to the difference between the Federation and the *Republika Srpska*.<sup>38</sup>

An additional factor which has defined the nature of both the war and the following peace, from the point of view of Bosnia, has been the role of international actors.<sup>39</sup> In particular, it is necessary to appreciate the character and significance of the Dayton Agreements which brought fighting in the republic to an end in November-December 1995. It would be difficult to exaggerate the importance of the Dayton Agreements for the subsequent development of society and politics in Bosnia. These agreements have provided an internationally sanctioned framework, backed by military force, which has been upheld vigorously by all international actors involved in the region, in the face of every indication that their role can be at best a temporary one, and anticipating the construction of a more permanent constitution. In view of the evident difficulties in finding agreement on any alternative structure, however, since the ratification of the Dayton settlement in January 1996,

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<sup>36</sup> The extent and character of war crimes in Bosnia was recognised as early as 1992, in a Helsinki Watch report. Helsinki Watch, *War Crimes in Bosnia-Hercegovina*. New York: Human Rights Watch, 1992.

<sup>37</sup> A test which I have applied in all of the major cities of the region I have visited is to ask in all of the bookshops to discover what they have in stock about the *Haški sud* (The Hague Tribunal). The only city in which it was easy to obtain such material was Sarajevo. There is still no good, popular objective survey of the work of the Tribunal, but it is possible to point to the pamphlet by Smail Čekić, *Haški tribunal*, Sarajevo: Vijeće bošnjačkih intelektualaca, 1996. At a rather more academic level there is the excellent volume by Edina Bećirević, *Međunarodni krivični sud između ideala i stvarnosti*. Sarajevo: Arka press, 2003. I record here my thanks to the Librarian of the Sarajevo Human Rights Centre (7 May 2004) for his observation on this matter. (JBA)

<sup>38</sup> There is also a big difference, in Bosnia as elsewhere, between the level of information between urban and rural populations. The fact that *Republika Srpska* is significantly less urbanised than the Federation contributes to the relative lack of public knowledge here. On the difference between regions and ethnic groups in relation to attitudes towards the Tribunal, see Appendices 4 and 5.

<sup>39</sup> Subsequently in this chapter we shall use “Bosnia” on many occasions to refer to the entire republic of Bosnia and Hercegovina, for stylistic reasons. It should be apparent from the context if the term is used more narrowly.

none of the parties involved has been willing to challenge its provisions—this despite the failure of the institutions it created to make for return to “normality” in the region.

The post-Dayton administration in Bosnia has been challenged on many occasions because of its apparent dilatoriness in supporting the needs of the war crimes tribunal. Reading the provisions of the Agreements, however, it becomes very clear that the pursuit and punishment of war criminals did not feature as a central concern of those who drafted and signed them. The “General Framework Agreement” does commit the parties (in Art. IX) to “cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law”. Similarly, Annex 6 (the Agreement on Human Rights) commits the parties to respect the measures in international law listed in the Appendix, which covers comprehensively the legal foundation of the work of the ICTY. Article XIII, para. 4, of Annex 6 also records that: “All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to the organizations established in this Agreement”, citing explicitly among these the ICTY. The Dayton settlement is almost entirely lacking, however, in the provision for the *enforcement* of these provisions.

The key to the operation of the Dayton constitution in Bosnia is the position of the High Representative (HR), whose powers and functions are detailed in Annex 10. Although the office of the HR is mandated to “monitor the implementation of the peace settlement” in general, to coordinate the activities of the various agencies set up under the Agreements, there is evidently a significant weakness with respect to the war crimes process. Although it is true that the HR is, by implication, expected to ensure that the provision of the General Framework Agreement, mentioned above, is respected, along with all other aspects of Dayton, the question of enforcement is dodged once again. Article II (9) expressly notes that: “The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations ....” Although the IPTF is directly responsible to the HR for its operation, it is not expressly mandated to undertake the pursuit and arrest of indicted war crimes suspects. The HR might (like the British monarch) “advise, encourage and warn”, there is a critical measure of optionality and discretion surrounding the degree of priority which the HR might attach to this issue.<sup>40</sup>

Piecemeal revisions of its provisions are taking place all the time: yet none of the major actors who are engaged with the future of Bosnia, domestic or foreign, is willing or

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<sup>40</sup> In an interview with Wolfgang Petritsch, who held the post of HR between August 1999 and May 2002, it became clear that the issue of war crimes in fact has a high degree of salience. He did acknowledge, however, that he had negotiated directly with Radovan Karadžić during his term of office. The need to persuade him to step down from any political office was construed as a more important step than his immediate arrest. (Interview in Sarajevo: 6 May 2004) It may well be relevant to note that occupants of the post before the appointment of Paddy Ashdown tended to be drawn from diplomatic backgrounds, and possibly were inclined to interpret their role primarily in terms of negotiation rather than enforcement.

able to precipitate an attempt at a comprehensive renegotiation of the Dayton settlement.<sup>41</sup> The coincidence of public commitment to the need to uphold the terms of the Dayton Agreements, and profound private scepticism about the real prospects for their durability, confines within a straightjacket political and social life in the republic.

As a consequence of the imposition of the Dayton settlement by external agents, and the fact that questions continue to hang over both its durability and its legitimacy, the essential character of “Bosnian society” and a Bosnian state are permanently in question.<sup>42</sup> Because of the acute sensitivity of any challenge to it, however, and the difficulty of finding a route towards an acceptable alternative, it is impossible to advocate any major constitutional change in Bosnia with any chance of success. Zlatko Hadžidedić has argued that the Dayton Agreements have had the effect of eliminating honest consideration either of the past or the future of Bosnia.<sup>43</sup> To challenge accounts of what has happened in the past, and to attempt a dispassionate scrutiny of the route by which things came to be as they are, it is necessary to ask awkward questions about the role of powerful international agents, and by implication to suggest that the Dayton settlement might have been contingent rather than necessary. No worthwhile discussion is possible about the future for Bosnia which does not take for granted the idea that the Dayton institutions are transitory rather than permanent. Consequently, as Hadžidedić expresses it graphically, “Bosnia now = no future/no past”.

This “now”, created by Dayton, is founded upon the “ethnoterritorialisation” of the republic—its division into “entities” and cantons based upon “the idea of an ethnic group’s ‘ownership’ over an entire territory and its resources”.<sup>44</sup> This results in the entrenchment of a set of ethnic oligarchies,

which legitimise their position of the *de facto* owners of territory and resources by presenting themselves as the sole, monopolistic representatives of “national interests” (at the same time excluding all other potential contenders for this form of ownership).

All questions about the past and the future of Bosnia, therefore, come to be refracted through the prism of definitions derived from this pattern of ethnic ownership of territories. By

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<sup>41</sup> The anxiety within the “international community” which can be provoked by the prospect of the revision of Dayton is illustrated vividly by an anecdote. I was invited recently, by a major international organisation, to submit a proposal for a research project in Bosnia. My initial response suggested that the problem which concerned them was fostered, if not generated, in large measure by the terms of one of the Dayton Annexes, and that what they might be looking for in actuality was academic sanction for compromising on one of the goals set out at Dayton. Their reaction can only be described as rising panic! (JBA)

<sup>42</sup> Something of the nature of these questions can be gleaned from: Christophe Solioz and Tobias K. Vogel, eds. *Dayton and Beyond: perspectives on the future of Bosnia and Herzegovina*. Baden-Baden: Nomos, 2004. The papers read to two international conferences organised by the Association Bosnia and Herzegovina, on the future of Bosnia (Sarajevo, May 2004 and Geneva, October 2005) have shaped the writing of this section.

<sup>43</sup> Zlatko Hadžidedić, “Bosnia now = no future/no past”. Variant, issue 18, October 2003. [www.variant.randomstate.org/18texts/18bosnia](http://www.variant.randomstate.org/18texts/18bosnia).

<sup>44</sup> Hadžidedić, “Bosnia now”, p. 1.

creating a rigid structure of “oligarchic ethnocracy” the legacy of Dayton has been the blockage of the process of the normalisation of Bosnian society in the post-war period. The continuing succession of gestures towards “balanced representation” in political and economic life, which possibly have an important role as window-dressing, emphasise rather than conceal this.<sup>45</sup>

Despite the fact that the Tribunal in The Hague is often justified in terms of its potential for enabling people to come to terms with their past, and thereby move unburdened by it into their future, in Bosnia the ICTY is inescapably implicated in patterns and processes which encumber any consideration of past or future with ideology, and frustrate the possibility of recreating “normal” society. The Tribunal, therefore, despite its own intentions and best efforts, also has come to be trapped within this “now”, defined inescapably in terms of the dominant interests of territorially-based ethnic oligarchies.

Because so much of the fabric of life in the republic is bound up with an order imposed by the “international community”, there has emerged a tendency to see *all forms* of external intervention in Bosnian life as parts of a single tissue.<sup>46</sup> The sense of stasis, blockage and artificiality which has come to infuse all aspects of public life, emanating from the Dayton institutions, is diffused subjectively to all international agents. As a result, perceptions of the ICTY can not be insulated from the prevailing culture of resignation and cynicism.

These aspects of Bosnian life are clearly reflected in the pattern of cooperation or non-cooperation between different local groups and organisations and the ICTY. Although the government of Bosnia and Hercegovina recognised and agreed to cooperate with the Tribunal from the outset, the authorities within the two “entities” have not been distinguished by their eagerness to support its work. In large measure, the attitudes and behaviour of the Croat and Serb political parties have tended to mirror those of the governments of Croatia and Serbia. This has been the case particularly with the *Republika Srpska*, in which it has not been difficult for the former leader of the Serbian Democratic Party, Radovan Karadžić, to

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<sup>45</sup> Michael Humphrey links this entrenchment of a belief in the importance of “balanced representation” to an important deficiency of the Tribunal’s work in Bosnia. “The ICTY’s prosecutors felt it was important to develop confidence in the Tribunal’s judicial process across the different communities and pursued a policy of ‘even-handedness’ [to] promote the judicial legitimacy of the court. At times this led to an over-zealous commitment to the idea that ‘atrocities were committed on all sides’, despite the fact that overwhelming majority of victims were Bosnian Muslims.” He adds that on one occasion a request to exhume a mass gravesite was denied allegedly because the HR insisted that three mass graves, one from each group, be found before the request would be granted. Michael Humphrey, “The international prosecution of atrocity and national reconciliation: the ICTY and the ICTR compared”, the conference *Law and Justice under Fire: the legal lessons of the Yugoslav wars*. Inter-University Centre, Dubrovnik, June 2001, pp. 12-13.

<sup>46</sup> The uniformity and interconnectedness of the network of international action has perhaps been symbolised most vividly for Bosnians by the fact that the badge of external humanitarian intervention is the large, white-painted, off-road vehicle of the Land Rover type. It seemed, in the period shortly following the war, that even the most modest action by an NGO depended upon the possession of at least one of these. The problem is even reflected in discourse, which tends to oppose the “internationals” and the “nationals”—for many purposes equally undifferentiated categories.

continue to evade attempts to find and detain him. The RS has come to be regarded as a “safe haven” for ethnic Serbs under indictment, and Bosnian Serb politicians continue to maintain a public façade of denial. Ethnic Croats tend to be divided in their attitudes, with the uniformly Croat areas of western Hercegovina, adjacent to the border with Croatia, adhering to strongly separatist views and deeply suspicious of the Tribunal, and the more dispersed and ethnically mixed communities of central Bosnia and the Posavina inclined to favour the perpetuation of an ethnically diverse Bosnia and to view the ICTY with greater sympathy. In contrast, the Bošnjak parties, and other groups committed to the integrity of a united Bosnia, such as the Social Democrats, have broadly given their support to the ICTY.<sup>47</sup>

The situation is complicated, to some extent, by the power of the UN Office of the High Representative (OHR), who in this matter, as in everything else in Bosnia, is able to intervene to impose courses of action where these cannot be agreed by local political agents. The powers of the HR have, in fact, been significantly augmented since the original Dayton settlement. Until 1997 his position was seen primarily in diplomatic terms—as a facilitator of negotiation. As Gerald Kraus and Felix Martin indicate, in a forceful and challenging analysis, however:

.... In May 1997, when the Peace Implementation Council authorized the OHR to stop incitations to violence broadcast on public media. In a unique, coordinated action, international peacekeeping troops seized the Republika Srpska public television transmitter towers while the OHR demanded the resignation of the entire management board of the Bosnian Serb broadcaster. The surprising success of this intervention led the PIC to hand the OHR vast new powers in the crucial areas of institutional reform, substantial legislation, and the personnel of public office ....<sup>48</sup>

These “Bonn powers” endow the OHR with, in effect, “the unlimited authority of an institutional mission to overrule all the democratic institutions of a sovereign member state of the United Nations”, creating a structure which Kraus and Martin compare to the system of “indirect rule” which characterised the British Raj in India.<sup>49</sup> Christophe Solioz has situated Bosnia “half way between a democracy and an authoritarian regime—in a grey zone”.<sup>50</sup>

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<sup>47</sup> It is important to note that the public stances taken by political spokespersons in their official capacities may not reflect the situation on the ground. A member of the investigative staff of the ICTY assured me that the prevailing attitude of people with whom he dealt at the local level was one of “respect”, and that even in the RS he received the cooperation he required. He did remark that he sometimes encountered “rudeness”—but insisted that this was “cultural rudeness”, which was not specific to his function. It seems that “ordinary” rural boorishness should not be read as politicised! (JBA)

<sup>48</sup> Gerald Kraus and Felix Martin, “Travails of the European Raj”, *Journal of Democracy*, 14(3), 2003: 6-074. The passage cited is from .p64.

<sup>49</sup> Kraus and Martin, “Travails”, p. 60. Others have termed Lord Paddy Ashdown (the HR at the time of writing) the “new Kállay”—a reference to Baron Benjamin von Kállay, who led the Austrian administration of Bosnia and Hercegovina after the occupation of 1978.



Since the High Representative needs to consider the efficacy of his intervention across the entire range of issues which concern him, he is naturally likely to “optimise” the use of the resources available to him.<sup>51</sup> In other words, he is not able to secure simultaneously all of the outcomes which might appear to be desirable at any one time. Refraining from putting his entire weight behind the investigations of the ICTY, under these circumstances, can appear to be rational where this might allow room for manoeuvre in pursuit of other political goals.

This same tendency to qualify in practice support for the ICTY has characterised the conduct of other international actors, particularly IFOR and its successors SFOR (“Stabilisation Force”) and EUFOR (the European Force). The pattern of detentions reveals that the military have been more proactive and effective in this direction than their critics often allow. The military structure is not part of the same organisation as the Tribunal, however, and is not directly subject to its authority—although arguably obliged to support its work. Military commanders can, and do, point out that their duties extend well beyond support for the ICTY, and that they are operating with limited resources. What is more, it is appropriate for them to consider the circumstances under which they are prepared to expose their personnel to danger, and several arrests have involved the exchange of gunfire with those they have pursued. As we have noted in Section III above, there has been confusion over the interpretation of the remit of military commanders, and hence lack of consistency in their conduct.

A good deal of the cynicism with which many Bosnians regard the ICTY has to do with the frequency with which individuals known to have been implicated in war crimes remain free to live their lives with impunity within Bosnia. They may have escaped indictment because the policy of the Tribunal has determined that their actions were not of sufficient seriousness to merit this, or the evidence does not appear to be sufficiently strong. Alternatively, the actions they committed may have been damaging or disreputable, or have involved simply associating with those who were guilty of major offences, but fall short of the level of seriousness which could expose them to retribution through the ICTY. They are, nevertheless, free of the threat of indictment and arrest, and able to return to life in the community—possibly even holding positions of public responsibility.

Justifiably and understandably or not, there is a gap between indictments issued and arrests achieved, and between perceptions of responsibility or guilt and liability for punishment. These perceived discrepancies between what might have been expected of the

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<sup>50</sup> Christophe Solioz, *L'Après-guerre dans les Balkans: L'appropriation des processus de transition et de la démocratisation pour enjeu*. Paris: Karyala, 2003, p. 78.

<sup>51</sup> Consistent use of the masculine pronoun appears to be appropriate here, all of the incumbents of this position have been male.

international presence in Bosnia, and their actions, are commonly seen as contributing to the prevailing cynicism about the “international community”. All of these aspects of the situation have tended to work together to reinforce the sense of disillusionment with which the Tribunal is generally regarded in Bosnia.

Xavier Bougarel argues that the international institutions in Bosnia, including the Tribunal, however benevolent their intentions, in fact serve unwittingly to root people in specific and limited identities.<sup>52</sup> Most importantly, they operate to impose and confirm the primacy of *wartime* identities. This is a startling challenge to the widespread view that what predominates in the region is the salience of *ethnic* identities. These have their relevance: but they become relevant in so far as they are refracted through the prism of who or what individuals are when defined by their wartime experiences. Are they veterans (and of which army)? Are they returnees (and as members of the local majority or minority community)? Most significantly in relation to the ICTY, are they victims or perpetrators? The Tribunal (along with all other international agencies) is principally interested in people as they can be identified in these terms.

This is only a part of a wider problem, of the imposition of a primarily western discourse upon the Balkans. This discourse sets aside entirely the possible role of international actors in *causing* the war. It defines the break-up of the former Yugoslavia entirely in terms of the responsibility and guilt of *local* actors. There is a double political action here, in that the imposition of a hegemonic definition of the war is furthered and indeed intensified through the imposition of a hegemonic interpretation of justice. This follows from the “auratic” status of the Dayton Agreements, because to affirm that major international actors must share (however marginally) responsibility for the war must cast, by implication, a shadow over the legitimacy of Dayton. Furthermore, as Bougarel expresses it cogently, the ICTY operates to turn a “three-person game” (perpetrators, victims and international agents) into a “two-person game” (perpetrators and agents), eliminating the possibility that international agents could ever be considered as a relevant factor in the causation of the war.

Note that these opinions relate to the role of the international community in the *causation* of the war, not its *conduct*. This is profoundly relevant to the matter of the formation of attitudes towards the ICTY. It is important to separate questions relating to legal (or moral) responsibility for the outbreak of war (*jus ad bellum*) from those relating to responsibility for conduct during war (*jus in bello*). The Tribunal in The Hague is mandated to deal with questions of the latter, but not the former kind. In the minds of many people in the Balkans, however, particularly when viewed from a moral as well as a legal point of view, these two types of questions tend to merge one with the other. Because of the nature of the

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<sup>52</sup> Personal conversations with Bougarel, particularly that in Paris, on 8 November 2002. (JBA)

circumstances surrounding the extension of war into Bosnia there is a powerful sense of the extent to which the “international community” must be held to account for its share of responsibility for war, even if not for its conduct. These two types of question, though separated in legal thinking in this area, are fused in popular understanding.

Additionally, however, there is in Bosnia a lively awareness of the degree to which, having determined to intervene militarily in the Bosnian situation, international bodies of one kind or another then failed to meet with appropriate action the obligations to which they were apparently committed. Conspicuous among these issues is the question of the manner in which locations designated as “safe havens” by UN forces turned out to offer much less protection than Bosnians had been led to expect. In particular, there was a succession of occasions when the support from the air which might be considered to have been necessary to give effective meaning to the concept of “safe havens” was not forthcoming. Most conspicuous as a focus of criticism of the idea of “safe havens” and the practical meaninglessness of this designation, have been the events surrounding the fall of Srebrenica in July 1995.<sup>53</sup>

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<sup>53</sup> Interestingly, it seems that the readiness of the Dutch government to investigate thoroughly these events, to make public the findings of the enquiry, to acknowledge responsibility for their part in the events, and to make reparation for their consequences, has served to draw attention to the general importance of this issue. The case of Srebrenica has served conspicuously to issue a challenge to the idea that matters relating to *jus in bello*, in the case of Bosnia, concern only Bosnians and not the international forces also engaged there. Relevant aspects of these issues have been debated with vigour in: Brendan Simms, *Unfinest Hour: Britain and the Destruction of Bosnia*. London: Allen Lane, 2001; Burg and Shoup, *The War in Bosnia-Herzegovina*.

## ***V: Summary and Conclusions***

### ***Conclusions***

This report has inevitably drawn attention to points at which the International Criminal Tribunal for the former Yugoslavia might be regarded as open to criticism. It would be a mistake to conclude without recognizing that the Tribunal has much to its credit. The team would not wish the critical points made here to distract from its positive achievements in bringing justice to the region and a measure of truth to the understanding of its recent past. Perhaps former Chief Prosecutor Louise Arbour draws attention to this positive side of things most effectively when she asks: “Where would Bosnia, or Croatia for that matter, be today without the ICTY?”<sup>1</sup>

The wider importance of the Tribunal has yet to be determined; but it will certainly also find its place in the overall narrative of the development of international humanitarian law. “The UN system has as its core the principle of sovereignty as the guarantor of order,” (writes Rachel Kerr), and the secondary principles of humans rights and fundamental freedoms have traditionally been sacrificed to this pre-eminent goal of sustaining order.<sup>2</sup> We noted, in our account of the foundation of the ICTY, that international concerns with security and stability were in the forefront of the minds of international actors—peace ranked as the primary goal in relation to which justice was perceived as generally secondary and instrumental. Kerr asks whether it might be the case that the ICTY has actually succeeded “to elevate the status of justice in relation to order”, and not simply within its original Balkan context.

In specific areas of international law (as Julie Mertus has insisted in Appendix 6, which deals with the law relating to sexual violence in war) significant developments have taken place as a direct outcome of the Tribunal’s work. In retrospect it will probably emerge that this legacy will have been appreciably more extensive—although the scope of that will probably only emerge when the newly-founded International Criminal Court becomes fully functioning.

The conclusion to which our Group has come is that there is no evidence of systematic bias—certainly not of deliberate bias—on the part of the ICTY against any of the ethnic groups in the former Yugoslavia. This is, in many respects, hardly a surprising conclusion because the scholarly literature available at the time of the launch of our project did not lead us to expect that

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<sup>1</sup> Interview for the film *Justice Unseen*.

<sup>2</sup> Kerr, “International judicial intervention”, p. 20-1.

we would find such evidence. We have confirmed, nevertheless, that the *perception* of bias is both persistent and widespread (although diminishing over time, to be replaced in some cases by cynicism and indifference) and we believe that this perception needs to be taken seriously. In the course of that investigation several things have become clear which help to make intelligible that apparent contradiction.

First of all, the absence of *deliberate* partiality on the part of the Tribunal does not mean that it is free from faults which are conducive to the attribution of one-sidedness. It was created primarily in response to the needs of the major international actors for “peace and stability” in the Balkans. It was designed to implement a body of international law, and by means of procedures which were chosen because they matched the requirements of those who were selected to the Trial Chambers. These requirements were principally for internationally recognisable professional standards, and mutually acceptable compromises between different judicial traditions. None of these factors took account centrally of the perceptions of, and needs for, justice held by people in the ex-Yugoslav states.

The pursuit of justice through the Tribunal had to be framed in relation to specific constraints, of resources, time and political will. Furthermore, it made its way in a changing political environment, in which resort to the Tribunal became available as a sanction which could be deployed in order to further ends other than that of justice. A problem which has bedevilled the Tribunal since its creation has been that to its original purposes has been added an ever-growing range of expectations, which no court of justice could ever be expected to meet. It has been burdened with the task of creating a historical record of events; with “healing the wounds of war”; “lifting the burden of collective guilt”; paving the way to reconciliation; and with deterring future violators.<sup>3</sup> As Chief Prosecutor Carla Del Ponte, and her deputy Graham Blewitt, remind us, however, the primary goals of the institution have been the search for justice and for truth.<sup>4</sup>

As a human institution the Tribunal has been no better, nor worse, than the occupants of positions within it. Despite the fact that those of the team (and others) who have had direct contact with the ICTY have paid tribute to the hard work, dedication and professionalism of its staff, the constraints under which they have been recruited as well as the conditions under which they work do reveal differences in their degree of competence. Errors of judgement, however, do not equate to deliberate bias, even if they might contribute to perceptions of unfairness.

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<sup>3</sup> An illustration of this multiplication of expectations, going beyond its original remit, is found in Carl Bildt’s *Peace Journey: the struggle for peace in Bosnia*. (London: Weidenfeld and Nicolson, 1998, p. 379.) The pedigree of the expectation that the ICTY should provide an important historical record of events clearly can be traced back to the opening speech of Robert Jackson, the Chief Prosecutor at the Nuremberg trial.

<sup>4</sup> Interviews for the film *Justice Unseen*.

These critical remarks certainly do not identify the ICTY as a failure, nor seriously challenge its legitimacy. The members of the Research Group do not set out to undermine the claims of its advocates that it has constituted an important development in the field of international justice, and one that has probably made a significant contribution to transitional justice, as well as its original purpose of furthering peace and stability in the region.<sup>5</sup> Nevertheless, the orientation which it has adopted towards global actors, and global criteria of its success, have resulted in it turning, to some extent, a blank façade towards the very region which might have been presumed to be its most important constituency—the peoples of the former Yugoslavia. In retrospect perhaps it can even be said to have been seriously negligent in its failure to address this audience.

On this condition of blankness, and relative unintelligibility, it has been possible to project a variety of different interpretations of its character and purposes. These have varied between the states emergent in the “Yugoslav space”, dependent upon their different political processes and culture. The ICTY has come to be inserted in contrasting ways into local political processes, meeting responses which in many ways were quite dissimilar, and following divergent trajectories. In Croatia, although the ICTY was at first experienced as a direct threat to Croatia’s newly-realised independent statehood, the growing security of its situation worked together with the sustained pressure of international agents to promote a fairly general acceptance of the importance of the work of the Tribunal—especially among its political elite. In Serbia, on the other hand, the manner in which political and military elites became enmeshed with a culture of violence and criminality worked together with aspects of the country’s economic deprivation and its historical culture to deepen the widespread conviction that the ICTY was only one component of an international environment which was hostile to Serbs and Serbia. Public opinion studies show that the modification of these antagonistic perceptions of the Tribunal there has been far slower and is more incomplete. In Bosnia and Hercegovina the structure of “ethnic oligarchies” created by war has been sustained by the action of international agents, with which the ICTY is grouped in public perceptions. Here attitudes towards The Hague are inseparable from the general sense of alienation which pervades other aspects of Bosnian political culture.

Despite these differences, it has been possible to identify some uniformities in local responses to the ICTY. Aspirations that it might provide anything like a *complete* account of the experience of war have not been met—and for pragmatic reasons, cannot be. The hope that it might promote reconciliation between the peoples of the region does not appear to have been

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<sup>5</sup> James Gow, “Security in South Eastern Europe: the war crimes legacy”, *Southeast Europe and Black Sea Studies*, 5(1) January 2005, pp. 9-20. See p. 17.

realised. Reconciliation, if it is to be achieved, is an immense task which will clearly require more than judicial intervention, and will extend well beyond the lifetime of the ICTY.<sup>6</sup> The demand that the Tribunal should furnish a reckoning of the moral responsibility for the war has been deliberately set aside. It is not because the ICTY has been a bad court of law that it has failed to deliver a sense of realised justice in these areas—it is precisely because it is a court of law, and for that very reason is unable to address these questions.

It should not be surprising that, given the relative incomprehensibility of the Tribunal and the lack of commensurability between its achievements and these expectations, that it should have been the case that locals have often tended to the conclusion that the Tribunal favours other interests than their own. In these circumstances, of course, it has been possible for politicians to “fish in troubled waters”, and seek to use criticism of the Tribunal (some of it, but by no means all, well-founded.)

Caution should be exercised, however, in the extent to which criticism of the ICTY should be reduced to the status of the “proprietary myths” of nationalist politicians, and thereby dismissed. There is a danger that a legitimate desire to support the legitimacy of the Tribunal could lapse into a kind of “orientalism”. In North America, and in a Europe intent upon expansion of the Union, there is a tendency to disparage all concerns over national identity as irredeemably non-modern. Such negativity is frequently implicit in the judgement of “nationalism”. The search for national identities, and an understanding of their significance, is an understandable element of cultural development throughout the Balkan region (as elsewhere). It is not always easy to judge which aspects of this process might be malevolent, and to what extent.

The penetration into the “Yugoslav space” of global judicial institutions (which in any case are of relatively recent creation, and poorly understood anywhere) is naturally and necessarily problematic. If the Scholars’ Initiative has a role to play in relation to these events, it must go beyond an aspiration merely to debunk local mythologies, and embrace the task of furthering a more objective general understanding of changes which affect us all.

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<sup>6</sup> The magnitude of this task became apparent during the panel on “Justice and Reconciliation”, at the international conference *Bosnia and Herzegovina: ten years of Dayton and beyond*, Geneva, October 2005.

### *Summary*

The results of the group's work can be summarised briefly as follows.

- The belief that the ICTY pursues a policy which is deliberately biased for or against any of the states or ethnic groups of the former Yugoslavia has no foundation of which we are aware.
- Although major international actors from time to time have sought to influence the work of the Tribunal in one respect or another, this has been inconsistent in direction and intensity—even on the part of the governments of particular states. The most significant and consistent element of external pressure has been the attempt to persuade all states of the region to cooperate seriously with the work of the Office of the Prosecutor, rather than any effort to bias the Tribunal against any specific regional state or ethnic group.
- Perceptions of bias within the Yugoslav space, however, have been widespread. In large measure these can be explained as the unintended and often unrecognised consequences of the manner in which the Tribunal was created and has operated, and policies which have not been deliberately partial to any group or state.
- There have been important variations between the regions of the former Yugoslavia in the manner in which the actions of the ICTY has had an impact upon domestic politics. Perceptions of bias can be related to specific aspects of the political process in each region, and consequently the kinds of action which might be appropriate in confronting these will differ.
- To a significant extent the misperceptions of the ICTY which have gained circulation in the region can be seen as stemming from misplaced expectations of justice, which could never have been met within an international judicial institution.



## *Appendices*

## APPENDIX 1:

### *The “political” character of the ICTY*

*John B. Allcock*

One often hears it said (particularly, although not exclusively, by Serbs) that the International Criminal Tribunal for the Former Yugoslavia is a “political” creation. This accusation has been made with the greatest bluntness in Emil Vlajki’s compilation *Demonization of Serbs*. “The ICTY is a political court”, he writes. “Practically, the ICTY has been established by the Clinton administration in order to serve the US colonization of the Balkans.”<sup>1</sup> He asserts that the Tribunal is oppressive in character, is not impartial, and is financially beholden to US interests. Clearly the intention of his remarks is to delegitimize the institution, which by implication ought to have to do with the transcendental value of justice.

To speak in this manner is, at one level, profoundly naïve. After all, what sociologist would challenge the claim that *any* court has a political character? Courts have to do precisely with the legitimation of the exercise of power, by rendering the outcome of power as “authority”. Unless courts are embedded within a matrix of power there is no possibility that they might arraign before a tribunal those who are accused of misdemeanours, or ensure that the sanctions which they pronounce are effectuated. These ideas have been with us since Max Weber—if not before. If all that is achieved by the observation that the ICTY is “political” is to reaffirm these sociological commonplaces, then it conveys nothing interesting.

This point is not only advanced by cynical sociologists. As Malcolm Shaw (one of Britain’s leading specialists in international law) has observed:<sup>2</sup>

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<sup>1</sup> Emil Vlajki, *Demonization of Serbs: Western Imperialism and Media War Criminals*. Ottawa: Revolt, 2001p. 118. Similar accusations are recorded in Hazan, P. (2000). *La justice face à la guerre: de Nuremberg à La Haye*. Paris, Stock. In similar vein is the wisecrack which has been widely repeated to the effect that the acronym CSCE stood for “Committee to Secure Clinton’s Election”.

<sup>2</sup> Malcolm N. Shaw, *International Law*. Cambridge University Press, 4<sup>th</sup>. ed. 1997, p. 10. There is often extreme confusion on this issue. A prime illustration of this is the essay by Jovan Babić, “War crimes: moral, legal or simply political?”, in the collection edited by Aleksandar Jokić, *War Crimes and Collective Wrongdoing: a reader*. Oxford: Blackwell, 2001, pp. 57-71. Babić argues that “the notion of war crimes is above all a political category .... the categorization of ‘war’ forms no separate criterion of moral evaluation” (p. 57). The reason why actions are designated as “war crimes” has to do as much as anything else with the fact that one side rather than another is defeated in war. In many respects his critique of the Nuremberg concept of “crimes against peace” is an effective one. His attempt to call into question other categories of “war crimes” (offences against the laws and customs of war, and crimes against humanity) is less successful. His argument appears to rest primarily upon a principled challenge to the legitimacy of international law *per se*. “It appears to me that international law is not, and cannot be, law in the fundamental sense of the word” (pp.62-3). He reserves the term “law” to the area of *the state*. Those actions which are often designated as “war crimes”, he affirms, can be tried and punished through normal judicial institutions within states. Leaving aside for the moment the pragmatic question as to whether it is likely that such actions will be prosecuted under an empirically significant range of circumstances, there is an important contradiction in Babić’s argument. The “political”

It is clear that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognised.

Antoine Garapon has argued strongly that it is dangerous to fall into the common trap of equating *international* justice with *universal* justice, with the effect that it comes to be seen as occupying some realm above and detached from politics. Indeed, he asserts that one of the problems of the ICTY has been the manner in which law and morality have come to be confused in perceptions of it, so that by a “utopian” identification of law with morality, politics is defined as an antinomy of morality. “The utopian idea of universal justice (he writes) runs the risk of implicitly demonising politics.”<sup>3</sup> Perhaps his argument is a little too emphatic, but this is a useful warning.

It is helpful at this juncture, however, to note the wider relevance of an important observation by Max Weber which might help us to clarify the issues here. In his *Economy and Society* he insists upon the distinction between “economic action” and “economically oriented action”.<sup>4</sup> The former refers to “any peaceful exercise of an actor’s control over resources which is in its main impulse oriented towards economic ends” (p.63). He affirms that it is important to distinguish this from “economically oriented action”, of which he notes two types. The first encompasses “every action which, though primarily oriented to other ends, takes account, in the pursuit of them, of economic considerations”. The second type he defines as “though primarily oriented to economic ends, makes use of physical force as a means” (p.64). A corresponding distinction could be made in relation to “political action” and “politically oriented action”. To some extent, therefore, “economics” and “politics” interpenetrate each other, in that the extraction of economic resources might be accompanied by the ultimate threat of force (as in the collection of taxes by the state, or indeed the legal enforcement of any contract), and effective political organisation depends in part upon the capacity of actors to amass material resources to support the pursuit of their aims. It is important to the sociological enterprise of understanding society, however, that we *understand* these actions differently, taking into account their *meaning* for those involved.

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character of war crimes prosecutions casts doubt upon their legitimacy in the realm of international law: but there is an implicit assumption in his article that, within the ambit of particular states, law somehow manages to avoid being “political”. He can’t have it both ways!

<sup>3</sup> Antoine Garapon, *Des Crimes qu’on ne peut ni punir ni pardonner: pour une justice internationale*. Paris: Odile Jacob, 2002, p. 61. His Chapter 2 is devoted largely to this and related issues.

<sup>4</sup> Max Weber, *Economy and Society*, Berkeley: University of California Press, 1978, pp. 63-68. Some translators use the phrase “economically relevant” rather than “economically oriented”.

An analogous point can be made in relation to law. It can be viewed as a “political” or even as an “economic” phenomenon, in that as a sphere of social action it partakes in some measure of both political and economic action. Nevertheless, it is sociologically unhelpful to *reduce* law to either, without reference to its proper context of meaning, if we are to understand its social character and significance. The claims that the ICTY is “political” are often guilty of this kind of conceptual reduction.

The relationship between power and law is particularly, and necessarily, more evident in the case of international law. Law is predominantly a feature of the institutional order of *states*, and international law typically emerges by virtue of the agreement between states. Within any state the conduct of law is influenced heavily by “legal habit”, which Shaw has described as “a particular legal atmosphere”, and sociologists might otherwise refer to as a legal *culture*.<sup>5</sup> This set of common assumptions and ways of looking at issues provides an (often tacit) context to formal legal instruments, and ways of approaching problems. Because international legal action takes place in the spaces between states (and hence national legal cultures) it has not been possible to rely to the same extent upon the development of this kind of “legal habit”. As a consequence, the ostensibly political character of law in this area is not only more evident, but more necessary. “Politics is much closer to the heart of the system (writes Shaw) than is perceived within national legal orders, and power is much more in evidence.”<sup>6</sup>

Gary Bass, subtitles his historical survey *Stay the Hand of Vengeance*, “the politics of war crimes tribunals”. Although his book is a sustained attempt to qualify the “realist” tradition in politico-legal thought (which can be summed up in the statement of Thucidides that “[E]verywhere justice is the same thing, the advantage of the stronger”) nevertheless, Bass takes it for granted that his task is to understand the development of international criminal justice *within the context* of politics, and not to *detach* justice from politics.<sup>7</sup> This report is premised, therefore, upon the belief that there is a level at which it is sociologically worthwhile to explore these issues, and in particular upon the notion that the Tribunal does possess a political *dimension*. We believe that the idea of “justice” is *necessarily* political. It is not a free-floating moral ideal which in some ideal world ought to be able to disengage itself from politics. In Habermas’ terms, the law must be both legitimate and *effective*.

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<sup>5</sup> Shaw, *International Law*, p. 11.

<sup>6</sup> Shaw, *International Law*, p. 11.

<sup>7</sup> Gary J. Bass, *Stay the Hand of Vengeance: the politics of War Crimes Tribunals*. Princeton University Press, 2000, esp. his “Introduction”. The citation from Thucidides is on p. 9.

There is an argument to be made, perhaps, that in the case of the ICTY the link between the law and politics is *unusually close and transparent*. Two points can be made in this respect. In the first place, as indicated in the section dealing with the foundation of the Tribunal, its *raison d'être* is *expressly* political, in that all the UNSC resolutions state explicitly that its existence is directed towards the advancement of *peace and security* in the region. The detention of those convicted of war crimes is regarded as important because it removes obstacles to the peace process.<sup>8</sup> This could be taken as indicating that justice is being sought here not because it is a good in itself, but because it is instrumental in realising some other and more purely political aim.

The determination of the circumstances under which conflict is a threat to peace and stability is made, of course, within a specific political context—the Security Council of the UN. This indicates unambiguously the importance of recognising its global character. Discussion of globalisation regularly insists that it is a multidimensional process, and that one of these “dimensions” is political. What is typically unrecognised in the literature, however, is that law provides a significant medium through which global politics is typically enacted.

As Garapon has maintained, however, the Tribunal is unusual within the spectrum of international law in that it has a *primarily penal* character. It is *essentially* retributive (and the recipients of punishment are invariably *individuals*) to an extent which is not typical of other areas of international law, which have to do more with the adjustment of interest—typically between *state* actors.<sup>9</sup> In other words, although global politics invariably features asymmetrical relations of power, there is here an unusual degree of asymmetry.

Whereas the claim that the Tribunal is “political” can not be taken as a knock-down argument demonstrating its illegitimacy, it is necessary to recognise that there are important issues here relating to the nature and significance of its “political relevance” which deserve further analysis.

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<sup>8</sup> The report is indebted to James Gow for this point.

<sup>9</sup> Garapon, *Des Crimes qu'on ne peut pas ni punir ni pardonner*, pp. 48-52.

## APPENDIX 2:

### *The emergence of international criminal law in the twentieth century*

*John B. Allcock*

This Appendix is concerned with the historical antecedents of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Although the Tribunal has been recognised as an important innovation in international law, in many respects it needs to be explained as a consequence of a long evolution of international criminal law more generally, and the emergence of humanitarian law. If we hope to understand where the Tribunal came from and why it has taken its current form, therefore, it will be useful to review briefly some characteristics of the development of international law, by way of context and background. In this endeavour it is neither possible nor necessary to attempt a systematic and comprehensive history of international law. My purpose is, quite simply, to demonstrate that the appearance of the ICTY has not been an arbitrary accident (both the timing of its creation and its institutional form are intelligible within their context) and to indicate its significance, especially with regard to the major focus of attention of this report.

#### *Early developments*

Although it is perhaps possible to trace the rudimentary origins of the legal regulation of relations between states back into the ancient world, “international law” in its modern sense is certainly no more than four centuries old.<sup>10</sup> Its “founding fathers” are widely acknowledged as being Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645). The former was of Italian origin but settled in England where he taught at the University of Oxford. The latter made his career as a Dutch legal scholar and diplomat. Drawing in part upon the work of Gentili, he is celebrated as the author of *De Jure Belli ac Pacis* (1625), which laid the foundations of modern international law, especially, as his title suggests, the “laws of war and peace”.

The emergence of this field of jurisprudence at this time, and in these countries, was by no means accidental, for two reasons. This is the historical era described by Immanuel Wallerstein in *The Modern World-System*, in which capitalistic finance and trade in Western Europe was beginning to spread their net across the world.<sup>11</sup> As Wallerstein has pointed out, the

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<sup>10</sup> I have relied heavily in this section upon Malcolm N. Shaw, *International Law*. Cambridge University Press, 4<sup>th</sup>. ed. 1997; Martti Koskenniemi, *The Gentle Civilizer of Nations: the rise and fall of international law, 1870-1960*. Cambridge University Press, 2002; and Cassese, *International Law*.

<sup>11</sup> Immanuel Wallerstein, *The Modern World-System*. New York: Academic Press, Vol. I, 1974, Vol. II, 1980.

earlier overland caravan routes between Western Europe and the East underwent serious disruption between 1590 and 1630, stimulating the creation of maritime trading enterprises. The first of these, the English East India Company, was chartered in 1600, followed closely in 1602 by its great rival, the Dutch East India Company. The Dutch West India Company was formed in 1621. The intensification of international contact, competition and inevitably conflict compelled the formation of some ground-rules for the conduct of relations and the resolution of disputes in ways not hitherto addressed.<sup>12</sup>

As George Schwarzenberger has pointed out, the early conceptualisation of the “laws of war” took place during the period of European history characterised by “Absolutism”.<sup>13</sup> This involved a shift in the character of war from a contest between rival knightly elites (whose conduct was framed in relation to rules of “chivalry”) to conflicts between *states* in the modern sense of that term. Their interaction required a rather different regulatory framework.

The process was stimulated in other respects by the Peace of Westphalia, which concluded the Dutch-Spanish War and the Thirty Years’ War, in 1648. The most significant feature of the two treaties which commonly bear this name was that the rearguard action of the Holy Roman Empire to sustain its authority over the emerging princely states of Europe was effectively ended.<sup>14</sup> Although the development of German national unity was set back by this process, dividing the German-speaking lands between around 300 principalities, the formation of new and independent states in Europe was facilitated greatly. Moreover, the way was opened to the development of secular law independently from the canon law of the Roman Catholic Church. The Peace of Westphalia established the fundamental principal upon which international law was built until the end of the Second World War, namely, that the subjects of international jurisprudence in whatever form should be *sovereign states*.<sup>15</sup> Not surprisingly, one of the earliest

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<sup>12</sup> It is unsurprising against this background that one of the durable contributions of Hugo Grotius to the development of legal thought in this area was his insistence upon the character of the high seas as *common* property, which could not be claimed (as the Portuguese had earlier attempted to do) by any individual state. (Shaw, *International Law*, p. p. 390.)

<sup>13</sup> George Schwarzenberger, “*Jus Pacis ac Belli?* Prolegomena to a sociology of international law”, in Michael N. Schmidt ed. *International Law Across the Spectrum of Conflict. Essays in Honour of Prof. L.C. Green on the occasion of his Eightieth Birthday*. Newport RI: Naval War College, 2000, pp. 483-505. See pp. 483-488.

<sup>14</sup> The two treaties were those of Osnabrück and Münster. On the significance of the Peace of Westphalia, see: Ove Bring, “The Westphalian Peace Tradition in International Law”, in Schmidt ed. *International Law* pp. 57-80.

<sup>15</sup> To a great extent this principle is still fundamental. Claims have also been advanced for the significance of the Congress of Vienna (which concluded the Napoleonic Wars in 1815) and the Congress of Berlin (which terminated the Balkan conflict in 1878). Measured in terms of the pragmatic importance and durability of the provisions which they enshrined, they did not inaugurate major changes in the basis of international law of the kind considered here.

aspects of international law to develop was the body of rules and conventions governing the conduct and recognition of the diplomatic and trading representatives of such states.<sup>16</sup>

### ***The nineteenth century***

With the rapid expansion of international trade during the nineteenth century, a wide range of international organisations and conventions were set up.<sup>17</sup> The Mainz Convention of 1831, for example, established the Central Commission of the Rhine, with the intention of regulating international shipping on the waterway, and preparing the way for a succession of major navigational and other improvements throughout the century. An International Telegraphic Union was created in 1865, and the General Postal Union by the Berne Treaty of 1875. War, however, continued to provide the primary occasion for the further elaboration of international law.

The International Committee of the Red Cross, founded in 1863, helped to promote the series of Geneva Conventions beginning in 1864 dealing with the “humanisation” of conflict.<sup>18</sup> This development was given a particular stimulus by the Franco-Prussian War, of 1870. The widespread reports of the abuse by both sides of Red Cross insignia occasioned great concern, and motivated a small group of legal specialists, notably the Swiss Gustave Moynier and the Belgian Gustave Rolin-Jaequemyns (who had been largely responsible for the success of the 1864 conventions) to correspond with leading figures in the field from both Europe and the USA in order to create an *Institut de droit international*.<sup>19</sup> The purpose of the Institute (in the words of its Statute, adopted at its first conference in Ghent, in 1873) was to be the “legal conscience of the civilised world”.

The phrase “la conscience juridique du monde civilisé” is interestingly and revealingly ambiguous, as it can be translated into English both as “conscience” and “consciousness”. (This

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<sup>16</sup> On the “capitulation system”, which emerged in order to regulate relations between European states and countries such as the Ottoman Empire, China and Japan, see Cassese, *International Law*, pp. 23-24.

<sup>17</sup> Shabtai Rosenne has argued that the development of naval actions against the slave trade also imparted a significant impetus to the development of international law. Shabtai Rosenne, “Antecedents of the Rome Statute of the International Criminal Tribunal revisited”, in Schmitt ed. *International Law*, pp. 387-420. See p. 388.

<sup>18</sup> Shaw, *International Law*, p.24. Also Rosenne, “Antecedents”, pp. 388-391. See also Aryeh Neier, *War Crimes: brutality, genocide, terror and the struggle for justice*. New York: Times Books, 1998, pp. 13-14. A vital reference source for the relevant documents is: Adam Roberts and Richard Guelff eds., *Documents of the Laws of War*. Oxford: Clarendon Press, 3<sup>rd</sup>. ed. 2000. Although Gary J. Bass considers the possibility that Napoleon Buonaparte and his leading associates might have been put on trial after 1815, it is necessary to note his own conclusion, that this came to nothing. Napoleon’s exile to St. Helena was not the result of a judicial process, but the means of avoiding one. *Stay the Hand of Vengeance: the politics of war crimes tribunals*. Princeton University Press, 2000, Chap. Two.

<sup>19</sup> Koskenniemi, *Gentle Civilizer of Nations*, pp. 39-41.



is a problem familiar to all sociologists in the rendering of Durkheim's *conscience collective*.) Martti Koskenniemi has argued convincingly that the understanding of international law which emerged at this time was very much the reflection of a particular legal "sensitivity" (I would prefer "culture").<sup>20</sup> This had its roots in awareness that the European powers did share a sense of their constituting a community of civilised states, whose mutual affairs could best be managed by means of the law. The concerns of the *Institut* were defined initially largely in terms of the legal implications of expanding European colonialism, and also the dubious nature of the succession of attempts by the European powers to give quasi-legal legitimacy to their dismemberment of the Ottoman Empire. Although in many respects its endeavours in this direction were ineffectual, its activities led indirectly to two conferences at The Hague, of which the "Convention with Respect to the Laws and Customs of War" of 1899 can be counted as one of their concrete results.<sup>21</sup> The concept of "crimes against humanity" can be traced to the preamble to the 1907 Convention, in the phrase "crimes against the laws of humanity".<sup>22</sup> It is important to note that the ideas about the importance of restraint and decency governing the relations between combatants were expected initially to be confined to the "civilized" world.

As Aryeh Neier has pointed out, a factor which promoted this enhanced awareness of the need to control the suffering occasioned by war was the growing activity of the press in reporting it. In both the Crimean War (1854-56) and the American Civil War (1861-65) for the first time the action was followed by war correspondents representing the principal newspapers.<sup>23</sup> This increasing exposure of the public to the experience of war through the media of mass communication has played an important part in the "moralisation of international relations", to use Pascal Boniface's phrase.<sup>24</sup> Certainly this process has continued at an accelerated pace in our own time, and relentless exposure of the activity of the military to the gaze of a public which elects democratically their chiefs has been widely credited as influencing the withdrawal of the

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<sup>20</sup> Koskenniemi, *Gentle Civilizer of Nations*, pp. 1-8.

<sup>21</sup> Bring, "Westphalian Peace Tradition", pp. 74-5. Edina Bećirević (following Geoffrey Robertson) gives a significant place in this development to the "Liebers Code", drafted in 1863 at the request of President Abraham Lincoln. (Entitled *Instructions for the Government of Armies of the United States in the Field*.) See her *Međunarodni krivični sud između ideala i stvarnosti*. Sarajevo: Arka, 2003, p. 156. For additional comment, see Geoffrey Robertson, *Crimes against Humanity: the struggle for global justice*. London: Penguin Books, 1999, pp. 171-2. This did not have the status, however, of an international convention.

<sup>22</sup> M. Cherif Bassiouni, "The normative framework of international humanitarian law", in Schmidt ed. *International Law*, pp. 1-55, esp. p. 3.

<sup>23</sup> Neier, *War Crimes*, pp. 13-14. These were also the first wars at which photographers were present.

<sup>24</sup> Pascal Boniface, ed., *Morale et relations internationales*. Paris: Institut de relations internationales et stratégique, and Presses Universitaires de France, 2000.

USA from the Vietnam war. My argument is that the steady “moralisation of international relations” has been accompanied by pressure towards legally sanctioned humanitarian intervention.

### ***The consequences of the First World War***

An important stimulus to the development of international law was given by the formation of the League of Nations in 1919, following the First World War. This did not set aside entirely the prevailing idea that the sphere of international law comprised the relations between sovereign states, in that the League was precisely an association of such states. Nevertheless, it did create the possibility that a body of law could be created, *originating in the community of states generally*, which was binding upon individual states. Although the wisdom of hindsight tends to lead us to regard the League as a failure, in view of its inadequacy as a means of preventing the breakdown of international order in the Second World War, this assessment overlooks some interesting innovations. In particular, its Permanent Mandates Commission took responsibility for the monitoring of the succession of mandates under which the Allied states administered the former colonies of defeated states. The peace treaties affecting the Eastern European and Balkan states in and after 1919 included provision for the protection of minorities, and these provisions were supervised by the League, to which there was the recourse of appeal. In many respects these continue to shape thinking about the position of minorities in the region even today. The International Court of Justice, and the International Labour Organisation, were both created in 1921, under the auspices of the League. In their different ways each of these can be regarded as having contributed to the subsequent evolution of international law and judicial institutions.<sup>25</sup>

It is clear from the experience of the League of Nations, however, that international legal opinion (and that of leading political figures) was deeply divided with respect to the idea of international *criminal* responsibility. The provisions of the Treaty of Versailles:

recognised the right of the Allied and Associated Powers to bring individuals accused of crimes against the laws and customs of war before military tribunals (article 228) and established the individual responsibility of the Kaiser (article 227).<sup>26</sup>

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<sup>25</sup> The League of Nations also took the first steps towards the international protection of refugees, with the creation of the office of Commissioner for Refugees in 1921. (The office was held by the Norwegian explorer Fridtjof Nansen) This became the Intergovernmental Committee on Refugees in 1938. For additional aspects of this historical process see also: Jean-Paul Bazelaire and Thierry Cretin, *Le justice pénale internationale: son evolution, son avenir. De Nuremberg à La Haye*. Paris: Presses Universitaire de France, 2000; Vladan A. Vasiljević (ed.) *Medjunarodni krivični tribunal*. Belgrade: Prometej, 1996, the editorial introduction.

<sup>26</sup> Shaw, *International Law*, pp. 184-5. For a more detailed treatment of these events, see: Bazelaire and Cretin, *La Justice pénale internationale*, pp. 13-16.

The Leipzig trials, which were intended to implement these provisions, have been described by Howard S. Levie as “a fiasco”, which:

established beyond doubt that a trial by a defeated nation of its own personnel charged with the commission of war crimes against enemy personnel or property during the hostilities was not a viable solution to the problem.<sup>27</sup>

Nevertheless, an insufficiently large and influential body of opinion could be mustered behind the idea that international penal law should “cease to be solely a question of courtesy between states and become simply a matter of law and of justice”.<sup>28</sup> The Kaiser had taken refuge in The Netherlands, which refused to hand him over for trial, and the opposition of the American government resulted in the limited application of these treaty provisions, resulting in the trial in Leipzig of only 21 German senior officers. Despite the creation of an International Court of Justice, the project, proposed in 1937 by the International Association for Penal Law, that this should incorporate a permanent chamber of *criminal* law, was never realised.<sup>29</sup>

### ***Nuremberg and after***

The modern framework of international law dates only from after the Second World War.<sup>30</sup> The United Nations Charter was adopted at the San Francisco conference of 1945, and the UN has provided subsequently one of the principle frameworks for the initiation and support of international action, through its various agencies. What is more, the origination of action within the UN, or its subsequent sanctioning, has come to be regarded as one of the most important (possibly the most important) sources of legitimacy. The United Nations Monetary and Financial Conference, which took place in July 1944, gave rise at the same time to both the International

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<sup>27</sup> Levie, “History and status of the International Criminal Court”, in M.N. Schmitt ed. *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on his Eightieth Birthday*. International Law Studies. Newport, Naval War College, 2000, pp. 247-262. The passage cited is from p. 249. Despite this comment, this possibility has resurfaced concretely in the course of the work of the ICTY.

<sup>28</sup> Bazelaire and Cretin, *La Justice pénale internationale*, p. 17. For a balanced consideration of the history and consequences of the Leipzig trials, see Bass, *Stay the Hand of Vengeance*, Chap. Three.

<sup>29</sup> The inter-war period also saw the adoption of The Hague Rules on Aerial Warfare, in 1923; and the Geneva Protocol prohibiting the use of poisonous gas and bacteriological agents, in 1925. In 1927 the Kellogg-Briand Pact, agreed between the USA and France, was adopted by the Assembly of the League of Nations and subsequently ratified by 42 states. This may be taken as an early effort to identify a crime of aggression, which still evades international consensus.

<sup>30</sup> A useful general review of these developments for the reader who is not a legal specialist is provided by Robertson, *Crimes against Humanity*, esp. Chaps. 5, 6 and 7. Detailed discussions of the work of the Nuremberg and Tokyo Tribunals are provided in Chapters 2 and 3 of Yves Beigbeder, *Judging War Criminals: the politics of international justice*. London: Macmillan, 1999.

Monetary Fund and the International Bank for Reconstruction and Development.<sup>31</sup> It would be out of place, and unbalancing of my primary aim, if I were to attempt a systematic review of the development of the UN and its attendant institutions here. Instead, I will confine my discussion to events which have a more specific and direct bearing upon the creation of the ICTY.

Although the government of the United States had opposed the Leipzig process after the First World War, with the overthrow of the fascist regimes in Germany and Japan in 1945 the Americans supported actively the establishment of the Nuremberg and Tokyo tribunals, created in order to try leading political and military figures of the defeated Axis powers.<sup>32</sup> The Nuremberg and Tokyo Tribunals have been criticised frequently in subsequent years because of their *ad hoc* status, and because they represented “victors’ justice”. In particular, it is noteworthy that the Charter provisions of these tribunals made provision for the punishment of “crimes against peace”, which included:

planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.<sup>33</sup>

This concept has not resurfaced in subsequent attempts to refine the laws of war, and indeed has been the subject of some vigorous and effective criticism.<sup>34</sup> Trials under similar circumstances could no longer claim legitimacy, and the ICTY was created with meticulous care to avoid this label. Most significantly, the 1945 tribunals were specifically *military* courts, whereas the ICTY has a purely civilian status.

It would be a mistake, however, to limit evaluation of the post-1945 Tribunals to this negative aspect of their work. Apart from anything else, they have been enormously valuable in relation to the rehabilitation of both Germany and Japan in the post-1945 period. The “London Agreement” of 8 August 1945, drawn up by the victorious Allied powers, ushered in four

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<sup>31</sup> This event is often referred to as the “Bretton Woods Conference”, after the town in New Hampshire in which it took place. The significance of these developments in providing for the regulation through legal means of economic relations in the modern world should not be overlooked. The similarly important General Agreement on Tariffs and Trade dates from 1948. See Cassese, *International Law*, pp. 398-9.

<sup>32</sup> Only, however, after the resolution of acute internal political disagreements. See Bass, *Stay the Hand of Vengeance*, Chap. 5.

<sup>33</sup> Article 6 of the Nuremberg Charter.

<sup>34</sup> See esp. the article by Jovan Babić, “War crimes: moral, legal or simply political?” in Jokić ed., *War Crimes and Collective Wrongdoing*. US Chief Justice Harlan Stone described the Nuremberg Tribunal as a “high class lynching party”—although in a more moderate tone Bernard Meltzer has noted that the concept of crimes against peace “met the emotional needs of the time, but it also cast a shadow on the trial”. See: Barnard Meltzer, “Remembering Nuremberg”, in Belinda Cooper ed., *War Crimes: the legacy of Nuremberg*. New York: TV Books, 1999. See esp. p. 23.

important new principles.<sup>35</sup> The first of these was the acceptance in international law of *individual* criminal responsibility for crimes against peace, war crimes and crimes against humanity.

International law imposes duties and liabilities upon individuals as well as upon states. .... 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.<sup>36</sup>

Secondly the notion of “crimes against humanity” was clarified. These have been defined by Richard Goldstone as “crimes of such magnitude that they injured not only the immediate victims and not only people in the country or the continent where they were committed but also all of humankind”.<sup>37</sup>

Thirdly, and precisely because of their intrinsic nature, crimes against humanity were recognised as falling under “universal jurisdiction”. Hitherto this concept had referred exceptionally in international law to acts of piracy.

The fact that every state may arrest and try persons accused of piracy makes that crime quite exceptional in international law, where so much emphasis is placed upon sovereignty and jurisdiction of each particular state within its own territory. .... All states may both arrest and punish pirates, .... The punishment of the offenders takes place whatever their nationality and wherever they happen to carry out their criminal activities.<sup>38</sup>

With the Nuremberg and Tokyo trials this notion of universal jurisdiction was extended to include war crimes, “crimes against peace” and against humanity.

Finally, the positive side of the story undoubtedly includes the impressive deployment of documentary evidence as the basis for the cases advanced by the Prosecutor. Justice Robert Jackson, setting out the task of the prosecution, stated that, “We must establish incredible events by credible evidence”.<sup>39</sup> In this respect (among others) they can be regarded as having set acceptable standards for subsequent endeavours, and these Tribunals should be acknowledged as

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<sup>35</sup> For a broad assessment of the significance of the Nuremberg Tribunal, see: Belinda Cooper ed., *War Crimes: the legacy of Nuremberg*. New York: TV Books, 1999.

<sup>36</sup> Shaw, *International Law*, p. 185. The statute of the Nuremberg and Tokyo Tribunals are reprinted in Bazelaire and Cretin eds. *La Justice*, Appendices 2 and 3.

<sup>37</sup> Richard Goldstone, *For Humanity: reflections of a war crimes investigator*. New Haven and London: Yale University Press, 2000, p. 75.

<sup>38</sup> Shaw, *International Law*, pp. 423 and 470. See also Robertson, *Crimes against Humanity*, pp. 237-242.

<sup>39</sup> Cited in Stephen G. Breyer, “A call for reasoned justice”, in Cooper ed., *War Crimes*, p. 40.

having foreshadowed not only the Yugoslav and Rwanda Tribunals but also a permanent international criminal court. The General Assembly of the UN reaffirmed unanimously the principles enshrined in their charters, and confirmed their decisions, in 1946.<sup>40</sup>

In the wake of the Second World War, between 1948 and 1954, the foundations were laid for the modern system of legal and conventional humanitarian protection. Although these measures are often referred to as relating to “war crimes”, it is significant that the first of them, the Genocide Convention of 1948, expressly acknowledged that the “odious scourge” of genocide should be outlawed “whether committed in time of peace or in time of war”.<sup>41</sup> Article VI of the Convention is of particular interest in relation to subsequent events in Yugoslavia.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The International Court of Justice (successor to the Permanent Court of International Justice, established under the League of Nations) was set up under the auspices of the United Nations, in 1946. Although this court was created solely in order to adjudicate disputes between *states*, there was extensive debate at the time about the possibility of adding an additional chamber to the court for the purpose of trying cases involving individual criminal responsibility. For a variety of reasons these discussions came to nothing. It is evident, even so, that in the response to the Nuremberg and Tokyo trials, and in the context of the passage of the Genocide Convention, the possible need for this kind of international penal court was already under consideration.

The four Red Cross (Geneva) Conventions followed in 1949. These covered the treatment of the wounded and sick in time of war, the treatment of prisoners of war, and the protection of civilians during armed conflicts. To these were added in 1954, following a UNESCO-sponsored international conference, The Hague Convention and The Hague Protocol dealing with “the protection of cultural property in the event of armed conflict”. Taken together,

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<sup>40</sup> Although it has become customary to recognise that the legitimacy of the Nuremberg court was called into question by its status as “victors’ justice”, it is important to acknowledge a point upon which Gary Bass has insisted (in *Stay the Hand of Vengeance*). Nuremberg was indeed “largely an American creation” (p. 156). Nevertheless, it is relevant to enquire into the character of the “victors” whose version of justice was dispensed. There was a world of difference between the “legalism” which the Americans were able to impose upon the process and the model of the Moscow show trials of 1936-38, which is what it seems the Soviets had in mind! In that respect it is hard to deny Bass’ claim that, in this respect at least, Nuremberg was a “spectacular success” (p. 147).

<sup>41</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, Article I. See Roberts and Guelff eds., *Documents*.

these instruments can be regarded as providing the spine of contemporary humanitarian protection law.<sup>42</sup>

In fact, the “laws of war” might be said to have passed through three stages of development. In the first stage, prior to the Second World War, the motivating assumption on the part of signatory states might be summarised as the need on the part of states to protect members of their armed forces during the course of conflict. The conflict of 1939-45, with its experience of genocide and its conclusion in the possibility of nuclear annihilation, characterised an age of “total war”. It became necessary under these conditions to recognise the importance of securing international protection for all citizens, and for the “cultural property” of nations. The International Covenant on Civil and Political Rights was promulgated in 1966; and with its passage the agenda for international humanitarian legislation underwent a further redefinition. Indeed, as Adam Roberts and Richard Guelff have noted, a new understanding of the nature and purposes of international humanitarian law in general began to emerge.<sup>43</sup> The need for international intervention is subsequently defined in terms of the need to protect human rights, and conflict is addressed less in the form of situations in which the interests of states must be adjusted, and more typically as a primary threats to the rights of all.

The changing climate of thinking in this area was reflected and confirmed in the passage of two protocols additional to the Geneva Conventions, in 1977. Article I of the first protocol included in its remit “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their self-determination”. Clearly, in encompassing what had hitherto been regarded generally as “civil wars”, the old understanding of the “laws of war” as regulating only armed conflict between states had been substantially eroded. The development of this dominant emphasis continued in the 1980 “convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects”.<sup>44</sup> Whereas the objects of protection of the convention are not specifically “civilians”, and indeed are by implication primarily members of the armed forces, its preamble insists that “the right of the parties to an

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<sup>42</sup> Shabtai Rosenne distinguishes usefully between the characteristics of “Geneva law” and “Hague law”. Geneva law was concerned with individuals—victims of war (military and civilian) and the perpetrators of violations of the laws and customs established for their protection, whether military or civilian personnel. Hague law dealt with the rights and duties of States in their conduct of warfare. (Rosenne, “Antecedents”, p. 391.)

<sup>43</sup> Martti Koskeniemi argues that such was the magnitude of the shift in its character at this time that it is possible to speak of the “fall of international law” (following its “rise” in the last quarter of the nineteenth century). See, Koskeniemi, *Gentle Civilizer of Nations*, and especially his discussion of the work of Hans Morgenthau.

<sup>44</sup> See Roberts and Guelff, Documents, pp. 515-534.

armed conflict to choose methods or means of warfare is not unlimited”. Furthermore, “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term or severe damage to the natural environment”.<sup>45</sup>

The Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment, adopted in 1984, confirms the character of this third phase. By the time of the creation of the ICTY in 1993, the boundaries between “war” and “not war”, and between “armed forces” and “civilians”, had been eroded from the point of view of the status of the actors, and with respect to space and time. The older concept of “laws of war” had by then evolved into a wider understanding of “international humanitarian law”.

The paradoxical fact arising from this series of measures, however, is that whereas international criminal law had become a reality, covering a wide range of types of actions, the *enforcement* of the law was left in the hands of separate contracting states.

The High Contracting Parties (to these conventions) undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of a series of grave breeches.<sup>46</sup>

There was no international criminal *court* responsible for the trial and punishment of offenders, and consequently no group of experienced professionals to work in this area, no established body of procedure governing the activity of such a court, and no “legal culture” within which it could be embedded.

### ***The creation of the ICTY***

The issue of international criminal responsibility was very actively on the agenda for discussion before the ICTY itself was founded. Events in Cambodia, under the Khmer Rouge regime, in particular had stimulated debate in this area, but led to no further immediate institutional change.

Still, even though the United Nations Transitional Authority in Cambodia (UNTAC) was given the responsibility by the peace settlement to promote human rights, there was a conspicuous omission from its mandate: nothing was said about bringing the Khmer Rouge to justice for its crimes against humanity ....<sup>47</sup>

Other protracted armed struggles, such as those in Mozambique, Angola and the Horn of Africa, in which atrocious conduct by various parties was reported but went unpunished, served to raise

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<sup>45</sup> Cited in Roberts and Guelff, *Documents*, p. 469.

<sup>46</sup> Shaw, *International Law*, p. 186.

<sup>47</sup> Aryeh Neier, *War Crimes*, p. 24. UNTAC was created in December 1991.



diplomatic, public and professional legal awareness of the need to respond more adequately to such situations.

The question has been posed often as to why none of these conflicts triggered international legal sanctions, given the fact that the legal foundation for such action was already in existence. There seems to be little doubt that the primary reason was the effect of the Cold War. Although a framework of international conventions was in place which would have made prosecution possible, there was no corresponding institutional apparatus which could have served as the vehicle for action. The principal obstacle to taking this important step was the shadow which super-power rivalry spread over all aspects of international affairs. Any given situation came to be coloured by its relevance to the interests of one super-power or another, and conflicts in the “Third World” almost invariably were turned into confrontations by proxy between the USA and the Soviet Union. Under these circumstances trials for infractions of international humanitarian law (perhaps especially if undertaken by individual states on the basis of “universal jurisdiction”) would in all probability have been turned into no more than another opportunity for each side to mount a propaganda offensive against the other, and the inevitable degree of politicisation of such trials would have diminished their legitimacy.<sup>48</sup> As in the cases of the abortive attempts to prosecute leading political and military figures from Germany and Turkey after the First World War, the case for advancing international juridical authority probably would have been weakened rather than strengthened.

After 1989, and the collapse of Soviet hegemony in Eastern Europe and Central Asia, the political context of such developments changed radically. This is not to claim that the development of international law no longer should be regarded as having a significant political dimension. Events did take on, however, a very different logic. The significance of this change in the situation became apparent in 1991, when the International Law Commission provisionally adopted a *Draft Code of Crimes against the Peace and Security of Mankind*. Protracted and controversial discussion of this possibility was overtaken by events.

Developments in the former Yugoslavia soon intensified interest in, and the sense of urgency surrounding, the possibility of creating a permanent international criminal tribunal charged with the enforcement of law in this area. Nevertheless, for a variety of reasons it soon became apparent that the process of creating such a court would be so lengthy and complex that it could not serve as an acceptable response to the immediate need for international justice. (The expected route through which an international criminal court would be created was by means of an international treaty, ratified by a large number of states.) Consequently, in May 1993, the

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<sup>48</sup> See Bass, *Stay the Hand of Vengeance*, Chaps. 3 and 4.

International Criminal Tribunal for the former Yugoslavia was established as an urgent, temporary and *ad hoc* measure by the Security Council, in circumstances examined more fully in Section I of the main text of this report.

Following the collapse of Rwanda in to civil war in January 1994, a similar *ad hoc* device was adopted by the Security Council in November of that year, when the institutionally linked International Criminal Tribunal for Rwanda was created.

### ***The formation of a permanent International Criminal Court***

The concept of a permanent international criminal court had been entertained over a long period of time, but without concrete result.<sup>49</sup> In 1989, however, senior judges in Trinidad and Tobago revived the idea, largely as an approach to the growing problem of the need to provide an effective international response to the narcotics trade.<sup>50</sup> The proposal was taken up within the International Law Commission, which by November 1994 was able to lay a draft statute for a permanent International Criminal Court before the General Assembly of the UN.<sup>51</sup>

This statute provides for the Court to have jurisdiction over persons with respect to the crime of genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity and crimes established under or pursuant to the treaty provisions listed in the Annexe, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.<sup>52</sup>

An *ad hoc* committee was created to review the draft and advance the proposal, and this became the Preparatory Committee in December 1995. Difficult and protracted negotiations, and the opposition of some powerful states, were overcome by the effective organisation of a lobby of “like-minded” states.<sup>53</sup> The Rome Conference, which considered the draft Treaty, and the statutes of the new court, took place between 15 June and 17 July 1998, involving delegates from

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<sup>49</sup> Bazelaire and Cretin record that the desirability of creating a permanent international criminal court was affirmed in UN Assembly resolution 260, of 9 December 1948. *Justice pénale internationale*, p. 13.

<sup>50</sup> This account is based largely upon Donna Axel, “Toward s a permanent international criminal court”, in Cooper ed., *War Crimes*, pp. 311-322, and the editorial “Epilogue”, pp. 323-327; Howard S. Levie, “The history and status of the International Criminal Court”, in Schmitt ed. *International Law*, pp. 247-262. On the significance of the narcotics trade as a stimulus to action, see also, Rosenne, “Antecedents”, p. 400.

<sup>51</sup> Levie, “History and statutes”, pp. 253-5.

<sup>52</sup> Shaw, *International Law*, pp. 187-8. Note that the difference between the ICC and the International Court of Justice is that the former is intended to try cases against individuals, whereas the latter is devoted to the resolution of disputes between states.

<sup>53</sup> A good part of their effectiveness seems to have been due to the fact that the “Like-Minded” were drawn from all regions, levels of development, political blocs and religious traditions. Consistent opposition was encountered from China, France the UK and the USA, with particularly dogged obstruction from the last of these.

160 states and more than 600 NGOs.<sup>54</sup> These were approved by a vote of 120 for, 7 against (including the USA) and 21 abstentions. Following acceptance by the General Assembly of the UN, the long process of submitting the Treaty to the ratification of individual states began, and ratification was completed on 11 April 2002, when a total of 66 states had completed their approval processes. Jurisdiction of the Court began on 1 July 2002.

The provisions of the Treaty of Rome are interesting in relation to the Yugoslav experience. It is beyond doubt that the proposal for a new international criminal court would not have advanced anything like as rapidly as it did had it not been for the widespread concern generated by the events in Yugoslavia and Rwanda, which underlined the perceived need for such an institution. Moreover, the successful operation of these Tribunals did a great deal to convince sceptics of the practicability of such a court.<sup>55</sup>

The ICC has deferred consideration of provision to prosecute on grounds of “aggression”—apparently abandoning the Nuremberg commitment to try “crimes against peace”.<sup>56</sup> This is not altogether surprising in view of the fact that the accused will be *individuals*, and it is perhaps sociologically far-fetched to believe that wars are started by individuals. The new court gives no place for the controversial distinction between “international” wars and “civil” wars, which troubled the ICTY in its early days. Finally, sexual crimes such as rape and enforced prostitution are, following the precedent set by the ICTY, now incorporated into the general legal understanding of war crimes and crimes against humanity.

### ***Situating the ICTY***

The field of international criminal law is relatively recent. The greater part of its current provisions has been created since 1945. The late development of international *criminal* law is suggested vividly by the fact that the second edition (as recently as 1978) of D.W. Greig’s, *International Law* contained no treatment of international criminal law, and its discussion of international humanitarian law was confined to a brief passage on the right to humanitarian

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<sup>54</sup> The political discussions which surrounded the proposal to form an international criminal court at this time are reviewed in Robertson, *Crimes against Humanity*, Chap. 9.

<sup>55</sup> It is interesting that objections to the project do not seem to be rooted largely in these two experiences, but in the spectre of other historical episodes arising from the grave to trouble the living—American experience in Vietnam and French experience in Algeria being the most frequently-cited. There are some significant differences between the statute of the ICC and that of the ICTY which are noteworthy, although it is not appropriate to review these here. .

<sup>56</sup> A vigorous and effective critique of the notion of “crimes against peace”, or the prospect of treating “aggression” as a criminal offence, has been written by Jovan Babić. See his essay, “War crimes: moral, legal, or simply political?” in Jokić ed., *War Crimes and Collective Wrongdoing*, pp. 57-71.

intervention.<sup>57</sup> Compare this with the substantial coverage of the issues in Antonio Cassese's *International Law*, published in 2001.<sup>58</sup> In all areas of activity, however, it is undergoing very rapid expansion and elaboration in our own day. Having noted the relative recency of these developments, however, it is important in relation to the ICTY to realise that its creation has been one element in a much wider and longer process, and in this paper I have endeavoured to provide a brief outline of its course.

Some critics of the Tribunal have been inclined to move from the observation that it is an *ad hoc* body, directly to the conclusion that its creation was an entirely arbitrary event which is to be explained by reference to the short-term political goals of the "Great Powers" in specific relation to Yugoslavia. This is clearly not the case; and it is important in situating the Tribunal to understand its place within the larger historical picture which I have outlined here. In the "epilogue" to his historical survey of the development of legal thinking on human rights, Geoffrey Robertson suggests that:

We may be witnesses to a kind of millennial shift, from diplomacy to justice as the dominant principle of global relations, achieved through the evolving force of international human rights law, carrying *jus cogens* compulsion in municipal courts and in an increasing number of international tribunals.<sup>59</sup>

I believe that it is important, however, to avoid falling into a kind of mysticism, which explains the advance in international humanitarian law by reference to some force immanent in history, or a version of the "Whig interpretation of history". In that respect we need to register the difference between "international law" and "universal justice". There is a tendency, warned against by Antoine Garapon, to descend (ascend?) into utopianism about this process, which is foreign to the spirit of my own enterprise.<sup>60</sup> We need a sociological explanation, which anchors such general developments concretely in history, and in our empirical knowledge of general social processes

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<sup>57</sup> D.W. Greig, *International Law*. London: Butterworth, 1976, pp. 879-883. The publication of Robertson's volume, directed to a non-specialist readership, is indicative of the change.

<sup>58</sup> Cassese, *International Law*. See also, Antonio Cassese and Mirielle Delmas-Marty, *Crimes internationaux et juridictions internationales*. Paris: Presses Universitaires de France, 2002.

<sup>59</sup> Robertson, *Crimes against Humanity*, pp. 437-8. The legal term *jus cogens* refers to "a peremptory norm from which no derogation is permitted".

<sup>60</sup> Antoine Garapon, *Des Crimes qu'on ne peut ni punir ni pardonner: pour une justice internationale*. Paris: Odile Jacob, 2002, Chap. 2.

### APPENDIX 3:

#### *Envisioning the ICTY*

*Richard Miller George Oloffson*

The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the result of many competing philosophies on how to address the violence and brutality that marked the dissolution of the multi-ethnic state of Yugoslavia. Conceived in the post-Cold War era, the ICTY was the product of the international community's new-found spirit for human rights. Yet, despite the initial high hopes and noble intentions, the ICTY has become a source of one of the key controversies surrounding the dissolution of Yugoslavia. By examining the vision of the central figures behind the tribunal's creation, a more objective assessment of the international community's vision for the ICTY can be made.

#### *Timing*

The timing of the ICTY is a potential source of controversy surrounding the process in which the ICTY was conceived. Understanding when it was conceived has much to do with the visions for the ICTY its creators had. For example, why during the period of 1992-1993 did the international community decide to revive an international legal process that had not been used in over half a century? Why did the international community wait so long to begin the process of establishing a human rights tribunal in Yugoslavia when violence had already been rife in that region? What drew the attention of the international community and forced its hand in taking such an unprecedented approach to resolving ethnic conflict and war?

To understand the creation of the ICTY, one must remember the political climate in which it was born. First, the dissolution of Yugoslavia, unlike Cambodia, Vietnam, or Afghanistan, was a human catastrophe in which the permanent Security Council nations were aware, but over which they themselves had no direct influence. Thus, intervention would not directly interfere with the foreign policy of any of the nations with veto powers. Further, with the end of the Cold War, the United States enjoyed a brief period not only as the world's sole super-power, but also as victor. As a result, the emerging Russian Federation was less apt to veto the UN's intervention into the Balkans than its predecessors, Imperial Russia and the Soviet Union, would have been in the previous one hundred years. This period also was marked by unprecedented Russo-American cooperation as Russia looked to the United State for guidance in replacing the Soviet system with liberal democracy. In addition, with the election of the Clinton

administration in the United States, human rights emerged as a key issue in the United States' foreign policy, not only in Yugoslavia, but in many of its interactions with foreign powers as well. This became a particularly significant factor in the United States' interactions with China, now the lone communist nation with a permanent seat on the Security Council. The pressure that the Clinton administration was able to exert on the Chinese government by threatening not to renew China's "Most Favored Nation" trading status with the United States over China's human rights abuses has been posited as a possible reason for why the Chinese did not exercise their Security Council veto against the ICTY despite their opposition to it.<sup>61</sup> Yet, despite Russia's willingness to cooperate with the United States, and China's desire to appear dedicated to improving its human rights record, it was the French and the British whose initial reservations proved more difficult to overcome. The French were hesitant to support the creation of a war crimes tribunal in Yugoslavia for a number of reasons. It has been argued that the French were resistant to the idea not only because it was a project the United States was pushing for, but also because other war criminals deserving of punishment would be outside the jurisdiction of an *ad hoc* committee for Yugoslavia exclusively.<sup>62</sup> The British, though staunch opponents of the rump Yugoslavia's aggression in the Balkans, were initially opposed to the idea of a tribunal on practical grounds because the key war criminals were not in custody and there would be no assured way of ever capturing them.<sup>63</sup> The final proposal for the ICTY, Security Council Resolution 827, was ultimately sponsored by, among others, France, Great Britain, and the Russian Federation.<sup>64</sup> By this time, their reservations had disappeared through a combination of enthusiastic politicking by Madeleine Albright, the United States' envoy to the UN, and the atrocities committed during the war in Bosnia.

Madeleine Albright's role in the creation of the ICTY should not be understated. Albright's ascension as the special envoy to the United Nations should be understood as a particularly influential event in the formation of the ICTY. Albright approached her role with unprecedented ambition and tenacity, and she had a free hand diplomatically since the international community had arrived at a state of anomie, with the bipolar world order only recently having ended. While Albright's detractors have claimed that she entered the office of

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<sup>61</sup> Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. New York: Random House/Times Books, 1998, p.131.

<sup>62</sup> Thomas Blood, *Madam Secretary*. New York: St. Martin's Press, 1997, p. 174.

<sup>63</sup> *Ibid.* p. 174.

<sup>64</sup> The other members being Spain, New Zealand, and the United States of America.

ambassador to the United Nations with her eyes already on the position of Secretary of State, an accusation she flatly denies, no one can deny that Albright increased the prestige of that post, and under her lead it was made a full cabinet position during the Clinton administration.<sup>65</sup> Albright's own experience as a refugee definitely inspired her to take a pro-active approach to what the UN could to bring war criminals to justice. Her impassioned speeches before the UN and her support for the resolutions 764, 771, 780, 808, and 827 arguably made her the champion of the ICTY before the Security Council. From the very beginning, it is clear that Albright was appalled at the crimes being committed in the Balkans, particularly rape and other crimes against women, and she wanted to punish not only those who were responsible, but their leaders as well.<sup>66</sup>

However, these circumstances only explain why the creation of an international tribunal on war crimes could be conceived and implemented during the 1990s. These same circumstances could just as easily explain the creation of the UN's commission on Rwandan human rights abuses. These factors alone do not explain why the international community felt so moved as to intervene during the Yugoslav catastrophe specifically. What does help explain why the Balkans received such particular attention is the public outcry that something more ought to be done about the violence in the former Yugoslavia. According to Aryeh Neier, then Director of Human Rights Watch, what caused him and his organization to begin lobbying for a war crimes tribunal in Yugoslavia was, "the war in Bosnia was avowedly fought in furtherance of an abhorrent principle: that persons of different ethnic groups may not live together."<sup>67</sup> Neier, who emerged as perhaps the primary American proponent of an international war crimes tribunal for Yugoslavia,<sup>68</sup> admits that at first he and his organization were reluctant to apply the term genocide to the violence in the former Yugoslavia because of the historic and legal connotations that it carried with it.<sup>69</sup> Further, in Neier's opinion, though the ethnic cleansing and violence seen during the war in Croatia were indeed abhorrent, the wars in Croatia and Bosnia-Herzegovina were international armed conflicts between warring states, and as such were outside the domain of Human Rights Watch's typical interventions.<sup>70</sup> As Neier indicates, never before had Human

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<sup>65</sup> Robert Novak, "If Christopher Goes, Albright May Get Nod," *Chicago Sun-Times*, 17 October 1993. ; Madeleine Albright, *Madam Secretary* (New York: Miramax Books, 2003).

<sup>66</sup> "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993)," in *The "Yugoslav" Crisis in International Law: General Issues Part I*, ed. Daniel and Marc Weller Bethlehem (Cambridge: Cambridge University Press, 1992). pp. 276-277. ; Albright, *Madam Secretary*. pp. 181-182.

<sup>67</sup> Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. p. 121.

<sup>68</sup> E-mail correspondence with Dr. Robert Donia 8/25/2005.

<sup>69</sup> *Ibid.*, p. 121.

<sup>70</sup> *Ibid.*, pp. 120-121.

Rights Watch or any other prominent human rights organization actively lobbied for a war crimes tribunal for participants in an international armed conflict until the wars that marked the dissolution of Yugoslavia. Nonetheless, the obvious violations of international law stated in the Geneva Conventions regarding “grave breaches” of war crimes clearly applied—especially in Bosnia. Most important of all, according to Neier, was the escalation of violence in Bosnia to such a degree that it clearly fit Raphael Lemkin’s legal definition of genocide. While Neier argues that the war in Croatia demonstrated only “grave breaches” of international law regarding war, Bosnia became such an undeniable case of genocide that he and Human Rights Watch were compelled to act.<sup>71</sup> This follows with the rhetoric used in Madeleine Albright and other UN dignitaries’ speeches in which events in Bosnia, particularly the name Srebrenica, were invoked as such symbolic and monumental crimes against humanity that they alone justified a war crimes tribunal for the whole conflict in Yugoslavia.<sup>72</sup>

Ultimately, the context during which the ICTY was conceived was particularly unique, and largely the result of a number of coinciding factors. The end of the Cold War, the election of the Clinton administration, and the appointment of Madeleine Albright as the United States’ envoy all laid the foundation for an international war crimes tribunal to be possible, whether its jurisdiction be Bosnia, Rwanda, or elsewhere. Had this conflict erupted even five years earlier, it is doubtful if anything would or could have been done about it by the UN Security Council. Secondly, and more importantly, the timing of the ICTY suggests that it was not a long-standing conspiracy created as a means of defacing the Croats, Serbs, or Bosniaks before the international community as some nationalists have claimed. No serious action was taken until after the flames of war had fanned from Slovenia and Croatia into Bosnia, and even then, it took crimes of the most inhumane and heinous nature to inspire even the most right-minded of individuals to act. Essentially, the ICTY was, as David Hannay, special envoy to the UN from the United Kingdom stated, “an exceptional step needed to deal with exceptional circumstances.”<sup>73</sup> Therefore, it is difficult to believe that the ICTY was a conspiracy on the part of the international community all along, rather than a hurried response to particular actions taken on the part of the belligerents.

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<sup>71</sup> Ibid., p. 123.

<sup>72</sup> "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993).", Madeleine Albright, "Statement by Mrs. Madeleine K. Albright, Ambassador, Permanent Representative of the United States of America to the United Nations," (20 March 1996). ; Madeleine Albright, "U.N. Security Council Establishes International Tribunal for Rwanda," ed. US Department of State (21 November 1994).

<sup>73</sup> "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993)." p. 278.



### ***What the ICTY was not***

At the time of its conception, the ICTY was not initially intended to be a part of the peace process—at least not directly. Obviously its creation was designed to send a deterrent message to war criminals (as will be discussed below), but as Madeleine Albright stated, the peace process and the ICTY were intended to be “two different tracks, two different processes.”<sup>74</sup> While in practicality it is difficult to see how the two are actually different given that both have implications for the other, but at the time the ICTY was conceived, it was at least the official stance of the United States and the UN that they were to be exclusive processes.

### ***High hopes for the ICTY:***

Once the international community found itself ready to pursue the implementation of an ad hoc international war crimes tribunal regarding the actions that took place in the former Yugoslavia, its proponents held many high hopes for what it would accomplish. While particular individuals may have had specific goals in mind, the general goals most commonly held were the following:

1. To correct the flaws of the Nuremberg and Tokyo trials.
2. To exert force on the belligerents and war criminals to bring an end to the war, or at the very least temper the ferocity with which it was conducted.
3. To provide justice to the victims, particularly women, who had suffered because of the war.
4. To hold accountable those persons who committed war crimes.
5. To establish for the United Nations a permanent court for the prosecution of war criminals.

The decision to create a new international court to try the war criminals of the former Yugoslav states obviously had certain ramifications in international law. Among the first pressing questions asked during the formation of the tribunal was: “From what would the ICTY take its legal precedent?” Granted, a large body of documents concerning human rights, rules of war, genocide, and international law had been drafted following the two World Wars that marked the first half of the twentieth century, but one could not help but look at the ICTY and conjure up allusions to the Nuremberg and Tokyo trials. Many of those who supported the creation of the

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<sup>74</sup> "United Nations: Security Council Proposes War Criminal Tribunal," *Inter Press Service Global Information Network*, 22 February 1993.

ICTY hoped that it would set new precedents in international law and correct a number of the legal flaws of the Nuremberg and Tokyo trials.

Two particular concerns on the part of international legal experts were the *ex post facto* nature of the laws advanced at Nuremberg and Tokyo, as well as the possibility for “double-jeopardy” situations in which war criminals could be acquitted by the international tribunal and then tried again for the same crime by their own domestic courts.<sup>75</sup> Secondly, it was clear from the start that the makeup of the ICTY would be different from Nuremberg or Tokyo. Whereas the Nuremberg and Tokyo tribunals were comprised of judges from the nations of the victorious allies, the ICTY was a tribunal drawn from legal scholars throughout the international community with sensitivity to the ethnic, gender, religious, cultural, and diplomatic interests surrounding the Yugoslav conflict.<sup>76</sup> Although the Security Council nations responsible for drafting, devising, and selecting the members of the ICTY believed that it would be an improvement upon what many viewed to be the failures of Nuremberg and Tokyo, the ICTY was not without its problems.

The ICTY was the first international attempt since Nuremberg and Tokyo to identify and penalize war criminals; unlike those trials, it was devised and implemented before the violence and abuses of human rights in the former Yugoslavia had ceased.<sup>77</sup> The result was that the ICTY would have to rely on the cooperation of other nations to bring suspects before the court. In addition, the ICTY was poorly funded and plagued by budgetary problems from its inception.<sup>78</sup> This has lead some to question exactly how seriously the UN took the ICTY at the outset. Nonetheless, despite these shortcomings, the ICTY rather than Nuremberg or Tokyo has now set the precedent for future international criminal tribunals, as is evidenced by the tribunal established by the UN only a few years later to try war criminals from Rwanda.

A second, and perhaps the most practical reason for the creation of the ICTY, was to use it as a deterrent to further violence and war crimes in the region. It is no secret that many government officials in the United States, the UN, and the international community at large believed that more could be done to stop the ethnic cleansing and brutality occurring in the former Yugoslavia.<sup>79</sup> Neier claims that there were even some who felt that the establishment of

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<sup>75</sup> Michael P. Scharf, *Balkan Justice* (Durham, NC: Carolina Academic Press, 1997). 69-71.

<sup>76</sup> Ibid., p. 64 ; “This will be no victors tribunal” – Madeleine Albright, “81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993).” p. 276.

<sup>77</sup> Mirko Klarin, “The Moral Case for a War Crimes Tribunal,” *The Wall Street Journal Europe*, 17 March 1994.

<sup>78</sup> Scharf, *Balkan Justice*. p. 79.

<sup>79</sup> For example see: “12 in State Department Ask U.S. To Move against Serbs,” *Reuters News*, 23 April 1993. ; Terrence Hunt, “Clinton Torn on Bosnian Decision; So Are Congress, Pentagon,” *Associated Press*, 29 April 1993. ; “Yugoslavia Files Complaint against Nato at Un Court,” *Agence France-Presse*, 23 March 1994.

the ICTY was just an act to make it appear *as if* more were being done.<sup>80</sup> Nonetheless, the theme of deterrence appears throughout the transcripts of the UN Security Council debates regarding the formation of the ICTY.

As Madeleine Albright stated before the Security Council on February 22, 1993, “President Bill Clinton has long supported the establishment of a war-crimes Tribunal at the United Nations to bring justice and deter further atrocities in the former Yugoslavia.”<sup>81</sup> This same sentiment is reflected in the wording of Resolution 827, which expressed the Security Council’s belief “that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.”<sup>82</sup> Nonetheless, this sentiment was not shared universally among the proponents of Resolutions 808 and 827. Some feared that the formation of the ICTY, like Lawrence Eagleburger’s “Naming Names Speech,” would be a deterrent to the peace process by increasing the resolve of potential war criminals to resist the will of the international community.<sup>83</sup> Others, such as Aryeh Neier believed that such rationale overlooked the true necessity of a war crimes tribunal for Yugoslavia. Neier claimed that to establish the court with the intent of it being a deterrent was essentially “the right deed for the wrong reason.”<sup>84</sup> Regardless of these objections, it cannot be denied from the international community’s frustration over the continuing violence in Yugoslavia, the wording of the Security Council’s resolutions, and the discussions among the Security Council members that there was hope that the establishment of the ICTY would deter further disregard for basic and established human rights by the belligerent parties.

Along with the hope that the ICTY would have practical implications as a deterrent, it is clear that the proponents of the ICTY believed that its ultimate benefits would be long-term benefits. Whether or not it had a significant impact as a deterrent, it is clear that the proponents of the ICTY, both inside and outside the Security Council chambers, believed that it was necessary for healing once the war was over. Neier certainly believed this principle arguing that

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<sup>80</sup> Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*.

<sup>81</sup> "61. Security Council Provisional Verbatim Record, 22 February 1993 (S/Pv.3175, 22 February 1993)," in *The "Yugoslav" Crisis in International Law: General Issues Part I*, ed. Daniel and Marc Weller Bethlehem (Cambridge: Cambridge University Press, 1992). p. 202.

<sup>82</sup> "Security Council Resolution 827 (1993) (S/Res/827, 25 May 1993)," in *The "Yugoslav" Crisis in International Law: General Issues Part I*, ed. Daniel and Marc Weller Bethlehem (Cambridge: Cambridge University Press, 1992). p. 42.

<sup>83</sup> Scharf, *Balkan Justice*. p. 44.

<sup>84</sup> Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. p. 111.

in order for Serbs, Croats, and Bosniaks to be able to live together again peacefully, those who committed war crimes during the wars of dissolution would have to be held accountable.<sup>85</sup> In order to facilitate such healing, it was the position of the Tribunal from the very start that it would neither be a “victors tribunal” nor assign guilt to any particular state, but instead would place responsibility for the war evenly on all of the belligerent communities in the former Yugoslavia.<sup>86</sup> This sentiment is reflected by members of the Security Council who hoped that by holding war criminals accountable, the victims of rape, ethnic cleansing, and the other atrocities committed in the former Yugoslavia would know that the international community was not ignoring their plight.

Among the victims that received singular attention in the Security Council debates, were women. During the discussions among the Security Council nations, Madeleine Albright was especially vociferous about bringing justice to those who had perpetrated crimes against women—particularly crimes of a sexual nature. Ambassador Albright stated before the Security Council, “We must ensure that the voices of the groups most victimized are heard by the Tribunal. I refer particularly to the detention and systematic rape of women and girls, often followed by cold-blooded murder. Let the tens of thousands of women and girls who courageously survived the brutal assault of cowards who call themselves soldiers know this: your dignity survives as does that of those who died.”<sup>87</sup> Albright’s sentiments were shared by other representatives to the Security Council, particularly the delegates from Britain, New Zealand, and Brazil. Since the creation of the war crimes tribunal hundreds of women in Bosnia and throughout the former Yugoslavia have found the courage to come forward and testify to the Security Council in hopes that justice will be served.

If on one hand, a purpose of the ICTY was to bring justice for those who had been violated, the ICTY was also designed with the intent of bringing those who had perpetrated crimes against humanity to justice. This sentiment rings throughout the words of another champion of human rights, Diego Arria, who served as the Venezuelan delegate to the Security Council during the debates on the creation of the ICTY. After the 15-0-1 passage of resolution 827 which established the court, Mr. Arria began the discussion by explaining why he and his country favored the resolution.<sup>88</sup> Mr. Arria stated, “Now the Security Council has decided to act

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<sup>85</sup> Ibid., p. 223.

<sup>86</sup> "61. Security Council Provisional Verbatim Record, 22 February 1993 (S/Pv.3175, 22 February 1993)." p. 202 ; "All Sides Yugoslavia Guilty of War Crimes: International Report," *Agence France-Presse*, 11 October 1994.

<sup>87</sup> "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993)." pp. 276-77.

<sup>88</sup> It seems appropriate here to note that the Chinese delegation abstained from the vote on this resolution, an act they would repeat on the future resolution to establish a human rights tribunal in Yugoslavia. As alluded to earlier, the

on behalf of the global community of States by establishing an International Tribunal which, as a forum representing all humanity, will bring to trial and punish those guilty of abominable crimes.”<sup>89</sup> Arria’s forceful condemnation of crimes against humanity both in Yugoslavia and throughout the world signaled that among members of the Security Council there were true believers who felt that the ICTY would act as an organ for international justice and a model for later such tribunals to follow.

Others had more specific hopes for the tribunal in terms of bringing war criminals to justice, and one can see from Madeleine Albright’s memoirs that she hoped not only to bring the individuals who actively committed the crimes, but the leadership who encouraged (tacitly or actively) the perpetration of those crimes. At the time, Albright apparently hoped that the even Slobodan Milošević, whom Albright identified as “the biggest fish of them all,” would be brought before the tribunal.<sup>90</sup> This is not to say that the ICTY was conceived solely to bring Milošević to trial before the international community. Clearly, the language of the resolutions and debates, as well as the actions taken by the ICTY in its early years show that its scope extends merely beyond political leaders down to the common combat soldiers and civilians who, in a frenzy of ethnic hatred, committed crimes against humanity. Thus, while many envisioned the tribunal as being a means to bring individual leaders whose reckless management allowed or encouraged these crimes, it was generally understood as a shared value among the sponsoring nations that war-criminals regardless of rank would be forced to face-up for their crimes.<sup>91</sup>

While the international community held to the long-term goals of healing ethnic tension, providing justice to the victims, and retribution to the perpetrators, another long-term goal many proponents of the ICTY held (and some still hold) is that the ICTY would eventually become a permanent organ of the United Nations dedicated to prosecuting war criminals and others who disregard human rights wherever they may be. Organizations like Amnesty International and Neier’s Human Rights Watch both have advocated such a permanent institution and looked to the ICTY as a possible answer. Others, like Venezuela’s Diego Arria, also hoped that the ICTY would be the first step toward a permanent human rights tribunal. While some have questioned the feasibility of such an institution, the idea was very popular at the time the ICTY was being

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Chinese were perhaps the most vehemently opposed to the ICTY of the permanent Security Council members, and demonstrated that continued opposition by not voting in favor of the resolution. The reasons given by the Chinese delegation (on both occasions) were concerns over sovereignty and the implications these ad hoc tribunals would have on the creation of a permanent human rights court.

<sup>89</sup> "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993).", p. 275.

<sup>90</sup> Albright, *Madam Secretary*. p. 181.

<sup>91</sup> For example see any of the statements in: "81. Security Council Provisional Verbatim Record, 25 May 1993 (S/Pv.3217, 25 May 1993)." pp. 274-284.

established.<sup>92</sup> For example, when the conflict in Rwanda erupted, many argued that that ICTY should be expanded to incorporate Rwanda as well as Yugoslavia.<sup>93</sup> While the ICTY remains dedicated to the investigation of war crimes in the former Yugoslavia, the precedent it set can be seen in subsequent UN decisions on human rights violations. This is particularly true in the case of Rwanda where the same legal language, rationale, and rhetoric were used by the sponsors of the resolution for a Rwandan war crimes tribunal as were used during the formation of the ICTY.<sup>94</sup> The zeal with which the international community approached the formation of the Yugoslav criminal tribunal, the claims made, and the words used were repeated later in the same decade (by many of the same persons) in the case of Rwanda. This too suggests that the ICTY was not an instrument designed with a vision of persecuting the South Slavs in particular, but that it was the result of a sincere dedication to human rights applicable to all similar humanitarian catastrophes.

### ***Conclusion***

The vision for the ICTY was one that had immediate and long-term goals. The creation of the Tribunal provided an opportunity to revise the legal precedents set at Nuremberg and Tokyo, while also acting as a potential deterrent to future war crimes as the war raged on. In the long term, many saw it as a means of healing the wounds the war would leave, bringing justice to the victims, and retribution to war criminals great and small. Lastly, at the time of its conception many hoped that the ICTY would eventually expand beyond its initial jurisdiction and become a permanent institution. The degree to which these goals will succeed or fail will be left to history to judge, however, the intent of the ICTY was apparently in concert with the moral principles it has proclaimed to uphold.

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<sup>92</sup> Klarin, "The Moral Case for a War Crimes Tribunal."

<sup>93</sup> Farhan Haq, "Rwanda: Experts Say Yugoslavia Court Should Judge Rwandan Crimes," *Inter Press Service*, 3 October 1994.

<sup>94</sup> For example, see: Albright, "U.N. Security Council Establishes International Tribunal for Rwanda."

## APPENDIX 4:

### *Public Opinion on the ICTY and Reconciliation*

*Eric D. Gordy*

Serbia has been the site of the most intensive and frequent research on perceptions of the ICTY, very likely because as the state most affected by indictments, the issue is most prominent there. This presentation will concentrate on public opinion findings in Serbia because we have had the greatest access to professional research organizations in Serbia engaged in such topics. Ideally, our research would have benefited from having the resources to conduct similar surveys in all parts of the former Yugoslavia, leading to a more comprehensive understanding of how the publics in several affected countries view the ICTY.

A notable finding is that in Serbia, the ICTY is the object of widespread mistrust and enjoys relatively low levels of credibility. Research from July 2003 identifies the ICTY as the international institution perceived to be “most threatening,” especially among supporters of the parties of the political right. The survey finds that 89% of supporters of the Serbian Radical Party (SRS) and 85% of supporters of the Socialist Party of Serbia (SPS) agree that the ICTY threatens the security of Serbia. The proportions are relatively lower, but nonetheless high in the proportion of discontent they indicate, among supporters of the more liberal parties G17+ (42%) and Democratic Party (37%).<sup>95</sup> At the same time, only 14% of respondents categorically oppose cooperation with the ICTY, though the reasons for cooperation advocated by the 85% who favour cooperation run the gamut from justice-related to economically instrumental.<sup>96</sup> At the same time, only small minorities regard the ICTY as an important issue for the country, and only 6% characterize themselves as well informed about the ICTY, compared to 68% who characterize their level of information as “a little” (35%) or “very little (33%).<sup>97</sup> This is consistent with the finding that only 8% of respondents say that they follow the broadcast of the Milošević trial “regularly or often,” while 66% follow it “rarely.”<sup>98</sup> The perception that the ICTY conducts

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<sup>95</sup> Belgrade Centre for Human Rights and SMMRI, “Public Opinion in Serbia: Attitudes Toward the International Criminal Tribunal for the Former Yugoslavia,” July 2003.

<sup>96</sup> Belgrade Centre for Human Rights/SMMRI, p. 21.

<sup>97</sup> Belgrade Centre for Human Rights/SMMRI, p. 14.

<sup>98</sup> Belgrade Centre for Human Rights/SMMRI, p. 38.

unfair trials is widespread, with 69% distrusting the impartiality of trials in which the accused is a Serb, and 57% distrusting the impartiality of all ICTY trials.<sup>99</sup> Data on the effect on attitudes of broadcast ICTY proceedings seem to suggest a broad conclusion that the principal effect seems was reinforcement of the views previously held by viewers.

There is not good reason, however, to believe that people who object to the involvement of the ICTY believe that Milošević is innocent: most people regard him as being guilty of something, and the main points of contention have to do with a preference for a domestic trial and a fear that a guilty verdict from the ICTY would amount to a declaration of collective guilt. Surveys indicate that a broad majority of people would like to see Milošević prosecuted, albeit more would like to see him prosecuted for domestic violations than violations of international law. Ljiljana Bačević, director of the Centre for Political and Public Opinion Research of the Institute for Social Sciences in Belgrade, summarized the findings of public opinion research in the first half of 2001 as follows:

The extradition of Milošević to The Hague did not especially disturb public opinion in Serbia. Three quarters of the citizens of Serbia consider that the people accused of war crimes, including Mr. Milošević, should be tried, and when they say tried they usually mean they should be convicted as well, which means that people are persuaded of that guilt. The results of public opinion research demonstrate the complete apathy of a convincing majority of the public toward Milošević, and the only thing that is controversial for them is whether he should be tried in The Hague rather than in Serbia. A large majority of people believe that the trial should be held in Serbia, and a large majority of citizens believes that Milošević, even before the trial has begun, is guilty of everything the Hague Tribunal accuses him of, and also that he is guilty of political killings and embezzlement.<sup>100</sup>

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<sup>99</sup> Belgrade Centre for Human Rights/SMMRI, p. 31.

<sup>100</sup> Quoted in Ivan Djordjević, "Milošević problem," *Free Serbia*, 7 June 2001. The article can be found in a reproduced version online at: <http://www.srpskadijaspora.info/komentar/milosevic/0607.asp>. More detail is provided in a survey by the Center for the Study of Alternatives (*Centar za proučavanje alternativa*) reported in *Nezavisna svetlost* in March 2001. The survey reported that 82% of respondents agreed that Milošević should be tried for "war crimes, corruption, electoral fraud, and abuse of power," while only 4% agreed that he should be tried only for war crimes. On the question of whether Milošević should be sent to The Hague (the survey was carried out before his



To the degree that Milošević's defence before the ICTY has enjoyed some sympathy in domestic public opinion, much of this can probably be attributed more to the perception that the Tribunal is selective in its prosecution than to support for the accused.

The low regard in which both Milošević and the organization which is deciding his fate are held in public opinion suggests a problem which is going to have far-reaching implications for processes of reconciliation and reform, and for any official efforts to come to terms with the recent past. All institutions, whether from the past or the present, and whether domestic or international, receive consistently low ratings of confidence in public opinion surveys. The finding has been repeated several times that institutions are regarded as relatively closed, corrupt, and as working against the interests of ordinary people. Without getting into the question of whether these low levels of confidence are justified, they present a major barrier to any expectation that institutional measures such as trials might have a major impact on public opinion.<sup>101</sup>

It is appropriate to add that although many people express a preference for Milošević to be prosecuted by domestic courts, domestic judicial institutions in Serbia receive consistently low measures of public confidence in surveys. A 1996 survey found 57% of respondents declaring a lack of trust in judicial institutions, with 37% expressing trust.<sup>102</sup> This is less than the level of distrust displayed toward representative institutions such as the federal parliament (62%), the federal government (61%), the Serbian parliament (62%), the Serbian government (60%), and political parties (71%). Among law enforcement, administrative and civic institutions, however, only the Serbian police (57%) and state-owned media (65%) received equal or higher ratings of

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arrest), 56% of people with higher education said yes, as did 45% of those with the equivalent of a high school education or less: 16% of those with higher education, and 24% of those without, were opposed to sending Milošević to the Hague. The results are summarized in "Suditi Miloševiću," *Nezavisna svetlost*, no. 287, 24-31 March 2001 (<http://www.svetlost.co.yu/arhiva/2001/287/287-6.htm>). An interesting finding, although there is no assurance whatsoever of a random sample, can be found in the informal poll on the website of the weekly magazine *NIN* ([www.nin.co.yu](http://www.nin.co.yu)). *NIN* has been asking visitors to vote "yes" or "no" on the question: "Should Milošević have been delivered to the Hague tribunal?" since the week he was delivered, with the results generally hovering between 35% to 40% in favour and 60% to 65% opposed since June 2001. A poll showed 45.5% voting "yes" and 54.5% voting "no." These results should probably be taken with some reservation, however, as a number of factors other than shifts in public opinion could easily influence this sort of survey.

<sup>101</sup> For a recent example, see Srećko Mihailović, *Gradjani u susretu sa institucijama u tranziciji* (Belgrade: Centar za proučavanje alternativa--Center for policy studies, May 2002). The results are similar to those in a survey from the previous year, Srećko Mihailović, *et.al.*, *Javno mnjenje Srbije: Na početku novih deoba* (Belgrade: Centar za proučavanje alternativa--Center for policy studies, August 2001). All of the published research reports of the centre are available in PDF format online at: [www.cpa-cps.org.yu](http://www.cpa-cps.org.yu).

<sup>102</sup> Institut društvenih nauka, *Jugoslovensko javno mnjenje 1996*, cited in Ognjen Pribičević, "Da li je minimalistički koncept demokratije još uvek validan? Slučaj Srbije," 1998. The article is available online at [http://www.komunikacija.org.yu/komunikacija/casopisi/sociologija/XL\\_3/CI03/document](http://www.komunikacija.org.yu/komunikacija/casopisi/sociologija/XL_3/CI03/document).

distrust.<sup>103</sup> This puts the judicial system on a level of public esteem comparable to that of some of the most despised and reviled institutions in Serbia.

An especially interesting finding about perceptions of responsibility was made by the Strategic Marketing agency in a survey in April 2001. The descriptive elements of the findings are less interesting than one clear comparative element—a marked tendency to project responsibility away from themselves and onto other factors. For example, asked to name the most important reason for NATO intervention against SRJ in 1999, 29.8% named “the policy of the Milošević regime,” while 55.2% identified either the political or economic “interest of the West.”<sup>104</sup> The factor of distance applies on comparative scales as well. Asked to choose between two options for “guilt for misfortune,” respondents named Slovenes (45.3%) more than Serbs (10.8%), the United States (27.3%) more than NATO (25.2%), the “international community” (44.8%) more than “all the peoples of the former Yugoslavia” (20.5%), Milošević (42%) more than “the people who elected him” (17.6%), and the interests of international business (53.7%) more than the interests of domestic business (11.2%).<sup>105</sup>

This form of projection does not necessarily arise from ignorance about the behaviour of Serb military and paramilitary forces in the wars. Asked to name three events “which first come to mind” in relation to the war in Bosnia-Herzegovina, the three most frequent responses were all atrocities committed by Serb forces: the mortar attack on the Markale market in Sarajevo (48.1%), the siege of Sarajevo (28.8%), and the massacre in Srebrenica (21.3%). Respondents named atrocities committed by other forces far less frequently: the bombing and destruction of the bridge in Mostar (12.7%), the sniper attack on the Serb wedding party in Sarajevo in 1991 (12.6%), and general “crimes against Serb civilians” (7.2%).<sup>106</sup> However, this pattern does not apply when the same question is asked about the war in Croatia. Although the siege of Vukovar is the second most frequently offered response (53.1%), actions on the part of Croat forces are dominant, such as the reconquest of the Knin region (55.3%) and the arrival of refugees from

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<sup>103</sup> Stjepan Gredelj, “Vrednosno utemeljenje blokirane transformacije srpskog društva,” in Mladen Lazić (ed.), *Račji hod: Srbija u transformacijskim procesima* (Belgrade: Filip Višnjić, 2000), Table 18, p. 228.

<sup>104</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 15.

<sup>105</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 22.

<sup>106</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 27. However, according to the same survey, only 11.2% of people who named the Markale attack believed that it was committed by Serb forces. This is consistent with the position promoted by state media at the time of the attack and afterward, which argued that the army of Bosnia-Herzegovina manufactured this atrocity and others for purposes of publicity. Similarly, only 22.8% of people who knew of the massacre in Račak believed that reports of it were true.

Croatia (30.5%). Only 5.3% of respondents named the bombardment of Dubrovnik.<sup>107</sup> Asked to identify three war crimes committed by Serbs in the preceding ten years, a large majority named the massacre in Srebrenica (69.4%), while large numbers named the destruction of Vukovar (31.4%) and the massacre in Račak (18.6%).<sup>108</sup> Results are somewhat more spread out when respondents are asked to name war crimes committed against Serbs: the three most frequent responses were the exodus of Serbs from Croatia (49.1%), the NATO bombing (35.4%), and the “suffering of civilians in Kosovo” (16.2%).<sup>109</sup>

A curious contradiction emerges with regard to the question of knowledge. The preceding results suggest that knowledge of at least some events is widespread in Serbia. At the same time, when asked directly, respondents do not indicate that they believe that they are themselves well informed. 22.3% of respondents consider themselves well informed about the wars in Croatia, while 19.4% of respondents consider themselves well informed about the wars in Bosnia-Herzegovina.<sup>110</sup> Nor did respondents indicate that they believed that their fellow citizens were well informed.<sup>111</sup>

When asked the admittedly long and probably confusing question, “Has it ever happened that a new fact which you have learned from any source about any event related to the conflicts (wars in Croatia, Bosnia-Herzegovina, Kosovo) caused you to change your thinking or position about the role (responsibility) of the warring sides?,” an overwhelming 85.5% answered in the negative.<sup>112</sup> Despite this somewhat discouraging result from the point of view of efforts to promote information, the survey results suggest some potential guidelines for efforts to disseminate information. These results suggest a wide gap between the sources of information people trust and the sources they actually use. Asked what were their primary sources of information were during the war, responses broke down as follows:

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<sup>107</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p.28.

<sup>108</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p.31.

<sup>109</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 30.

<sup>110</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 73.

<sup>111</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 72.

<sup>112</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 71.

RTS-TV/state media	80.4%
Independent papers ( <i>Blic, Glas, Danas</i> )	67.9%
Stories of witnesses	62.3%
Stories of relatives	45.5%
State-controlled papers ( <i>Politika, Expres, Novosti</i> )	43.1%
Independent radio/TV ( <i>ANEM, B-92</i> )	42.4%
Personal experience	17.4% <sup>113</sup>

When people were asked what sources of information they trusted, the structure of responses was different, as follows:

<u>Source</u>	<u>Trusted</u>	<u>Did not trust</u>
RTS-TV/state media	23.2%	42.5%
State-controlled papers	28.8%	36.5%
Independent papers	44.7%	17.9%
Independent radio/TV	62.4%	16.2%
Relatives	68.6%	16.2%
Witnesses	62.2%	15.4% <sup>114</sup>

The results suggest that a strategy of “re-education,” as some political advocates like to call it, would not have much effect if it were imposed from above. First, the question of availability of information arises—why did people tend to use most the sources of information which they trusted least? The answer would most likely have to do with the structure of distribution and availability, and immediately suggests concrete measures to improve the quality of information people receive. Second, aside from the broadcast programs offered by ANEM and B-92, respondents expressed the most faith in interpersonal sources, particularly relatives and witnesses. The personally close category of “relatives” attracts more trust than the potentially unlimited category of “witnesses.” Here, as in the attribution of responsibility, distance is a factor. International media, especially the programs sponsored by various governments with an eye toward influencing public opinion in Serbia (such as the VOA and BBC language services)

<sup>113</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 68.

<sup>114</sup> SMMRI, “Vidjenje istine u Srbiji,” May 2001, p. 69.

are not mentioned, but the distance of these sources might interfere with the level of trust they enjoy. The same might be said of international non-media sources, such as statements from international governments, the United Nations or the ICTY.

Any effort to change minds (a project which is faced with tremendous difficulty from the beginning) has to involve influencing the stories people tell one another, more than the stories people are told by institutional sources. To offer a concrete example, Serbian prosecutors did not declare an intention to investigate Slobodan Milošević for war crimes after the ICTY indictment, or after demands for prosecution by European and American politicians, but only after domestic media revealed a case in which there was clear indication of efforts to remove evidence of massacres on the part of high state authorities.<sup>115</sup>

A 2003 study of the political conflicts surrounding cooperation with the ICTY in Croatia notes the recurrent dynamic in which on the official level, the international benefits and drawbacks of extraditing suspects is weighed against the threat of mobilization by the nationalist political right.<sup>116</sup> A comparative study of attitudes toward justice and reconciliation in three municipalities in Bosnia-Herzegovina and Croatia finds, unsurprisingly, the highest levels of acceptance of the ICTY among the most prominent “victim” groups (Bošnjaks) and the lowest among the most prominent “perpetrator” groups (Serbs).<sup>117</sup> The same study also finds, however, the highest level of acceptance of reconciliation among Serbs in Vukovar, suggesting that “the level of traumatic experience does not predict positive attitudes toward the ICTY, nor the readiness for reconciliation (but the value system does).”<sup>118</sup>

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<sup>115</sup> The case in question is the famous “freezer truck” incident in which the bodies of victims of massacres in Kosovo were apparently removed from the scene and destroyed. A diver found a freezer truck containing 40 corpses in the Danube river near Kladovo in 1999, and the case was quickly suppressed. Local media reported extensively on the case after the information suppressed in 1999 was publicly revealed in April 2001. In May 2001, prosecutors declared that they had traced the effort to destroy evidence of massacres directly to Milošević.

<sup>116</sup> Victor Peskin and Mieczysław Boduszynski, *Croatia's Moment of Truth: The Domestic Politics of State Cooperation With the ICTY*. Berkeley: Berkeley program in Soviet and Post-Soviet Studies Working Paper Series, January 2003.

<sup>117</sup> Mikloš Biro, Dean Ajduković, Dinka Ćorkalo, Dino Djipa and Petar Milin, “Attitudes Toward Justice and Social Reconciliation in the Former Yugoslavia,” in E. Stover & H. M. Weinstein, (eds.), *My Neighbor, My Enemy: Justice and Community after Mass Atrocity*. Cambridge, Cambridge University Press, 2004.

<sup>118</sup> Biro correspondence with Scholars' Dialogue, March 2004. See also Biro, M., Ajduković, D., Ćorkalo, D., Djipa, D., Milin, P., Weinstein, H. M. (2004). «Attitudes towards justice and social reconstruction in Bosnia and Herzegovina and Croatia,” 2004.

## APPENDIX 5:

### *Findings from focus group research on public perceptions*

*Julie Mertus*

Whereas the evidence drawn from opinion surveys is very useful in relation to the study of perceptions of the Tribunal, this kind of material has two major disadvantages. It is limited in the main to assessing public perceptions along only one dimension, that of “trust,” and does not probe the kinds of reasons which respondents might give for trusting or distrusting the ICTY. Viewed in relation to the aims and aspirations of the Tribunal, particularly in relation to perceptions of justice, this is a serious limitation. What is more, these crude indicators do not suggest significant specific respects in which the activity of the Tribunal might conceivably be changed in order to enhance either public trust, or perceptions of its contribution to justice. The team determined that the published survey data should be supplemented by additional material which would offer a rather more rounded and multidimensional understanding of the formation of perceptions in this area., and elected to conduct a small study using “focus groups”.

#### *Why focus groups?*

Focus group interviewing is a well-established research method which is particularly well-suited to obtaining several perspectives about the same topic.<sup>119</sup> “A group of individuals (is) selected and assembled by researchers to discuss and comment upon, from personal experience, the topic which is the subject of the research.”<sup>120</sup>

The main purpose of focus group research is to draw upon respondents’ attitudes, feelings, beliefs, experiences in a way which would not be feasible using other methods, for example, observation, one-to-one interviewing, or questionnaire surveys. These attitudes, feelings and beliefs may be partially independent of a group or its social setting, but a more

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<sup>119</sup> The following account of focus group interviewing is based upon Anita Gibbs, “Focus Groups”, *Social Research Update*, Issue 19, Winter 1997: [www.soc.surrey.ac.uk/SRU19](http://www.soc.surrey.ac.uk/SRU19)

<sup>120</sup> R.A. Powell, cited in Gibbs, 1997, p. 2.

likely to be revealed via the social gathering and the interaction which being in a focus group entails.<sup>121</sup>

The choice of focus groups as a method was chosen because it permitted the relatively spontaneous expression of ideas by respondents, and it could be managed within the rather limited resources available to the team. The method is particularly valuable in that it allows spontaneous resort to the language which interviewees use about an issue to an extent often difficult to achieve in more formal and controlled interview situations.

Typically it is difficult to ensure the representativeness of focus groups. Ideally we would have conducted focus groups in all parts of the former Yugoslavia, yet we only had funding and researchers available for sets of focus groups in Sarajevo, Banja Luka, Belgrade and Novi Sad. In each case, we targeted college students as a separate group and social activists as another group. The focus group results are limited, given these circumstances, but nevertheless, they have enabled us to formulate a typology of responses to the ICTY which conveys clearly the variety of concerns which people in the region have about the work of the Tribunal. In this way they may be valuable as a means of orienting subsequent and more systematic research.

The results are also extremely useful in that they show the diversity of ways in which these ICTY concerns are articulated in association with other aspects of their political environment. From the public discussions on the ICTY in Serbia and Bosnia-Herzegovina, critiques emerged which fall broadly into nine categories:

- A) the role of the ICTY in processes of reconciliation,
- B) perceptions of bias in the ICTY,
- C) perceptions that the ICTY contributes to continued conflict in the region,
- D) perceptions of conflicts between international and domestic legal jurisdiction,
- E) critiques of the conduct of trials before the ICTY,
- F) the failure of the ICTY to protect the rights of suspects and of witnesses,
- G) doubts concerning the ICTY's political interest,

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<sup>121</sup> Gibbs, 1997, p. 3.

H) the role of prominent trials as public spectacles, and

I) lack of communication between the ICTY and domestic institutions.

***A. The ICTY does not promote reconciliation***

The goal of reconciliation is not generally an integrative part of legal processes, and with the exception of South Africa's Truth and Reconciliation Commission (TRC), has not been a major part of most post-war fact-finding efforts. Nonetheless, it is often articulated as one of the purposes of the ICTY, and this goal is received with mixed reactions in the region. One position simply expresses that hopes for the ICTY in contributing to reconciliation were misplaced:

Many people had the wrong expectations of the ICTY. They thought it was to promote reconciliation. That wasn't its role and that is not the way it is acting. *(Novi Sad)*

To the degree that reconciliation is accepted as a goal, some controversy remains with regard to the question of who is obligated to carry it out. Some respondents see an international role as less than appropriate:

We must first reconcile ourselves, then we can begin to think about reconciliation.  
*(Sarajevo)*

Other respondents reject demands for reconciliation on the grounds that they themselves committed no violations, and consequently do not share in obligations to reconcile:

What do you mean with reconciliation? I do not have to reconcile with anyone because I did not hurt or offend anyone! Why would I reconcile when I did not do anything to create this war or hurt anyone!?" *(Banja Luka)*

At the opposite end of the spectrum is the perspective that reconciliation can only be possible when the conditions leading to conflict are removed, and that the incompleteness of the ICTY's criminal enforcement is a barrier to reconciliation:

My expectations of the ICTY are 70-80 % fulfilled. These are not empty words, but Radovan Karadžić and Ratko Mladić really need to be arrested. That is [the] 20-30 % that lacks for the tribunal to complete my expectations. That fact prevents the reconciliation



here. I believe that the reconciliation is possible but while Ratko Mladić and Radovan Karadžić are free—there will be no reconciliation among people. I believe that they are Republika Srpska's war heroes and they might become bigger heroes if not caught.

*(Sarajevo)*

Whether the goal of reconciliation is broadly accepted or rejected, domestic perceptions tend to regard the ICTY's role in the process as either misplaced or incomplete.

### ***B. The Tribunal is biased***

Especially among respondents from Serbia and Republika Srpska, the legitimacy of the ICTY is undermined by the perception that its indictments concentrate on crimes committed by Serbs, with far less attention given to crimes committed against Serbs. Not all respondents attach to this view a rejection of the Tribunal's goal of creating a documentary record:

It would be great to see the whole truth. *(Novi Sad)*

However, several respondents argue that this "whole truth" is not available through the ICTY, which threatens the perception that justice can be achieved through it:

I don't see that what is happening at the Tribunal is justice. It is partial justice and that is not justice. *(Belgrade)*

To the degree that justice is seen as a precondition for reconciliation, the same perception also undermines hopes for reconciliation:

I do not know whether the ICTY is an institution that is supposed to work on the reconciliation issues, but if it is, then I do not see how it deals with such issues when all war criminals ... are not being equally apprehended and accused. *(Banja Luka)*

The perception of bias is applied in two directions: first, it is applied to a general critique of the legitimacy of the ICTY, especially as a support that negates the legitimacy of the Tribunal because of what appear to be its political motivations. Often, this is tied to the perception that a permanent global criminal court, such as the International Criminal Court (ICC), would be more legitimate than an *ad hoc* body like the ICTY:

It was very clear, from the beginning of its existence, that the tribunal is an illegal institution... [the] tribunal is going to create a new conflict by using the inappropriate terminology during its proceedings (war criminals, capture, arrest, kidnap...). This court should be dissolved since the new international court has been established... We can see that the tribunal has only one goal and that is to accuse only one national group for the genocide and create a negative stereotype of that group...the only solution is the ICC.

*(Banja Luka)*

Other respondents tie the critique of perceived bias to concrete demands on the Tribunal, especially the demand that it prosecute violations committed by NATO during its bombing campaign in Serbia and Kosova in 1999:

If Hague Court accepted to look into NATO's crimes, it would be seen as balanced, but its dismissal of crimes was detrimental to the notion of an independent court. *(Belgrade)*

Having NATO's actions examined would increase my trust in the ICTY. They are completely immune. Even examining their behaviour is impossible. I wouldn't believe my eyes if I were to see that happen. *(Novi Sad)*

Here it might be observed that the perception of bias relies at least as much on local press coverage which emphasizes charges against members of a particular group as it does on an assessment of the balance of indictments filed or convictions obtained. In that sense, this is a clear instance in which effective publicity on the part of the ICTY could have an effect on the way the institution is perceived.

### ***C. The ICTY creates new conflicts***

Another line of critique directed at the ICTY is that its engagement fails to resolve political conflicts in the region, and may in fact contribute to their prolongation. One version of this critique argues that to the degree that people accused of crimes represent political movements which remain popular in one place while they are regarded as criminal another, prosecutions simply serve to intensify existing conflicts:

Those who are accused and are being prosecuted in the ICTY are heroes for one side and war criminals for the other. *(Banja Luka)*

Another line of critique argues that a consequence of high-profile prosecutions, the prosecution of Slobodan Milošević in particular, has been to offer continuous publicity and media presence to the accused. This attention has the effect of promoting the version of events which is offered in cross examination and defence statements:

The way they are dealing with Milošević is unproductive. They are turning him into a hero. (*Belgrade*)

I wanted the Tribunal to teach this nation something, but the results are what Milošević wanted. (*Belgrade*)

At least one new indictment has had the effect, probably unintentional, of keeping debates over the legitimacy of the Tribunal and the desirability of official cooperation with it alive. On 20 October 2003, the ICTY released an indictment against four high ranking military and police officers for crimes in Kosovo.<sup>122</sup> The indictment charged the four on the basis of “joint criminal enterprise” and command responsibility rather than direct participation in criminal activity, and included a police commander on active duty, Sreten Lukić.<sup>123</sup> The indictment was widely criticized by government officials as an ill-timed and unwelcome intervention into the pre-election campaign, and unified nearly all parties in their rejection of it. Prime Minister Živković openly speculated in an interview that the ICTY was actively contributing to the popularity of the parties of the former regime, and accused ICTY prosecutor Carla Del Ponte of “unconsciously participating in the elections on the side of Šešelj and Milošević.”<sup>124</sup> Whether Živković’s provocative charge is a fair assessment or an effort to manipulate anti-ICTY sentiment, it points to a background fact which has remained unchanged: the Tribunal is not universally regarded as the ally of reformist political forces.

#### ***D. The Hague Tribunal undermines local courts***

Some respondents argued that the ICTY’s exercise of its “primacy” over domestic courts deprives domestic courts of the ability to contribute to the prosecution of crimes committed during the period of conflict, and also limits the ability of legal institutions to explore connections between

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<sup>122</sup> The four officers charged were former military chief of staff Nebojša Pavković, former Priština Corps commander Vladimir Lazarević, former public security chief Vlastimir Djordjević, and Djordjević’s successor Sreten Lukić. The indictment had been issued on 22 September, but was unsealed on 20 October. On the ICTY website, see documents relating to Pavković *et al.* (IT-03-70).

<sup>123</sup> Lukić was dismissed from his post in March 2004, on the assumption of power of a new government in Serbia.

<sup>124</sup> Unsigned, “Zapad delimično snosi krivicu za popularnost ekstremista,” *B92 vesti dana*, 4 December 2003.

violations committed in an international context and crimes committed within the borders of states:

....while some [of the high-placed accused may be] tried in international courts, other executors and criminals should be tried in national courts. (*Banja Luka*)

After 1998, the ICTY refined its approach to focus its indictments on major violators and figures who held high military or political authority, though its early cases against low-level perpetrators remain as precedents. Also, since all of the countries of the region had elected post-war governments by the end of 2000, the capacity for legitimate domestic prosecutions has probably increased, though this capacity has not been realized everywhere.

All of the crimes which the ICTY has the authority to charge people with were also crimes under the Criminal Code of Yugoslavia, and remain crimes in the successor states: war crimes, crimes against humanity, and genocide. Domestic Criminal Codes also include some potential charges which the ICTY does not have the authority to level, such as promoting ethnic and religious hatred, aggression, and crimes against peace.<sup>125</sup>

### ***E. Process inefficient/unfair***

Respondents directed many critiques to the functioning of the ICTY in trials, especially in relation to its most prominent case, the prosecution of Slobodan Milošević. Criticisms were mostly directed to the perceived lack of fairness and efficiency in the proceedings, but there were some critiques directed toward the theory of prosecution too, which was viewed by some respondents as overly ideological in character:

There have been a lot of blunders that undermined its perception here. For example, the indictment against Milošević and the opening of the trial. The Greater Serbia argument is too exaggerated and there are some factual mistakes. This is not helpful for a legal case. (*Belgrade*)

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<sup>125</sup> A detailed summary of the state of domestic law and the condition of the application of that law is offered by Vojin Dimitrijević (ed.), *Ljudska prava u Jugoslaviji 1999*. Belgrade: Beogradski centar za ljudska prava, 2000.

The members of the court behave with a “communist mindset” [anti-communism feeling.] He said that they are arrogant and want to “shape people’s minds.” Rather than doing that, however, they simply sound pathetic. (*Belgrade*)

The opening statements of the prosecutors in Milošević’s trial were worse than anything and extremely harmful. (*Belgrade*)

Other critiques were directed at the slow pace of the procedure and the quality of evidence put forward by the OTP:

The way in which tribunal is functioning is a too long of a process and it takes too much time. (*Banja Luka*)

Most of the witnesses that I’ve seen are not good witnesses. If it’s the best they can get, they should put a lock on The Hague... (*Belgrade*)

The fact that they don’t have anything [in the Milošević case] shows that the court is run by political pressure. They need evidence and clearly don’t have it...A lot of people need to be there and aren’t there. (*Novi Sad*)

I generally have confidence in the ICTY, but it needs to be more effective and fast. It’s not well organized and doesn’t have hard evidence. (*Belgrade*)

Added to the perception that OTP has not handled cases in its care with the rigor or precision expected of it is the sense that the office operates as a relatively closed unit, which is not receptive to submissions of evidence or charges from domestic authorities:

Once someone or some local association collects documents against a certain war criminal, the tribunal rejects it with explanation that there are too many documents or too many pages in that charge/accusation. (*Banja Luka*)

The general effect of such critiques has been to undermine the expectation that the ICTY dispenses justice in a reliable or even-handed manner.

***F. The ICTY is not human rights sensitive***

A further procedural critique of the ICTY is related to its treatment of people under its supervision. In relation to prisoners, respondents mentioned the long waits for trials and conditions both in the detention facility and for families of accused individuals:

The treatment of prisoners while waiting to be tried [and that means that prisoners are waiting too long in the prison before the actual beginning of his/her trial] is against human rights. (*Banja Luka*)

The ICTY is not even thinking about families of accused war criminals and are not offering any sort of help to them. (*Banja Luka*)

***G. The tribunal serves its own interests***

The motivations for establishing the ICTY, and consequently the legitimacy of the ICTY, remain matters of controversy in the states over which the Tribunal has oversight. The perception that it was established as a body directed against one party to the conflict was discussed earlier. The perception also exists that the ICTY was established as a symbolic expression of concern, and was never intended to carry out its charge seriously. The lack of completeness of the Tribunal's work is then attributed to this equivocal motivation:

The establishment of the tribunal was a way to clean the international community's conscience-but if there was any sort of conscience to start with, there wouldn't be a need to clean it up!- so they thought: OK, since it happened, let's try to help out now. The idea did not come from the brains of law and justice experts, but the idea [to create the tribunal] came from the high level politics. And that same politics is the reason why Ratko Mladić and Radovan Karadžić are not captured... (*Sarajevo*)

Other critiques are directed at the legitimacy of the ICTY as an *ad hoc* institution, a status which is regarded as suspect in itself. The view offered is that since a permanent international body has

been established in the form of the International Criminal Court (ICC), a tribunal with only local and temporal authority is no longer legitimate:<sup>126</sup>

Since ICC has been created, the ICTY should cease to exist. (*Banja Luka*)

The question is then raised as to why indictments continue to be filed and trials continue to be held. One answer that is offered refers to the logic of institutional self-preservation:

The tribunal is intentionally creating work for itself. Why would I cut the tree branch on which I am sitting?! (*Banja Luka*)

Taken together, these perceptions direct attention once again to the conflict between the approach of international legal professionals who regard the question of the ICTY's legitimacy as a matter which has been legally settled, and the approach of local observers who continue to regard the ICTY as politically open to question.

#### ***H. The ICTY as entertainment***

While one of the goals of the ICTY's trials has been to create a public record which would provide a resource to historians, and also to put on public trials which would familiarize domestic audiences with the facts of the cases, in practice this goal has been difficult to achieve. Publicity for the Milošević trial has been achieved largely by live broadcast of the proceedings, which was widespread and continuous at the beginning. Now that the trial is entering its third year, however, coverage has been sustained only by Serbia's B92 television network. It has been noted above, as well as by other observers, that one effect of this has been to provide a platform for the accused to broadcast their version of events. Another effect noted by some respondents has been the trivializing of the proceedings by reducing them to level of entertainment:

I do try to watch Milošević's trial. It's funny. It's like a sport. Milošević is winning now.

It's not relevant and it is too politicized.

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<sup>126</sup> The ICC does not have jurisdiction over violations committed before the Rome Statute of the court came into force on 1 July 2002.

There is too much a fuss about it and it looks like a TV show. I watch it from time to time.... I am not thinking much about it because it doesn't affect me personally.  
(Belgrade)

To the degree that live broadcast of the ICTY's proceedings represents just one more television offering among several, its perceived importance and gravity are blunted.

### ***I. A lack of communication between the ICTY and domestic counterparts***

One basic condition which would allow the ICTY to establish its legitimacy domestically would be to establish lines of communication with local audiences. This would allow it to explain its goals and procedures to local publics, and also allow the Tribunal to receive and exchange information locally. It is the perception of many respondents that the ICTY has not succeeded in establishing productive relationships with local institutions and local legal professionals:

The Hague needs to educate lawyers in this region about the laws and judicial system that the Tribunal uses. Media outlets need to report about positive happenings that are contributing to the reconciliation process. The Tribunal needs to create a balance and to have almost equal number of war criminals from all three ethnic groups...the Tribunal needs to be more transparent...the Tribunal needs to dissolve because they are just spending more money and time, in vain...the Tribunal needs to disappear because it is becoming a circus...the reconciliation needs to be clearly defined...there is a need to have more discussions like this, particularly about corruption...since the ICC has been formed and accepted, the Hague Tribunal should close its doors. (Banja Luka)

The critiques offered regarding the failure of the ICTY to establish lines of communication and perceptions of legitimacy among local audiences is echoed in a 2000 interview study of judges and prosecutors in Bosnia-Herzegovina, which found that respondents showed low levels of understanding of the ICTY's unique procedures and low levels of trust in the institution.<sup>127</sup>

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<sup>127</sup> *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*. Human Rights Center/International Human Rights Law Clinic—University of California-Berkeley and Centre for Human Rights—University of Sarajevo, May 2000.



Our focus group research suggests continuing difficulties faced by the ICTY in establishing its legitimacy in the states over which it exercises oversight. Only some of these problems derive from pre-existing political orientations in support of the parties which organized and carried out violations of international humanitarian law. Other problems are more closely related to the ICTY's own procedures, to a lack of clarity regarding the purposes of the ICTY, and to the issue of communication between the ICTY and its local publics.

## APPENDIX 6:

### *The ICTY's impact on the Treatment of Wartime Rape and Sexual Violence under International Law*<sup>128</sup>

*Julie Mertus*

One area in which the ICTY has had great impact is on the treatment of rape and wartime sexual assault under international law. Although their approaches varied, women's human rights advocates made central to their campaign before the ICTY the explicit recognition of rape as a violation of international law and not a mere by-product of conflict. In some circulated drafts of the ICTY statute, rape and sexual violence were treated as affronts to personal dignity and honor – a reference to earlier formulations under humanitarian law.<sup>129</sup> Catherine N. Nicarchos underscores many of the pitfalls in linking rape and honor:

First, reality and the woman's true injury are sacrificed: rape begins to look like seduction with "just a little persuading" rather than a massive and brutal assault on the body and psyche. As reports from the former Yugoslavia indicate, violations of honor and modesty are wholly inadequate concepts to express the suffering of women raped during war. Second, by presenting honor as the interest to be protected, the injury is defined from society's viewpoint, and the notion that the raped woman is soiled or disgraced is

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<sup>128</sup> The number one opposition in the Scholars' Dialogue to including a study on the ICTY is that the work of an ad hoc tribunal of this nature is an "aberration" and is "meaningless." We included Appendix A to provide evidence of an area in which the ICTY has made a long-lasting contribution. This Appendix is drawn from a monograph by Julie Mertus and Olja Hocevar, [Women's Participation in the International Criminal Tribunal for the Former Yugoslavia \(ICTY\): Transitional Justice for Bosnia and Herzegovina](http://www.womenwagingpeace.net/content/articles/BosniaFullCaseStudy.pdf) (Inclusive Security: Women Waging Peace Policy Commission Report) Available at: <http://www.womenwagingpeace.net/content/articles/BosniaFullCaseStudy.pdf>

<sup>129</sup> For example, Article 46 of The Hague Regulations of 1899 and 1907, requires respect for "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice." Convention Respecting the Laws and Customs of War on Land, Annex of Regulations, art. 46, 18 Oct. 1907, 36 Stat. 2277, 2306-07, 1 Bevans 631, 651 The Fourth Geneva Convention of 1949 incorporates these concepts in a provision giving women special protection against rape. Article 27 states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, opened for signature 12 Aug. 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 (Geneva Convention IV).

resurrected. Third, on the scale of wartime violence, rape as a mere injury to honor or reputation appears less worthy of prosecution than injuries to the person.<sup>130</sup>

More modern humanitarian law, as reflected in the 1977 Protocols to the Geneva Conventions, reflects a slightly more enlightened approach, using the term dignity instead of honor.<sup>131</sup> This formulation, however, is still troubling for women's human rights advocates. "[A]lthough dignity is a more germane referent than honor, it does not adequately express the fact that sexual assault is a violent crime; indeed, the Protocols *distinguish* sexual assaults from crimes of violence."<sup>132</sup> Through their advocacy around the ICTY, advocates did not seek to deny that rape is a violation of dignity. Rather, they sought to underscore that rape is primarily a physical assault and hence an explicit violation of humanitarian law.

In general, women's human rights advocates took a two-pronged approach to the inclusion of rape and sexual violence in the ICTY statute. On the one hand, many advocates sought to have rape and sexual violence prosecuted as a form of the most serious of crimes such as genocide, torture, enslavement, and mutilation. At the same time, many advocates pushed for a separate section that would specify that rape and sexual violence should be prosecuted as serious forms of violence. While some advocates pursued both tracks simultaneously – "to cover all bases and make sure that rape appeared somewhere" – in general advocates were divided between the two approaches. Ultimately, all approaches won out as all are reflected in various portions of the ICTY statute and practice. This appendix outlines some of the areas in which the ICTY has proven to be a landmark for women's human rights advocates and provides specific examples of success in ICTY cases.

### ***Recognition of rape as a war crime***

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<sup>130</sup> Catherine N. Nicarchos, "Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 17.4 (1995) 649-690.

<sup>131</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(2)(b), opened for signature 12 Dec. 1977, 1125 U.N.T.S. 3, 37, 16 I.L.M. 1391, 1423 (1977) (emphasis added) (hereinafter Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2)(e), opened for signature 12 Dec. 1977, 1125 U.N.T.S. 609, 612, 16 I.L.M. 1442, 1444 (1977)(Protocol II).

<sup>132</sup> Nicarchos, *supra* at 676.

The Tribunal's subject matter jurisdiction is set forth in four articles, giving it jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). Advocates were successful with respect to its demand that rape be named as a crime against humanity. Thus, Article 5 defines crimes against humanity in armed conflict as “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts.”<sup>133</sup> The term “rape” was still omitted from both Articles 2 and 3, the provisions relating to grave breaches of the Geneva Conventions and war crimes. This was problematic because rape could be prosecuted as a crime against humanity only when committed as part of a widespread or systematic attack directed against a civilian population.<sup>134</sup>

Over time, however, the omission of the term “rape” from Articles 2 and 3 proved to present few difficulties for prosecutors. In practice, the Office of the Prosecutor adopted the approach that sexual violence could be prosecuted not only as crimes against humanity but also under the other provisions of the statute – genocide, grave breaches and violations of the laws and customs of war. Increasingly, the practice of the prosecution is to charge violations of laws or customs of war under article 3 of the Statute instead of grave breaches under Article 2. “The reason for this,” Kelly Dawn Askin observes, “is that Article 3 charges do not require the prosecution to undertake the lengthy process of proving that the armed conflict was international in character at the time and place of the crimes alleged in the indictment.”<sup>135</sup> This strategy has allowed for more successful sexual violence cases.

### ***Expanded liability***

Advocates also played a role in the ICTY's incorporation of an expanded notion of liability for rape and sexual violence. Under the Statute, individual liability may be imposed on any person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime."<sup>136</sup> Command responsibility applies if a superior "knew or

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<sup>133</sup> Article 5,

<sup>134</sup> ICTY Statute, Art. 5.

<sup>135</sup> Kelly D. Askin, “Reflections on Some of the Most Significant Achievements of the ICTY,” *New England Law Review*, (Summer 2003).

<sup>136</sup> Statute, art. 7(1).

had reason to know" that a subordinate was about to commit a crime or had committed a crime and failed to take reasonable measures to prevent the crime or punish the perpetrator.<sup>137</sup> The ICTY has interpreted its statute to mean that an accomplice is guilty if "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident," and that guilt extends to "all that naturally results" from the act.<sup>138</sup> Under these principles of liability, guilt may be assigned to attackers who claim to be acting under orders, to persons who "aid and abet" a rape through taunts or other provocations, and to persons in authority who fail to take action to prevent rape or to punish those responsible.

### *Improved rules of evidence and procedure*

Article 15 of the ICTY Statute made it the duty of the ICTY judges them to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses, and other appropriate matters."<sup>139</sup> Judge Gabrielle Kirk McDonald played a central role in the formulation of rules that would protect women's interests. Largely as the result of her efforts, which were supported by women's human rights advocates, the ICTY adopted important rules of procedure and evidence to protect and counsel victims of sexual crimes and to ensure proper handling of sexual crimes during trials. As noted by Gender Legal Advisor Patricia Viseur Sellers, "the Rules [of Procedure and Evidence of the ICTY] offer the strongest evidence of the [ICTY's] specific intent to investigate, prosecute, and adjudicate sexual assaults."<sup>140</sup>

The rule related to evidence in sexual assault cases, Rule 96, is revolutionary in its approach to evidence of rape and other sexual crimes. Rule 96 provides that in cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;

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<sup>137</sup> Id. art. 7(3).

<sup>138</sup> Ratner, Yale 2001

<sup>139</sup> The Statute is contained in the Annex to the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary- General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704, Annex (1993), reprinted in 32 I.L.M. 1192 (1993) [hereinafter Statute].

<sup>140</sup> Cite to article [JM—Do you have the citation?]

- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted in evidence.<sup>141</sup>

Three other procedural rules apply generically to all crimes but have particular pertinence to rape and sexual violence cases. These rules permit:

- The prosecutor to seek an order preventing disclosure of the identity of a victim or witness during the investigative stage;<sup>142</sup>
- Deposition evidence in exceptional circumstances, which will spare some victims and witnesses the burden of traveling to The Hague;<sup>143</sup>
- The Tribunal to order additional measures before or during trial for the privacy and protection of victims and witnesses, such as expunging names from the public record, nondisclosure to the public of identifying information, closed sessions, and testimony through closed-circuit television and image- and voice-altering devices.<sup>144</sup>

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<sup>141</sup> The ICTY Rules of Procedure and Evidence entered into force on 14 March 1994, and have been amended three times on 5 May 1994, 4 October 1994, and 30 January 1995. 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, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.3 (1995), reprinted in 33 I.L.M. 484, amended, 33 I.L.M. 838 (1994), amended, 33 I.L.M. 1619 (1994).

<sup>142</sup> Rule 69.

<sup>143</sup> Rule 71.

<sup>144</sup> Rule 75 provides, in part:

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

Rule 34 of the Rules of Procedure and Evidence provide for the creation of a Victims and Witnesses Unit within the Registry, the Tribunal's administrative organ. The explicit purpose of this Unit to "provide counseling and support for [victims and witnesses], in particular[,] in cases of rape and sexual assault."<sup>145</sup> In the creation of such a unit, "due consideration shall be given, in the appointment of staff, to the employment of qualified women."<sup>146</sup> The Unit may provide care for children and dependent persons, support for accompanying persons, relocation of witnesses, and attendance allowances, flat fees paid to witnesses for costs incurred from being absent from home.

### *Case examples*

Under these rules of procedure, the ICTY delivered several landmark decisions expanding the understanding sexual violence under international law. The notion that a person can be convicted for having encouraged crimes of sexual violence, even if they did not participate directly, was confirmed early on in the Tadić case, the first trial to be conducted by the ICTY.<sup>147</sup> Duško Tadić, a Serbian and former cafe owner, was brought to the Tribunal for his alleged participation in the repeated beating, rape, murder, and torture of detainees at the Omarska, Keraterm, and Trnopolje detention camps in Bosnia-Herzegovina. In that case, the charges of aiding and abetting the rape of a female detainee were dropped after the victim eventually refused to testify for fear of reprisal and the testimony of the corroborating witness was discredited. Nonetheless, the case remains a significant precedent for gender violence in wartime as Tadić was eventually convicted of aiding and abetting the sexual mutilation of a male prisoner.

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(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image- or voice-altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions in accordance with Rule 79 [to ensure "safety, security or nondisclosure of the identity of a victim or witness"];

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid harassment or intimidation.

<sup>145</sup> Rules Revision 8, *supra* note 13, rule 34(A)(ii).

<sup>146</sup> *Id.* rule 34(B).

<sup>147</sup> Indictment, *Prosecutor v. Tadic*, Case No. IT-94-1 (Feb. 13, 1995), <http://www.un.org/icty/indictment/english/tad-ii950213e.htm>, amended by Case No. IT-94-1-T (Sept. 1, 1995), <http://www.un.org/icty/indictment/english/tad-1ai950901e.htm>, amended by Case No. IT-94-1-T (Dec. 14, 1995), <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm> [hereinafter *Tadic Indictment*].

In reaching its decision, the Trial Chamber reasoned that sexual assault constituted the war crime of inhumane treatment and was a grave breach of the Geneva Conventions.<sup>148</sup> The Trial Chamber also affirmed that rape was a war crime even when committed by non-state actors and in non-international armed conflict. Significantly, the case also highlighted the prevalence of male-on-male sexual violence in wartime. According to Gabrielle Kirk-McDonald, however, the importance of the case “from a broader perspective, ... is that the Tadić trial gave the Tribunal the first opportunity to apply the rules it crafted especially the rules of evidence - in a way that protected the accused’s right to a fair trial, thereby demonstrating that international criminal justice was possible.”<sup>149</sup>

The issue of wartime rape was addressed again in the Čelebići case where four men were charged with Čelebići with “participation in atrocities at the Čelebići prison camp, where officials “killed, tortured, sexually assaulted, beat and otherwise subjected [detainees] to cruel and inhuman treatment.”<sup>150</sup> Among other holdings, the Trial Chamber convicted one of the accused of war crimes and grave breaches of the Geneva Conventions for forcing male inmates to perform fellatio and other sexually humiliating acts on each other, finding that such conduct constituted “at least, a fundamental attack on . . . [the victims’] human dignity.”<sup>151</sup> The Čelebići case is noteworthy not only for recognizing wartime rape as torture under the facts of that case, but for establishing a rationale for wartime rape as torture in all cases, whether committed against men or women.<sup>152</sup>

To prove torture, one must show that the act in question (i.e., rape or other inhumane treatment) was inflicted for some designated purpose other than the act itself. The judges in the Čelebići case reasoned this requirement that the act be inflicted for a designated purpose is satisfied in a rape case because violence directed against women is discrimination. This understanding of rape as discrimination against women did not come out of nowhere. Women’s human rights advocates had laid the foundation for the argument, which had been taken up and promoted by the Gender Advisor in the Prosecutor’s Office.

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<sup>148</sup> Opinion and Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T (May 7, 1997), <http://www.un.org/icty/Tadic/trialc2/judgment-e/tad-tj970507e.htm>.

<sup>149</sup> Gabrielle Kirk McDonald, “The International Criminal Tribunals: Crime And Punishment in the International Arena,” *ILSA Journal of International and Comparative Law* Summer, 2001, p. 668.

<sup>150</sup> Čelebići Judgment, *supra* note 5, para. 1019 (quoting Čelebići Indictment, *supra* note 59), and para. 1060 (quoting Čelebići Indictment, *id.*).

<sup>151</sup> Čelebići, Judgment, Case No. IT-96-21, at para. 1066.

<sup>152</sup> Judgment, *Prosecutor v. Delalić*, Case No. IT-96-21-T (Nov. 16, 1998), <http://www.un.org/icty/celebici/trialc2/judgment/main.htm>. (Čelebići case)



In the Furundžija case, Anto Furundžija was found guilty of violations of the laws or customs of war on the basis of command responsibility for his role in the rape of a woman in the village of Nadioci. The trial court found that Furundžija failed to intervene in any way while a woman that he was interrogating was "forced . . . to have oral and vaginal intercourse" with a subordinate officer.<sup>153</sup> Responding to the arguments of women's human rights advocates about the systemic nature of wartime rape, the Furundžija case made three significant contributions to international jurisprudence. First, it recognized that sexual violence was not only torture, but also that sexual violence could constitute acts of genocide.<sup>154</sup> Second, the Furundžija case also found that coercion - which the Trial Chambers in Čelebići had found is inherent in armed conflict - exists whether directed to the victim or to third parties. Finally, the Furundžija case set forth a broad definition of rape that unequivocally encompassed oral sexual acts.<sup>155</sup> Building on the momentum of the earlier cases, Kunarac was the first international criminal case against perpetrators convicted exclusively for sexual crimes, and the first international judgment in which the offence of enslavement has been applied to the practice of female sexual slavery.<sup>156</sup>

## ***Conclusion***

Just as the Tribunal serves as a set of cautionary reminders on "how not to make an international justice mechanism," it also provides positive examples of "how to do it right." One of the major successes of the ICTY has been the inclusion of women in positions of power and the inclusion of women through all stages of the processes. Yet beyond the significant gains made in the area of rape and sexual violence, the women who served on the tribunal staff as investigators, prosecutors, defence attorneys, counsellors and judges – as well as the women who were witnesses and who played other supportive roles – have had a tremendous impact on international justice. As Gabrielle Kirk-McDonald notes the most far-reaching contribution of the ICTY, is that its establishment:

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<sup>153</sup> Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1, paras. 39-41, 44-46 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgment/fur-tj981210e.htm>.

<sup>154</sup> Judgment, Prosecutor v. Furundžija, Case No. IT-95-17/1T (Dec. 10, 1998), <http://www.un.org/icty/Furundzija/trialc2/judgment/main.htm> [hereinafter Furundžija Judgment].

<sup>155</sup> Trial Chamber defined rape as:

(i) [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person. Id. at para. 185.

<sup>156</sup> For a full discussion of this case, see *infra* pp. \_\_\_\_ - \_\_\_\_ (JM—do you have the citation?).

...signalled the beginning of the end of the cycle of impunity. Those responsible for committing or ordering the commission of horrific acts of violence against innocent civilians, simply because of the happenstance of their birth, their ethnicity, their religious beliefs, or their gender, are now for the first time being called to account for their criminal deeds.... The [ICTY has] also demonstrated that the rule of law has been an integral part of the peace process; expanded the jurisprudence of international humanitarian law; raised the international community's level of consciousness regarding the need of states to enforce international norms; and accelerated the development of the permanent International Criminal Court.<sup>157</sup>

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<sup>157</sup> Gabrielle Kirk McDonald, "The International Criminal Tribunals: Crime and Punishment in the International Arena," *ILSA Journal of International and Comparative Law* Summer, 2001, p. 663.

## APPENDIX 7:

### *The ICTY in the Serbian media*

*Mikloš Biro*

Serbian media reports about the Tribunal, and their influence on public opinion in Serbia, can be examined in three different periods.

During the first period, that coincides with Milosevic's rule (until October 2000), the majority of media transmitted THE negative attitude of the regime towards the Tribunal as an "anti-Serb institution". Rare exceptions were the independent electronic media gathered around the Association of Independent Media (ANEM) and the daily newspaper *Danas*. Although the influence of the independent media was not negligible, the state media (especially state TV) had a dominant influence on creating public opinion<sup>158</sup>. That fact, as well as the authoritarian nature of the regime, where it is dangerous to think and speak contrary to the official politics, contributed to the mostly negative attitude of Serbian citizens towards the Tribunal at the time<sup>159</sup>.

During the rule of the DOS coalition (October 2000—fall 2003) among the creators of public opinion (political and national leaders, the main media) some disputes appeared, but not for long. The general opinion prevailed that the majority attitude of the Serbian public towards the Tribunal was negative, and that it was politically non-pragmatic to "poke in the eye" potential voters by standing for cooperation with the Tribunal. It should be emphasized here that the majority of public opinion polls showed that 20-30% of the population took a "hard" anti-Hague position, which coincides with the percentage of citizens with "hard" nationalist attitudes, while the joint percentage of "hard" and "soft" opponents of the Tribunal always remained under 50%. On the other hand, it is a fact that "hard" supporters of the Tribunal hardly achieved 10-15%, while all the others were undecided or refused to answer ("I don't know," "I don't wish to answer"). Thus, in numbers, the opponents of the Tribunal were dominant in Serbia, but psychological analysis shows that this could be a simple consequence of "socially desirable" answers. This "social desirability" was undoubtedly the result of the messages sent by the creators of the public opinion.

Among these, one of the most important was Vojislav Koštunica, who, in the beginning of that period, had undoubtedly the greatest credibility among the leaders of DOS. In many

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<sup>158</sup> See for example: Biro, M., Logar-Đurić, S., Bogosavljević, S, "Politički uticaj državnih i nezavisnih televizija u Srbiji", *Nova srpska politička misao*, 6 (2000): 1-2, 227-242.

<sup>159</sup> More than 60 per cent of the population in Serbia were convinced that "the ICTY did not offer justice", while only 8.9 per cent could remember any ICTY trial or sentence (Biro et al., "Politički uticaj").

statements about the Tribunal he expressed attitudes that ICTY is a political, and not a legal institution<sup>160</sup> (that sounded even more convincing coming from a distinguished professor of Law); that ICTY is biased against the Serbs;<sup>161</sup> and that it is an instrument of the USA.<sup>162</sup>

In the media from this period there is still a visible division. While radio and TV B92, as well as the daily *Danas* reported much more about war crimes, and reported objectively about the work of the Tribunal, “liberated” state media gave equal time to pro and contra arguments about the ICTY, mostly in the form of a dialog between the two sides. As in the previous period, there was a dramatic lack of information about war crimes, which should naturally give arguments in favor of the Court that prosecutes those crimes. A typical example is the state TV, which on the 6<sup>th</sup> of October (the first day after the Milošević regime was brought down) started the broadcast of a serial about Serbian crimes in Srebrenica, but due to “public pressure” abandoned the series after the first showing. Throughout these three years more data about the war crimes of the Serbian side was offered to the citizens of Serbia only in two instances—during and after the arrest of Milošević, when facts about Kosovo crimes were presented (the truck full of bodies found in Danube river near Tekije, etc.) and during and after the arrest of General Šljivancanin, when facts about the crime in Vukovar were presented. It should be emphasized that the facts about crimes were systematically published both in the publications of the Fund for Humanitarian Law (who published facts about crimes in Kosovo even during the NATO intervention, which

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<sup>160</sup> The announcement of the Cabinet of the President of the SRJ after the meeting between Del Ponte and Koštunica, (01/24/2001, [http://www.medijaklub.cg.yu/zanimljivi/zanimljivi%202001/januar/23 1. htm](http://www.medijaklub.cg.yu/zanimljivi/zanimljivi%202001/januar/23%201.htm)) stated that: “Koštunica made a critique of the way that Tribunal was formed, the way it created its rules, the problem of secret indictments and the political engagement of the Tribunal, especially pointing to the danger of selective justice, i.e. breaking of one of the basic principles that justice has to be the same in the same or similar cases. Yugoslav president also pointed to the danger that the indictments towards most of Serbian political and military leaders, as well as the fact that there is the greatest number of indictments against the Serbs, can be understood as attribution of collective guilt to one nation, though Tribunal is formally insisting on the individual nature of responsibility.”

<sup>161</sup> During the meeting with Prosper, Koštunica “presented facts which show the Tribunal’s selective justice,” adding that the number of indictments and the indicted’s rank indicate that The Hague tribunal blames the Serbian side for the majority of the crimes. Kostunica emphasized that there were no indictments for crimes committed against the Kosovo Serbs, adding that this is why The Hague tribunal does not enjoy the trust of the Yugoslav public (*Beta*, 01/22/2003, [http://www.mfa.gov.yu/Policy/Bilateral/USA/activities\\_e/230103\\_e.html](http://www.mfa.gov.yu/Policy/Bilateral/USA/activities_e/230103_e.html)).

<sup>162</sup> In an interview for daily newspaper *Danas* (03/03/2001. <http://home.drenik.net/kovlad/Danas.%20V.%20Kostunica%20intervju.htm>) Koštunica said: “I think that the need for The Hague Tribunal is coming from the political philosophy of the Clinton administration. We are talking about something that has a lot of elements of democratic totalitarianism and is an attempt to promote US interests in every part of the world and to protect and impose them in not only material, but also ideological matters.” Also, he expressed similar idea to the weekly *Vreme* (# 548, 07/5/2001. <http://www.vreme.com/cms/view.php?id=291433>): “... justice that this Court is dealing is selective, Hague court is biased, and this court is in fact barely a court. It is not international, though it has that title. It is practically a court of certain powers and certain interests, more American than international.”

was considered to be the treason at the time!<sup>163</sup>) and the Helsinki Committee for Human Rights in Serbia. Unfortunately, the outreach of those publications was very limited indeed.

Most data about Serbian war crimes appeared starting from the fall of 2003 up until today. In that period facts about Srebrenica, Vukovar, Eastern Bosnia and Kosovo finally appeared, not only on state TV, but also on the most popular private TV *stations*—*Pink* and *BK*, as well as in the daily newspapers *Blic*, *Politika* and *Novosti*. This change has little to do with the change in ruling elite (the coalition lead by Vojislav Koštunica and his DSS was in power), but more with the pressure of the USA and the EU (and probably also foreign donors to the media, who conditioned their donations with changed attitudes towards the Tribunal). However, still almost nothing was said about the nature of the ICTY, the way it operates, its main goals and its significance.

Generally speaking, throughout the existence of the ICTY in Serbia the idea about its “political and not legal” nature was dominant. It is interesting that the only arguments based on the science of Law to support this thesis came from Kosta Cavoški<sup>164</sup>, who tried to prove in several pamphlets the “illegality” of the ICTY. He disputed the legal basis of the ICTY by pointing to procedural problems during its establishment, the fact that it created its own Rules, and the fact that the prosecution has a disproportionately large influence on the work of the Tribunal<sup>165</sup> (later, these claims were additionally argued by other authors, but their essence remained unchanged.)<sup>166</sup>

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<sup>163</sup> Unfortunately, even after the downfall of Milošević regime, pointing to Serbian war crimes was treated as an “anti-state activity.” For example, we will cite two statements from Vojislav Koštunica: “We do not think only about the trade that coincides with certain dates and ultimatums from abroad, I suppose with the Donor conference, but simply of a politically not *especially* important, but very much articulated through the media and loud part of our public which profited on the story about crimes made only on one side, and especially on the glorification of The Hague Tribunal. Many careers were made on this and huge amounts of money hoarded.” (*Vreme*, # 519, 12/14/2000. [http://www.vreme.com/arhiva\\_html/519/08.html](http://www.vreme.com/arhiva_html/519/08.html)); “I wish to say that this conditioning or praise and glorification of the Hague Tribunal often comes from within the country, sometimes from lack of knowledge, sometimes from ignorance, sometimes from some kind of servility towards the foreign world, and sometimes because of internal calculations and all that.” (Radio B92, 02/01/2002. <http://www.b92.net/intervju/2002/kostunica.php>) The measure with which ICTY is treated as an anti-Serb institution is also illustrated by the fact that, according to the news from *Borba* (03/01/2003, <http://www.borba.co.yu/politics.html>) The Hague’s Chief Prosecutor, Carla Del Ponte, was unable to pay her final respects to Zoran Djindjić. Del Ponte had originally planned to attend the funeral in a personal, unofficial visit to Belgrade to say goodbye to the slain Prime Minister, until Federal Foreign Minister Goran Svilanović advised her against the move. It is obvious that the presence of Carla del Ponte would (in the mind of Serbian political leaders) “spoil” the image of the late Prime Minister.

<sup>164</sup> Kosta Cavoški is a professor of Law at the University of Belgrade and a President of NGO «Comeetee for the Truth about Karadžić». In some of his articles he also offered a legal arguments for Radovan Karadžić's "innocence" (see, for example: <http://www.balkan-archive.org.yu/kosta/autori/cavoski.kosta/karadzic.e1.html>).

<sup>165</sup> In the article “The Hague Against Justice” (*Center For Serbian Studies*, 1996, <http://www.balkanarchive.org.yu/kosta/autori/cavoski.kosta/djukic.e.html>), he wrote: “It is usual to say that a good beginning is essential for every important job. If things begin well, there is a good chance that they will also end well. The start of the first important

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case that was presented to the International Criminal Tribunal was a complete fiasco. The case in question was that of the Tribunal Prosecutor versus Djordje Djukić. It ended disgracefully, leaving behind a sad example of serious violation of the guarantees and institutions of criminal law which are applied and respected in all civilized countries.”

And, further on (as well as in his later several other articles), he offered the “proofs” for the lack of legal foundation of the ICTY: “...the existing legal system of the UN does not provide a legal basis for it (ICTY-M.B.), nor can there ever be one. Half a century has passed since the founding of the UN, and its main political and executive body, the Security Council, has never assumed the right to found a tribunal since court jurisdiction rests on international treaties as a result of the absence of a universal legislative organ. This was clearly stated by the UN Secretary General in his report no. S/25704 (section 18) of 3 May 1993, when he said: “The approach which in the normal course of events would be followed in establishing an international tribunal would be the conclusion of a treaty by which the member states would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g. the General Assembly or a specially convened conference) following which it would be opened for signing and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all issues pertaining to the establishment of the international tribunal. It would also allow the states participating in the negotiation and conclusion of the treaty to fully exercise their sovereign will, in particular whether they wish to become parties to the treaty or not... Since no such tribunal had ever been established before by the Security Council, it would have been appropriate to find some sort of legal basis in order to avoid the inference that might is right.” And, he concluded: “... by awarding the International Tribunal primacy over the prosecution of crimes committed on the territory of the former SFR Yugoslavia, it (the Security Council—MB) annulled the competence of all national courts world-wide.”

Discussing the way of constituting the ICTY Rules, he wrote: “To make for even greater paradox, the Tribunal took another step: having become its own legislator it then passed part of its legislative power over to the Prosecutor in order to allow him to draw up the rules he would work by. Hence, Rule 37 paragraph (A) stipulates that *the Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him.* Antonio Cassese, President of the International Tribunal, was well aware that never in the history of a civilized country had an individual court drawn up the rules by which it would pass judgment. This would be a dangerous breach of the principle of separation of powers between the legislature and judiciary which, according to Montesquieu, is an essential guarantee of freedom. Thus it could be said that the adoption of the Rules of the Tribunal in May 1995 represented an enterprise *for which there is no precedent at the international level.*”

<sup>166</sup> Vladimir Kršljanin, for example, wrote (pamphlet of the NGO *Sloboda/Freedom Association*, Belgrade, May, 2003, <http://www.icdsm.org/more/future.htm>): “When *ad hoc* tribunals are concerned, the absence of universality or rather of equality as one of the basic legal principles is contrary to the principle of sovereign equality of states as well.”

The majority of leading Serbian politicians, as well as Serbian national leaders, accepted the claim about the “political Court”<sup>167</sup> without digging deeper into the essence of the critique made of the ICTY that it could be considered from the point of view of procedure only, while disregarding questions of justice, and the importance of the Tribunal for preventing future war crimes. Furthermore, guided by this idea, some of them complained that Tribunal “has no understanding for the political situation in the country”, or that indictments from The Hague arrive “at a politically very inconvenient moment”.<sup>168</sup>

The majority of political leaders in Serbia accepted the claim that Tribunal represents a “necessary evil” and that Serbia must cooperate with The Hague because of state economic or political interests<sup>169</sup>. Thus the question of justice seems to be completely lost, while cooperation with the ICTY is treated as a plain bargain in the common interest.

The first serious discussion about the nature of war crimes was lead in the weekly *Vreme*, while the war still raged on, between this author and Petar Kostić, a lecturer at the Military Academy, who in his reader stood for the thesis that killing of civilians is one of the best means of psychological warfare, and that “only fools respect Geneva conventions during warfare”. The debate continued in five editions of the newspaper, and several other authors joined in.<sup>170</sup>

<sup>167</sup> For example, giving the interview for the Open Studio programme of the Russian state television channel (<http://english.pravda.ru/accidents/2001/11/04/20073.html>), Koštunica censured The Hague Tribunal for its desire to engage in all problems and declared that “the Tribunal is destroying itself by its own methods and length of trial”.

<sup>168</sup> Serbian Prime Minister Zoran Živković (11/01/2003, [http://pinr.com/report.php?ac=view\\_report&report\\_id=106&language\\_id=1](http://pinr.com/report.php?ac=view_report&report_id=106&language_id=1)) criticized the new indictments as “a blow to reform in Serbia” and posed the following intriguing question: “Why [the indictments] today—seven days after the meeting in Vienna with the Kosovo Albanians and the international community, during a campaign for presidential elections in Serbia and when we are just about to start a debate on confidence in the government?”

<sup>169</sup> Koštunica (*Danas*, 03/03/2001, <http://home.drenik.net/kovlad/Danas.%20V.%20Kostunica%20intervju.htm>): “... the question of the cooperation with The Hague is something that represents a necessity, because we have to survive. I am aware of that, but I will never praise to heaven The Hague Tribunal. My attitude is that we should try to introduce some more justice into the great amount of injustice and selectivity of The Hague court and we have to adjust to the realities of the today’s world...” Djindjić (*Vreme*, # 551, 07/26/2001, <http://www.vreme.com/cms/view.php?id=293195>): “The extradition of Milošević was a price for the lack of activity we demonstrated in this field last months. We do not get any reward for that, we are only preventing sanctions... It was not a trade ‘Milošević for money,’ rather ‘Milošević for credibility’.” A somewhat different thesis about “national interest” in cooperation with the ICTY was presented by Drašković (*Radio B92*, 06/22/2004, [http://www.b92.net/radio/emisije/kaziprst.php?lang=srpski&nav\\_id=144114&yyyy=2004&mm=06](http://www.b92.net/radio/emisije/kaziprst.php?lang=srpski&nav_id=144114&yyyy=2004&mm=06)): “Europe and the world will turn their back on us, if we do not fulfill our obligation to the Tribunal. That is a fact number one. The fact number two is that this is our national obligation. Why? Precisely because—as I said—until the appearance of Slobodan Milošević, his Legias, Markovićs, Pavlovićs etc., we Serbs have never in history been accused for ethnic cleansing, burning down villages and cities, killing civilians, war prisoners, or political opponents with the ‘death squads’ created by the state. Therefore, by being indicted for what they are indicted, they have committed a crime towards, first of all, Serbian history and the Serbian nation, culture, tradition and, finally, the virtues of Serbian soldiers and officers.”

<sup>170</sup> *Vreme*, 10/17/1994, pp. 24-26; 10/31/1994, pp. 64-65; 11/7/1994, p. 64; 11/14/1994, pp. 62-63; 12/12/1994, pp. 62-63.

It is only much later that a number of authorized texts appeared which upheld the principle of justice and the moral aspect of punishing all war crimes<sup>171</sup>. Those discussions finally started to question the very essence of law and justice. A wider legal debate was lead about moral aspect of command responsibility<sup>172</sup>. Unfortunately, these texts were published only in low selling and rarely read media and did not influence public opinion in Serbia in a significant way.

From the point of view of public opinion in Serbia, the Tribunal missed a great chance to improve its image at the beginning of the Milošević trial. According to a survey of the media in the first week of July 2001, over one half of Serbian citizens monitored the trial of Milosevic!<sup>173</sup> Unfortunately, the approach of considering general historical circumstances at the beginning of the trial (instead of some kind of summary of the main points of the indictment) was boring enough to alienate the audience, and the decision to call as the first witness Mahmut Bakali, and ex-communist leader from Kosovo with an image as the promoter of Albanian nationalism during the 1980s, was the ideal opportunity for opponents of the Tribunal to present this as a “prime example” of the anti-Serb nature of ICTY.

The second dominant thesis used by the opponents of the Tribunal was that it is “biased against the Serbs”<sup>174</sup>. During the countdown of the number of accused and convicted in The

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<sup>171</sup> Sonja Biserko (*Bosnia report*, # 27-28, January - May 2002, [http://www.bosnia.org.uk/bosrep/report\\_format.cfm?articleid=843&reportid=153](http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=843&reportid=153)): "It is as though the Serbian public has forgotten the reasons why the Tribunal was set up. Only individuals seemingly think that refrigerator trucks and mass graves with the bodies of murdered Albanians round Belgrade, or even Srebrenica, Vukovar and Sarajevo, have anything to do with the work of the Tribunal. The Court will over time, as is its function, assist recognition of the scale of the crimes and the policies which led to them. The Hague will surely make a full investigation of specific crimes, thereby preventing the manipulations and interpretations of the war that are still operative here». Borka Pavićević (*Danas*, 07/28/2004, p. 9): "...the real question is not how did Hadžić get away, but how come that no one asked him or the public about him anything all these years? That is, would anyone remember to ask him anything, if The Hague court did not ask that?..." Ljubiša Rajić (*Danas*, 07/30/2004, p.8): "Mass civilian victims cannot be explained as individual cases of murdering civilians or war prisoners out of revenge, fear, deranged behavior, robbery or some other similar motive. If there are hundreds of civilian corpses, and if they are found in a completely different part of the state from the one they were murdered in, than people must exist that murdered them, someone ordered for them to be killed, transferred, buried and so on, and someone knew what was happening, but did nothing to stop it. That is a crime, help in committing a crime, and covering the crime."

<sup>172</sup> Answering the critiques about the legal problems of establishing command responsibility, Dragoljub Todorović (*Danas*, 07/22/2004, p. 8) cites article 7 of the Statute of the ICTY: "the commander or superior officer is not on trial because he is commander or superior officer to the person who committed a criminal act, but because he knew or had reasons to know that his subordinate will commit such an act or has already committed such an act, and his superior officer did not undertake necessary and reasonable measures to prevent such an act or punish the perpetrators."

<sup>173</sup> <http://groups.yahoo.com/group/balkanhr/message/3505>

<sup>174</sup> Koštunica (*Danas*, 03/03/2001, <http://home.drenik.net/kovlad/Danas.%20V.%20Kostunica%20intervju.htm>): "The Hague Tribunal unfortunately in the same or similar cases acts differently. I pointed to Mrs. del Ponte on several examples of the selective nature of justice of the Hague tribunal, and selective justice is not justice. As far as the accused are concerned, only the political and military leadership of SRJ and Republic of Srpska are indicted. From the leaders of other participants of the undoubtedly bloody war on the territory of former Yugoslavi, no one is mentioned before The Hague Tribunal." Koštunica (*Vreme*, # 548, 07/5/2001, <http://www.vreme.com/cms/view.php?id=291433>): "Cooperation with the court would have to include the opening of the question of not only the crimes committed by Serbs, but also the crimes committed over the Serbs in Kosovo, or in Knin krajina, or in Bosnia. Let me not even talk



Hague,<sup>175</sup> the fact that ICTY documents do not mention the nationality of the accused in order to underline individual responsibility was (deliberately) overlooked. Moreover, in order to demonstrate a disproportionately large number of Serbs indicted or convicted, the number of those convicted for crimes committed by the Serbian side included even a non-Serb—Dražen Erdemović!

The search for an “alibi” for one’s own crimes in the crimes of other side<sup>176</sup> is a typical device of nationalist consciousness that accepts and registers only the collective, completely disregarding the individual. The fact that the crimes of others in no way could diminish the horror and criminal nature of one’s own crimes was pointed out several times<sup>177</sup>, but unfortunately those attempts did not reach the consciousness of the majority of the Serbian citizens.

One of the very important roles of ICTY—reconciliation among the conflicting nations—is the least mentioned one in the Serbian media.<sup>178</sup>

So, according to the results of a public opinion poll from July 2004<sup>179</sup>, 76% of the citizens of Serbia continue to believe that ICTY is a political, and not a legal institution.

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about the crimes done by NATO during the bombardment of this country in 1999.” Šešelj (*Walter*, 02/17/2002, <http://www.srpskapolitika.com/hag/tekstovi/seselj.html>): “All that was said in the indictment against Slobodan Milošević does not concern Milošević personally, it concerns Serbian nation as a total, it concerns Serbian state. The indictment that was presented to the world public in The Hague process has put to the bench of the accused Serbian nation, Serbian history, Serbian right to their own state. Serbs are declared guilty of existing, Serbs are declared guilty for standing up to their traditional executioners. Everything that is said against Serbian nation, Serbian state and against Slobodan Milošević is a total fabrication. Milošević is doing a right thing for going into offensive and pointing where real criminals are.”

<sup>175</sup> Vladimir Kršljanin (pamphlet of the NGO *Sloboda/Freedom Association*, Belgrade, May, 2003, <http://www.icsd.org/more/future.htm>) argued: “The reminder of the inglorious balance of the «first ten years» of the Tribunal is the following: 45 indictments have been brought in against the Serbs, 12 against the Croats, 5 against the Muslims, one against the Albanians, and none against the Americans and their NATO allies. Among those sentenced were 13 Serbs, 4 Croats and 3 Muslims. Three Croats and two Muslims were acquitted. These statistics alone speak of bias and the political character of the Tribunal.”

<sup>176</sup> Koštunica (*Vreme*, # 519, 12/14/2000. [http://www.vreme.com/arhiva\\_html/519/08.html](http://www.vreme.com/arhiva_html/519/08.html)): “The Hague is simply not sufficient to disclose all the complexity of relations, war, victims, all of that what happened in these areas. Other institutions are necessary. I cannot understand that someone thinks that only crimes that happened after the World War 2 happened only in former Yugoslavia. And that the right measure of establishing the responsibility and justice is only in The Hague. Crimes were committed on all sides. There are ideas about some other court, one was even established, but of course, without the blessing of the most powerful country in the world, that bears responsibility for the suffering and sacrifices of many people in the world, especially in Vietnam.”

<sup>177</sup> Mikloš Biro (*Danas*, 10/30-31/1999, p. 22; *Dnevnik*, 09/16/2001, p. 7; *Politika*, 04/18/2002, p. 8.); Srđa Popović (*Danas*, 07/23/2004, p. 16).

<sup>178</sup> Rare exceptions are Mikloš Biro (*Danas*, 05/15/2001) and Nataša Kandić (OSI Forum, [http://www.soros.org/resources/events/balkans\\_20031009?skin=printable](http://www.soros.org/resources/events/balkans_20031009?skin=printable)).

<sup>179</sup> The research of the SMMRI for the Ministry of National Minorities.