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Abstract

This Essay examines the specific conditions and motives that led to the establishment of the International Criminal Tribunal for the Former Yugoslavia ('Tribunal' or 'ICTY'), its features as both a legal and a political institution, and the role of the ICTY in the development of international criminal adjudication. First, this article discusses the establishment of the ICTY. Second, this article discusses the role of the ICTY as a political and legal institution. Third, this article explores the role of the ICTY in the development of international criminal adjudication. Finally, this article evaluates the results of the ICTY to date.

THE ROLE OF THE ICTY IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL ADJUDICATION

Ivan Šimonović*

I. THE ESTABLISHMENT OF THE ICTY

Just a few years ago, the idea of the establishment of an international war crimes tribunal seemed noble yet unrealistic, and the possibility of its realization very distant. Today we have *ad hoc* tribunals for the former Yugoslavia and Rwanda, and the process of the establishment of a permanent international criminal court (or “ICC”) has advanced considerably. Why has there been such a change in so short a time? What future developments in this area are to be expected? This Essay examines the specific conditions and motives that led to the establishment of the International Criminal Tribunal for the Former Yugoslavia¹ (“Tribunal” or “ICTY”), its features as both a legal and a political institution, and the role of the ICTY in the development of international criminal adjudication.

In order to understand the emergence of the ICTY, it is necessary to put it into historical and political context.² It has been said that the states and nations of southeast Europe are burdened by historical divisions and an ethnic patchwork that has led to the area becoming a living case study for the “clash of civilizations” thesis. Indeed, living within a relatively small area are several national groups, the adherents of three major religions, diverse cultures, as well as differing levels of economic development and political tradition. In spite of this, southeast Europe is not necessarily condemned to conflict any more so than the rest of the Old Continent. Its emergence as the primary European security issue at the end of the twentieth century can be

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1. The Security Council resolution on its establishment named the new court the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia, *see* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

2. For more extensive information, see I. Simonovic & I. Nimac, *Stabilizing Southeast Europe*, 5 CROATIAN INT’L REL. REV. NO. 15 (1999).

attributed to the co-terminous incidence of several events, most notably the rise of nationalism in the Socialist Federal Republic of Yugoslavia (or "SFRY") at the time when communist rule came to an end, and the security vacuum that arose at the end of the Cold War.

The conflict that began to spread through southeast Europe at the beginning of the 1990s, while having identifiable roots, was not unavoidable. It was the result of a course of events in which domination-oriented Serbian nationalism led by Slobodan Milosevic supplanted the previous communist ideology in Serbia, the largest federal unit in the SFRY, and clashed with the defensive nationalisms and state building aspirations of the other peoples and federal units. The confluence of these events with the end of the Cold War, and the attendant need for the redefinition of the roles of the European Union and United States in the period to follow, impacted upon the response of the international community to the emerging crisis. The initial steps taken proved to be slow, indecisive, and unresponsive to the far reaching geopolitical changes that had taken place.

Despite differences in approach, the international community was, for the most part, passive towards the dissolution of the SFRY. While certainly not encouraging them, the international community reluctantly tolerated the quest for independence of the newly emerging states. Unfortunately, this passivity extended to the period in which the Serb-controlled former Yugoslav National Army moved against the new states. The lack of clarity about the roles in the protection of peace and security in Europe at the end of the Cold War left Milosevic's aggression unopposed by an adequate response. Early in the crisis, the United States was happy to go along with the assertion of Luxembourg's Foreign Minister that the challenge of resolving matters was the "hour of Europe." "We have no dog in this fight" was James Baker's somewhat less famous, though erroneous, summation of the impact upon U.S. interests of the escalating crisis, following his visit to Belgrade in 1990. With reason, this position was subsequently widely seen as having been interpreted by Milosevic as a "green light." Hence, while the United States waited for Europe to resolve the trouble in its midst, the European Community, unprepared for this new role, preoccupied with its internal affairs and divided by the divergent interests of its member states, failed the test.

While it can certainly be said that violations of the laws of war occurred on all sides during the ensuing conflicts, the horrendous atrocities committed by the Serbian forces associated with ethnic cleansing propelled international humanitarian concern to the forefront.³ At the time of the occupation of Vukovar, Croatia in November 1991, the international community watched with horror and disbelief as columns of refugees left their homes in tears, victims of the deliberate and planned policy of "ethnic cleansing." These pictures and subsequent information on the massacre of the wounded at the Vukovar hospital simply did not fit into the optimistic image of the 1990s Europe that had witnessed the fall of the Berlin Wall.

It was the pressure of world public opinion, viewers of the media with global coverage bringing the reality of the horror to millions of homes that were the catalyst for a response from the international community. Given its earlier intervention in Iraq, the U.S. Administration was not eager to get directly involved, and Europe preferred recourse to multilateralism as well. The fact that the end of the Cold War had brought a period of better understanding between the permanent members of the Security Council enabled the United Nations to become actively involved. As a reaction to the gross violations of human rights and humanitarian law resulting from the aggression against the Republic of Croatia and continuing aggression on Bosnia and Herzegovina, the institution of the United Nations Special Rapporteur on the human rights situation in former Yugoslavia was introduced in 1992.⁴ The reports of the Special Rapporteur confirmed what was widely suspected.⁵ Horrendous war crimes were being committed in a systematic manner. As a next step the Security Council established a Commission of Experts to investigate alleged violations of humanitarian law in October 1992.⁶ The Commission of Experts received information from governments, but also

3. See Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 *DENV. J. INT'L L. & POL'Y.* 235, 236 (1994).

4. For an insider's description of the events preceding the establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the establishment itself, see Ralph Zacklin, *Bosnia and Beyond*, 34 *VA. J. INT'L L.* 277, 277-81 (1994).

5. See M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *FORDHAM INT'L L.J.* 1191, 1202 (1995).

6. Informal discussions within Security Council whether to name the body "Com-

carried out its own investigations. Although its mandate did not include investigations for the purpose of prosecution of individual crimes, it was an obvious precursor to the establishment of the Tribunal—should it be needed.

Continuing events proved that it was indeed needed. The scale of atrocities committed and resultant human suffering in Bosnia and Herzegovina during the winter of 1992-93 brought the final push for the establishment of the ICTY. In February 1993, the Security Council unanimously adopted a resolution requesting the Secretary General to submit for its consideration a report on the way in which to establish a tribunal, accompanied by specific proposals.⁷ At the time there was considerable doubt and skepticism within the legal community, including among international legal advisers⁸ regarding this endeavor. Within less than than 100 days, however, on May 25, the ICTY had come into existence by virtue of the adoption of Security Council Resolution 827 that accepted the Secretary General's report, including the Tribunal's Statute.⁹

The Tribunal was established under Chapter VII of the U.N. Charter ("Charter") as an enforcement measure. The Security Council recognized the existence of a threat to international peace and security under Article 39 of the Charter, and decided that, in terms of Articles 7(2) and 41, the establishment of a subsidiary organ for the performance of judicial functions was needed to maintain or restore international peace and security.¹⁰ Because of its judicial nature, the Tribunal was required to perform its functions independently of political considerations and the control of the Security Council. Much was left to the discretion of the future judges. The statute of the Tribunal consists of just thirty-four articles, leaving it to the panel of judges to elaborate the rules of procedure and evidence. The judges themselves are selected in their individual capacity by the General Assembly. The statute authorizes the Tribunal to deal with individuals responsible for four different categories of crimes:

mission" or "Committee" and whether its mandate would be to "investigate" or to "inquire," indicated differences between the Security Council members.

7. See ICTY Statute, *supra* note 1, at 2.

8. See Zacklin, *supra* note 4, at 278, 281.

9. See ICTY Statute, *supra* note 1, at 1.

10. Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103, 106 (1997).

grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, crimes against humanity, and genocide.

II. *ICTY AS A LEGAL AND POLITICAL INSTITUTION*

The establishment of the ICTY represented a breakthrough in the development of international criminal law. For the first time in history the implementation of international criminal law was imposed on all sides to the conflict, avoiding the objection of victor's justice. Importantly though, the implementation of international criminal law was not accepted through the free choice of all of the parties. While the Croatian Government and the Muslims and Croats in Bosnia and Herzegovina called for and supported the establishment of the Tribunal, the Federal Republic of Yugoslavia and Bosnian Serbs opposed it.¹¹ The legal form of its establishment, through a Security Council resolution passed pursuant to Chapter VII of the Charter, simply meant that the Tribunal had been imposed on all sides and, therefore, that for the countries concerned cooperation with this Tribunal represented a binding obligation backed by the sanction of the Security Council.

The establishment of the ICTY obviously implies a certain limitation upon sovereignty. No country easily accepts such conditions of its free will, except in very specific circumstances.¹² The Tribunal's statute provides for its primacy over national jurisdiction, which allows for the takeover of an investigation whenever the Tribunal's prosecutor finds it appropriate. The traditional *ne bis in idem* principle also does not apply: if the ICTY is unsatisfied with a national trial, then under certain conditions it can repeat the trial against the same perpetrator for the same offence. National authorities are bound to cooperate with the Tribunal and comply with its orders, including the execution of its arrest warrants.

The use of Chapter VII for the establishment of the Tribunal and its imposition upon the states concerned did not go un-

11. In UN Doc. A/48/170-s/25801 (1993), there is a letter dated May 19, 1993 from the Minister of Foreign Affairs of Federal Republic of Yugoslavia to the U.N. Secretary General.

12. See Justice Richard Goldstone, *Conference Luncheon Address*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 4 (1997)

opposed. During the debate on Security Council Resolution 808, which established the Tribunal, Brazil and China expressed concern that the interpretation of Security Council powers had been over-stretched. Mexico presented an official report, challenging the Security Council's authority to act as it did. Subsequently, in the much-publicized Tadic case—the first trial for war crimes after the Second World War—the Appeals Chamber examined the legal basis of the establishment of the Tribunal, upon a defense challenge. The Chamber found that the establishment of the ICTY fell within the powers of the Security Council under Article 41 of the Charter.¹³

The Tribunal's legal features are rather obvious. It is a judicial body that uses legal procedures to dispense justice according to previously defined rules. But to get the full picture of the Tribunal, its political features must be taken into account as well. As Ralph Zacklin puts it, "[t]he Tribunal's background is political; it has a history of politics driven by public opinion and leading to developments in law."¹⁴

The Tribunal was created due to the existence of a critical mass of political will, for identifiable political reasons and its performance produces political effects. Furthermore, in performing its legal tasks it relies upon the political support of the states concerned and the Security Council. Finally, it has to make political choices when selecting which cases to prosecute, which is done by taking into account political realities.

An important impetus for the establishment of the ICTY was a feeling of a moral guilt among the international community resulting from the double failure to either prevent or stop the massacre.¹⁵ As Louis Henkin puts it:

International law is generally the law of the lowest common denominator of agreement among states. The nomination of that dominator might be changed radically by some fortuitous event. Something can happen—as happened in Yugoslavia—which will raise the denominator so that states are subject to international law and institutions what they might have

13. In re Duško Tadic (The Prosecutor v. Duško Tadic): Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995 I.C.T.Y. No. IT-94-1-AR 72, *reprinted in* 35 I.L.M. 32, at 45.

14. See Zacklin, *supra* note 4, at 277.

15. See Cisse, *supra* note 10, at 105.

refused earlier.¹⁶

In fact the “raising of the common denominator” was been made possible through the establishment of the ICTY—but its jurisdiction was not agreed upon—which was imposed upon the states arising from the former Yugoslavia from the Security Council.

It is not an easy task to balance the sovereignty of states with the efficiency of criminal law. The Tribunal’s former prosecutor Justice Louise Arbour admitted herself that the marriage between international law and criminal law is an unhappy one, in which consensus, as a key feature of international law, has to be supplemented in large part by force.¹⁷ This marriage, however, was needed for a number of reasons and international and criminal law were forced into it. The justification for the establishment of the Tribunal was convincing. Firstly, it was prevention—the establishment of the Tribunal should discourage possible perpetrators of future violations and change the “climate of impunity.” Secondly, individualization of guilt should distinguish war criminals from the rest of their communities, and therefore, by avoiding the perception of collective guilt, facilitate reconciliation. Finally, the establishment of a reliable historical record. This record was important for future generations, so as to avoid dangerous misinterpretations and myths.¹⁸ Indirect benefits of the Tribunal also included learning from the ICTY’s experience, and treating it as an experiment helpful for the establishment of a permanent criminal court.

The commencement of the ICTY’s proceedings with the *Tadic* case—an awful sadist, but a politically marginal criminal—has been a source of frustration to many. It raised the question whether the ICTY was capable, and willing, to bring to justice not only the marginal perpetrators, but also, the politically and militarily most responsible, as was the case at Nuremberg. Many

16. See Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 578 (1997).

17. Louise Arbour, *Progress and Challenges in International Criminal Justice*, 21 *FORDHAM INT’L L.J.* 531, 536 (1997).

18. The report of the first ICTY prosecutor, Judge Richard Goldstone, presents a warning in this respect: “whenever I visit the former Yugoslavia, virtually every visit starts with a history lesson. If I am lucky, it may begin in Second World War; if I am unlucky, it may begin in the Fourteenth Century.” See Goldstone, *supra* note 12, at 10. So-called history lessons are being repeated by opposing sides simply because there is no common, reliable history accepted by all.

have perceived the political impact of the Tribunal as a double-edged sword. Could the Tribunal turn into an impediment to a negotiated peace settlement in Southeast Europe? Contrary to the idealistic view that there is no peace without justice, there is also a pragmatic alternative. Firstly, it may not be possible to bring about a peace settlement in the former Yugoslavia if the Tribunal is going forward with active prosecutions of the state leaders of the belligerent parties. Secondly, even if the political leadership changes, it may be impossible for the new governments to hand over former leaders and remain in power. Namely, if the peace includes ICTY's ability to apprehend all perpetrators of crimes, then at least for some members of the leadership of the sides to the conflict, peace might not be such a desirable idea.

The underlying dilemma is whether, at a certain point in time, it is better to prosecute or to rehabilitate.¹⁹ Argentina, for example, has chosen to increase stability by putting an end to investigations concerning its civil war. South Africa established a Truth and Reconciliation Commission, not a tribunal. The countries that emerged from the former Yugoslavia did not choose for themselves. The ICTY was chosen for them by the Security Council. According to a recent account, the Tribunal was widely perceived as an important public relations device and a policy tool by the U.S. government.²⁰ Changes in the situation in southeast Europe brought about a policy change towards President Milosevic of Serbia. At one time, in Dayton 1995, his indictment was thought to be harmful for the prospect of peace talks, while later it seemingly became a useful tool to pressure him and maintain public support for the North Atlantic Treaty Organization's ("NATO") bombing campaign against Serbia in spring 1999.

The political dimension of the Tribunal is most visible in the Prosecutor's dilemma on case selection. In regard to this issue, Justice Arbour, the former ICTY Prosecutor, has drawn at-

19. In this respect, the principles of justice and pragmatic political and security interests might sometimes be pulling in different directions. For example, during the process of peaceful reintegration of formally occupied Eastern Slavonia, Croatian authorities were under strong pressure not to initiate criminal proceedings against the local Serbian war criminals, exerted by the same international forces that brought the ICTY into being.

20. See Michael Scharf, *Indicted for War Crimes*, WASH. POST, Oct. 3, 1999.

attention to an important distinction between the ICTY and national courts:

An immediate distinction can be seen between the work of these Tribunals and a domestic criminal justice system, because a domestic prosecutor is never really seriously called upon to be selective in the prosecution of serious crimes. Crimes are committed, they are reported, investigated, charges are brought, and the prosecutors prosecute all major crimes where the evidence permits.

...

By contrast, in the work of the international Tribunals, the prosecutor has to be highly selective before committing resources to investigate or prosecute, and must work in a manner that can complement domestic legal systems. That is what we have had to do.²¹

Each trial necessarily contains different dimensions. It is the trial of a perpetrator of a crime, bringing justice to the victims and their families. Further, it contains a deterrent element, because it shows that certain practices are unacceptable and will be punished. This element is also precedent-setting and preventative. Finally, it brings to light the broader framework of the crime, the role and indirect responsibility of the superiors and political leadership. This dimension is very important, because of the present and future image of the countries and groups concerned.

Crimes are committed by individual perpetrators and not by an ethnic group or a nation. Every crime, no matter the ethnicity of the perpetrator, must be examined in accordance with the available evidence and the applicable law. However, due to the magnitude of the crimes committed, time constraints, and the scarcity of other resources available to the Tribunal, it cannot prosecute all of the numerous perpetrators of war crimes. Rather, it has to carry out its work in a selective manner. However, if a selective approach is unavoidable, then the cases brought before the Tribunal must at least be representative.

For political reasons, the cases must be representative in terms of nationality of the victim and the perpetrator. This certainly does not imply that the prosecutor should equally distribute indictments among the three national groups. To have

21. See Arbour, *supra* note 17, at 534.

credibility, the prosecutor's decisions on the selection of cases must be based on the available evidence, and not on some notion of moral equivalence among the parties.²² On the other hand, it is the office of the prosecutor that directs investigations and chooses priorities in collecting evidence.

For both moral and political reasons, and for the historical record, these choices, which are the exercise of prosecutorial discretion, should reflect the extent and the level of involvement of the various sides in the war crimes committed. Even an unintended disregard for these elements in the exercise of prosecutorial discretion leads to a distorted picture and handicaps the Tribunal in achieving its ends. In order to analyze the present record of the Tribunal, we have used data on the indictments and detainees from the sixth annual report of the Tribunal submitted to the Security Council and the General Assembly pursuant to Article 34 of the statute of the Tribunal.²³

The data indicates that, unfortunately, to date, prosecutorial discretion has fallen short of its desired objectives. The numbers speak for themselves and there is no particular need to comment upon them. Some important shortcomings, however, are not visible from the numbers alone. It is important to note that, up to the present, nobody has been indicted for the well-documented crimes targeted specifically against Bosnian Croats. This deficiency seriously undermines the crucial objectives of the Tribunal: justice, a truthful account of what took place during the conflict, and ultimately, healing and reconciliation.

Cooperation with the Tribunal, in the sense of extradition, represents a mixture between a curse and a blessing for the country or the national group concerned. The more one cooperates, the more his citizens or fellow nationals are being tried, the more negative media coverage one receives, and the more negative the perception that is spread. It is not news for the media that the SFRY does not cooperate with the Tribunal. What makes the news is the face of the individual Croat or Bosnian,

22. See Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 15, 20-21 (1997).

23. See U.N. GAOR, 54th sess., U.N. Doc. A/2905 (1999) cited in International Criminal Tribunal for the Former Yugoslavia, (visited Jan. 17, 2000) <<http://www.un.org/icty/rapportan/rapport6-e.htm>> (on file with the *Fordham International Law Journal*).

Table One: Comparative Data on Indictments and Detainees of the International Criminal Tribunal for the Former Yugoslavia as of August 1, 1999

(1) Percentage of crimes committed, indicted persons and persons in custody, according to ethnicity

	Ethnic Serbs	Ethnic Croats	Ethnic Muslims/ Bosniaks	Total
Crimes Committed*	90%	<10%		100%
Indictments**	47	14	2	63
% of total	75%	22%	3%	100%
Persons in custody	15	11	2	28
% of total	54%	39%	7%	100%

* These statistics are U.S. Central Intelligence Agency estimates as reported by Roger Cohen, N.Y. TIMES, Mar. 9, 1995.

** Indictments that were dropped are not included.

(2) Percentage of indicted in custody

	Ethnic Serbs	Ethnic Croats	Ethnic Muslims/ Bosniaks	Total
Indicted*	47	14	2	63
In custody	15	11	2	28
Percentage	32%	79%	100%	44%

* Indictments that were dropped are not included.

facing accusations in the courtroom, shown on the television screen. The historical record has already been influenced heavily by the cases that were tried by the Tribunal. If 'victor's justice' was one extreme, then the present work of ICTY might be perceived as the other. In Nuremberg, the Allies tried the Nazis, exclusively. As long as the SFRY and the Bosnian Serbs do not want to cooperate with ICTY, can the ICTY obviously settle to try exclusively Croats and Muslims? Would this case not be similar to a situation if only Allies were tried after World War II, because the Nazis refused to cooperate? Apprehensions of indictees in Republika Srpska by the SFOR are slowly correcting this initially absurd situation. However, what of the war criminals in the SFRY? What about Mrksic, Slijivcanin, and Radic, who are responsible for the massacre of wounded Croats in Vukovar, who continue to live comfortably in SFRY? And, what about Milosevic, himself?

The ICTY does not formally recognize prosecutorial discretion. It is obvious that, however, Milosevic, because of his responsibility for crimes in Croatia and Bosnia and Herzegovina, was the same war criminal at Dayton, when he was treated with respect as a powerful negotiator, as he was in the midst of the NATO bombing campaign when an indictment was issued against him for his involvement in the crimes committed in Kosovo. It is a matter of speculation whether political considerations impacted upon the decisions of the prosecutor. Whatever the case, further indictments against Mr. Milosevic for his participation in crimes committed in Croatia and Bosnia and Herzegovina would be very important for the historical record, for healing and reconciliation, and for the long term stability of south-east Europe.

III. THE ROLE OF ICTY IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL ADJUDICATION

The history of international criminal law is closely related to the development of international law on war crimes. Although, theoretically, there is no reason why the body of international crimes would not include any crime, primarily due to political interests it has more or less overlapped with the body of war crimes. The idea that limitations upon acceptable ways of conducting war is exclusively European and relatively new, is quite wrong.²⁴ As early as the sixth century B.C., the Chinese warrior Sun Tzu appealed for restrictions in the conduct of hostilities. Manu includes them in his codification reflecting Hindu customary law around 2000 B.C. Similarly, when the Persian king Xerxes realized that the Greeks had killed his envoys, he refrained from retaliation against the Greek envoys that were in his power, because he considered that what the Greeks had done was against the laws and customs of all peoples.

International criminal law developed through the centuries by the common acceptance of certain limitations upon the conduct of hostilities and through the establishment of individual responsibility through multinational *ad hoc* courts created to punish those responsible for atrocities. The evolution of the

24. For more details on the examples and literature, see Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 681-732 (1997).

mechanisms for adjudication appears to have a recognizable pattern. Starting from these trends we can develop a model identifying certain stages, each representing a step forward in broadening the scope of international jurisdiction over crimes and their perpetrators.²⁵ This broadening can be understood as moving from selectivity in designating the groups whose crimes are being prosecuted and selecting conflicts in which the crimes committed will be prosecuted, towards universality in the sense of jurisdiction over all participants in the conflict and covering all conflicts of the same sort. The stages are set out in the following table:

Table Two: Evolution of International Adjudication

STAGES	PERSONAL JURISDICTION	TEMPORAL JURISDICTION	ORIGIN OF JURISDICTION	EXAMPLES
I	Conquered perpetrators of crimes	<i>Ad-hoc</i>	the right of the victor	Trial of Peter von Hagenbach 1474; Nuremberg; Tokyo
II	All perpetrators of crimes during the conflict	<i>Ad-hoc</i>	Security Council mandate	Tribunal for the Former Yugoslavia; Tribunal for Rwanda
III	Perpetrators of crimes covered by the agreement	Permanent	Multilateral agreement	International Criminal Court
IV	All perpetrators of crimes	Permanent	<i>jus cogens</i>	?

The first stage of development starts with sporadic cases of the establishment of *ad hoc* courts with international composition to try the defeated enemy for crimes committed during hostilities that are universally perceived as such. The first such registered case seems to be the trial of a certain Peter von Hagenbach in Breisach, Austria in 1474. Hagenbach was tried by an *ad hoc* tribunal consisting of twenty-eight judges from the allied states who defeated Hagenbach's followers. Hagenbach was convicted of murder, rape, perjury, and other crimes against the "laws of

25. Another dimension of expansion is related to the broadening of the list of crimes, however, this matter is beyond the scope of the present Essay.

God and men” and as a punishment he was stripped of his knighthood and sentenced to death.²⁶ Conceptually, the Nuremberg trial was not much different. It also was multinational, rather than international, and composed essentially of the four victorious Allies. Its rules of procedure and evidence were only rudimentary, with only eleven written rules, leaving the Nuremberg Tribunal a lot of maneuvering space, but also exposing it to many doubts. For the purpose of our survey we can conclude that both of these courts were established *ad hoc*, having jurisdiction over perpetrators on the defeated side only, and therefore sensitive to the objection of the imposition of victor’s justice.

Victor’s justice has been criticized from the moral, political, and legal points of view. A model of an international tribunal was argued for which would give equal treatment to the victors and the defeated alike with respect to the prosecution of war crimes. Those discussions in fact represented an academic preparation for a new stage in the development of international criminal adjudication, marked by the establishment of the ICTY and the International Criminal Tribunal for Rwanda.²⁷ These two tribunals are of an *ad hoc* nature, established and imposed by Security Council resolutions, having jurisdiction over all perpetrators of crimes during the conflict. In this respect, the tribunals undoubtedly represent a breakthrough, putting all sides engaged in a conflict in the same position with regard to the prosecution of war crimes committed. The question, however, remains: why the former Yugoslavia and Rwanda only? For example, when the same conflict between Hutus and Tutsis spilled over from Rwanda to Burundi and Zaire (or the Democratic Republic of Congo) neither the jurisdiction of the tribunal was broadened, nor was a new one established. The fact that the *ad hoc* tribunals for the former Yugoslavia and Rwanda remain the only ones, indicates selectivity in choosing conflicts upon which the international community is capable of and willing to impose the implementation of international criminal law. If it is practically, normatively, and politically feasible to create *ad hoc* tribunals, then why does the establishment of a permanent court with global jurisdiction remain a distant prospect?

26. For more information, see McCormack, *supra* note 24, at 689-90.

27. *Statute for the International Criminal Tribunal for Rwanda*, S.C. Res 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

The establishment of the ICC will represent the next step in the evolution of international criminal adjudication, and will be significant enough to mark a new phase. Until now, eighty-nine countries have signed the Rome Statute of the International Criminal Court²⁸ ("ICC Statute"). The process of ratification is going rather slowly. The ICC Statute cannot enter into force until it has been ratified by sixty states, while just four have done so to date. The basis for the ICC jurisdiction is found in a multilateral agreement. Once sufficient ratifications are deposited, a permanent court with jurisdiction over all the perpetrators of the crimes that are one way or another related to the countries that signed the agreement will be established. According to the ICC Statute, the ICC is of a complementary character. It is activated only when the national organs of the State party are unable or unwilling to prosecute crimes under international law. It should be noted that the method of the establishment of its mandate, that is, its contractual origin, fully respects the sovereign equality of all states.

The Court's treaty basis makes its jurisdiction dependent upon the goodwill of states. Since, as we have previously indicated, states are reluctant to reduce their sovereignty, the ICC Statute adopted in Rome included many compromises between the sovereignty of states and the efficiency of the ICC. One of the results is that if and when the states agree to submit themselves to the jurisdiction of the court, then their practical cooperation in individual cases rests, more or less, upon their goodwill. There simply are no clear and effective sanctions for non-cooperation provided in the ICC Statute. The linking of relatively undefined sanctions to the Security Council, privileges Security Council members, particularly the aristocratic "upper house" members who possess the power of veto.

With regard to the treaty character of the Court, a quite legitimate question arises as to why an international criminal jurisdiction can be imposed upon some states—such as the states that have arisen following the disintegration of the former Yugoslavia and Rwanda—but not upon others. A principled answer that would be in line with the sovereign equality of states simply

28. UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, U.N. Doc. A/Conf.183/9 (1998) (adopted by United Nations on July 17, 1998).

does not exist. Indeed, the answer is not based upon a matter of principle, but rather on the international division of power.

The pattern of a further qualitative movement, that is, a new stage in the development of international criminal adjudication that would finally fulfill the criteria of universality, justice, and equality (the equal treatment of all offenders in every conflict), is already clear. Its practical realization is unclear, however, not just in time, but whether we shall arrive at it at all. If we are facing the emergence of global civilization, if we speak about world climate and world trade, then perhaps we are approaching a "world law" replacing contract-based international law in some areas. If, according to the newly emerged doctrine of humanitarian intervention, countries can be bombed without their consent, then why could not criminals be tried without the consent of their governments? In order to achieve its full potential, the ICC should be a permanent, independent, judicial organ with its jurisdiction covering all international criminal acts. The mandatory nature of international criminal law and the jurisdiction of the ICC should be of a universal and cogent nature, and independent of its acceptance by states. The selection of cases should be part of its inherent jurisdiction, independent of the Security Council, or any other body.

It is clear which parties shall have diverging interests when it comes to the establishment of this idealistic world juridical institution, fully respecting the principles of universality and equality. On the one side there are the supporters of the inviolability of state sovereignty and the current "controllers" of the international order—in particular the permanent members of the Security Council. On the other side are the idealists, liberal legal theorists, and non-governmental organizations (or "NGOs") whose aim is the protection of human rights. Whilst at this time the balance appears to be a completely uneven, the idealists may, with time, given the spread of globalization, free media, and the unacceptability of double standards, attract the necessary critical level of support. In this prospect, the International Coalition for the ICC, uniting almost a hundred NGOs that actively support its establishment, might represent an important nucleus.

IV. *ICTY: A PRELIMINARY EVALUATION*

It is easy to overestimate, but also to underestimate the results of the ICTY to date. In order to try to avoid personal expectations about the development of international criminal law influencing our judgement, the success, or the lack of it, should be carefully assessed by analyzing the level of the achievement of goals for which the ICTY was established. In this respect, it is important to evaluate to what extent the Tribunal has contributed: ending and preventing further war crimes, altering the climate of impunity, assisting in the individualization of guilt, preventing the creation of negative stereotypes, and establishing a reliable historical record concerning the conflict. Finally, and perhaps most importantly: what is the ICTY's experimental value and its contribution to the further development of international criminal law?

Unfortunately, the establishment of the Tribunal neither stopped, nor prevented future war crimes. They continued to be committed in Bosnia and Herzegovina, and after the escalation of a new conflict—this time in Kosovo—ethnic cleansing has been used as a tool once again. Perhaps it was the impunity of the major indicted Bosnian Serb war criminals—Karadzic and Mladic, the Croatian Serb, Martić, and all of the other indictees from SFRY—that sent the wrong message. President Milosevic of Serbia—the key figure and the most responsible for the drama in southeast Europe—was only indicted when NATO air strikes against SFRY were already in progress.

Evidently, prevention failed with respect to the conflict and the area for which the Tribunal has been established. But what of the global aim of general prevention, that is, the influence upon behavior in possible future conflicts around the world? There is no clear answer, but it seems that it depends upon whether people like Karadzic, Mladic, Martić, and Milosevic as well, are successfully brought to justice. It is also important to note that the ICTY was established *ex post facto* when the conflict was already going on and many crimes had already been committed, while, of course, the full preventive effect can only be expected from a permanent court, such as the ICC.

It is probably too early for a final say on the effects of the work of the Tribunal upon the individualization of guilt for the war crimes committed, and toward the end of avoiding the per-

ception of collective guilt and facilitating reconciliation. The refusal of cooperation by the Bosnian Serbs and the SFRY, however, is discouraging in this respect. The unwillingness of the SFRY to cooperate with the ICTY, and its continued harboring of indictees charged with the most grievous war crimes is of serious concern to Croatia since these acts are in blatant disregard of international law, the ICTY, and the U.N. Security Council. An even greater concern stems from the fact that such a lack of cooperation is a function of the SFRY's unwillingness to accept its responsibility for the war in southeast Europe. The climate of impunity encouraged further breaches of international humanitarian law by the SFRY armed forces in Bosnia and Herzegovina and Kosovo.²⁹ The process of reconciliation hinges upon bringing people like Slijvcenin, Mrksic, Radic or Martic, Karadzic and Milosevic, and others to justice.

On the matter of the historical record, the results are, up until now, ambiguous. There is a serious problem of unrepresentation in the indictments presented compared to the breadth and level of involvement of different national groups in the conflict. The Bosnian Croats are over-represented as perpetrators, and underrepresented as targets. The lack of efficiency in bringing before the Tribunal high level Bosnian Serbs or any perpetrators from the SFRY adds to the distorted picture.

The ICTY represents a crucial test of our readiness for the establishment of a permanent international criminal court of wider jurisdiction. What are its results? The ICTY certainly represents a great improvement from the Nuremberg and Tokyo practice of victor's justice. Selectivity stemming from the fact that it has been imposed by the Security Council as the result of a particular situation and only upon the countries concerned, casts a shadow upon the principle of the sovereign equality of all states.

At the same time, the merits of the ICTY and the Tribunal for Rwanda that followed as a direct consequence of the ICTY are numerous. The practice of the Tribunal already is, and will continue to be, very important for the interpretation of international humanitarian law. International law, mostly a product of multilateral negotiations, is frequently articulated in a highly ab-

29. See INSTITUTE FOR INTERNATIONAL RELATIONS, *ARTICULATING INTERESTS IN A CHANGING WORLD: CROATIA AT UN HEADQUARTERS 1998* 62 (Ivan Simonovic ed. 1999).

stract manner, often ambiguously and obscurely.³⁰ The ICTY's interpretation of command responsibility and the responsibility of political leaders, for example, will have important impact not only as a new subject of adjudication, but could also have significant repercussions upon future conduct with a preventive effect. In the sense of prevention, the narrowing of the distinction between international and internal armed conflict will surely have a positive effect, restricting unacceptable behavior in wars. Systematic rape has been added to the list of war crimes through the practice of the Tribunal.³¹ The recognition of a new gender related crime—that of rape and the incitement to rape that has been used to achieve political goals, such as ethnic cleansing—is new and important. Finally, the Tribunal raised considerable academic and professional interest in humanitarian law. International humanitarian law courses have received new life in law schools and the number of articles dealing with humanitarian law in law journals has grown exponentially, which all contributed to the positive climate for the establishment of the ICC.

The ICTY, however, ran into, and warned us about, some important problems. The ICTY relies heavily—just as any future international criminal court will—upon the cooperation of the countries concerned.³² Justice Arbour is right when she claims that it is vital for any international tribunal to gain trust and respect. While on a national level prosecutors and courts are pressured to be unbiased and fair, on an international level they have to prove as much. Although acceptance is never universal, it must be sufficient to permit the easy functioning of the courts without recourse to coercion.

The Tribunal managed to achieve what it did thanks to the cooperation of Croats and Muslims in Bosnia and Herzegovina and the Government of Croatia. If they had decided not to cooperate, given the position of the Bosnian Serbs and the SFRY—which is not beyond political logic—then the Tribunal would have been stillborn. Therefore, finding a way to ensure the cooperation of SFRY and Bosnian Serbs with the Tribunal is cru-

30. W.J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 23, 43 (1997).

31. See Goldstone, *supra* note 12, at 3.

32. See Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 *ALB. L. REV.* 841, 860 (1997).

cial.³³ If the Tribunal, which has been created and supported by the mighty enforcement powers of the Security Council, is not efficient, then how can we expect efficiency from the ICC, which shall be based upon the acceptance of the parties of a multilateral treaty?

Our final evaluation is that up to the present, the ICTY has been partially successful in many respects. The crucial question, however, is whether in its future development international adjudication can overcome a selective approach, incompatible with the principle of sovereign equality of states. This shall be reflected from the perspective of a permanent criminal court, if it treats all states equally. A reduction of sovereignty caused by globalization and its reflection on the increased international authority to punish crimes committed is not necessarily a problem itself, as long as it affects all the states equally. Within the principle of the sovereign equality of states—vital for the regulation of international relations—the accent might shift from sovereignty to equality. If, however, we want sovereignty to mean less, then it is vital not to forget about equality. Without equality receiving due consideration, we will face new divisions and conflicts, instead of increased global security and stability.

33. The general, if not the practical, support of the present government of Republika Srpska for the Tribunal and the positive attitude of some opposition leaders in the Socialist Federal Republic of Yugoslavia is encouraging in this respect.