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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: ITS FUNCTIONING AND FUTURE PROSPECTS*

*The Honorable Claude Jorda***

As I introduce my remarks regarding the functioning and future prospects of the International Tribunal for Crimes in the Former Yugoslavia (hereinafter ICTY or IT), I will limit myself to a few general observations.

Two series of elements lie at the creation of this institution:

(a) the judicial reflection which inspired the creation of universal instruments enabling us to raise the issue of international criminal responsibility;

(b) the pragmatic and realistic culmination of regional action by the Security Council (hereinafter SC).¹

This realistic approach is twofold:

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1. See JOHN JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (3rd ed. 1997): "The International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) was established by the Security Council (hereinafter SC) in its Resolution of 25 May 1993, following its consideration of the Report of the Secretary-General (U.N. Doc. S/25704, (1993)) submitted pursuant to operative paragraph 2 of the SC Resolution 808, which proposed a Statute for the ICTY. The SC determined that the situation in the former Yugoslavia and in particular in Bosnia and Herzegovina, where there were reports of mass killings, massive organized and systematic detention and rape of women and [. . .] the practice of ethnic 'cleansing,' constituted a threat to international peace and security under Chapter VII of the United Nations Charter. It established the ICTY in the belief that an

(a) On the one hand, the judicial community has long been seeking either an experimental model or at least a life-size test;²

(b) On the other hand, the SC has been looking, albeit more subtly, for an exemplary intervention calculated to reestablish UN credibility. These two pragmatic goals, which are grounded in realism, may be enough to account for the two-fold approach undertaken, thereby conferring the institution with creative strengths and endemic weaknesses.

Today's conference is heightened by the current political and international events surrounding the former Yugoslavia. Indeed, we are at a pivotal moment in the life of this institution. Its fate is unquestionably tied to the decisions of the SC, which is solely empowered to determine when "peace is reestablished and maintained."³ Then and only then will we consider the mission of this *ad hoc* Tribunal accomplished.

Nonetheless, we the judges (*qua* judges as well as attentive observers of our work) keenly feel that the crucial, new period that occurred since the signing of the Dayton Accords in France and their subsequent ratification is going to seal the fate of this institution more surely than any resolution or official proclamation. The fate and development of our Tribunal depend upon putting these accords effectively into practice. Beginning with the arrival of this crucial, new period and depending on how this period will end, history will certainly record and retain the peace that has been reached and the role which justice has played to achieve it. Simply put, history will reveal if this period is considered one of peace without justice, justice without peace, or peace with justice.

But this period has not yet been reached, and as we witness the proceedings in The Hague, all we can do is outline the future prospects of the Tribunal.

In order to put this period in perspective and to fully appreciate it, let us contrast our legislators' intentions with everything that has happened inside this institution since the Tribunal's creation in The Hague on November 17, 1993. Viewed in this light one can say that the achievements of the Tribunal resulting from the Dayton

international tribunal would "contribute to ensuring that such violations are halted and effectively redressed." *Id.* at 9.

2. Report of the Secretary-General, U.N. Doc. S/25704 (1993), at para. 17.

3. *Id.* at para. 22-28.

Accords signed in Paris last December 14,⁴ and from the recent resolutions of the SC (*i.e.* Resolution 1031 implemented on December 15, 1995,⁵ a follow-up to Resolution 1022)⁶ undoubtedly mark the beginning of a crucial, new period which, despite its uncertainties, already represents a breakthrough with regard to judicial proceedings for crimes against humanity. Indeed, let us note that the mere reestablishment of peace has not yet been judged decisive enough for the Tribunal's work to be suspended. Quite the contrary, one can infer that new conditions for world peace make it possible for the Tribunal to develop investigations already begun or about to be opened.

To a certain extent, I consider the creation of the Tribunal a kind of acknowledgment of its accomplishments over the last two years, in particularly difficult times and under difficult material conditions. This acknowledgment indicates that the Tribunal is considered operational and further signals its feasibility as an institution. The acceleration of the International Law Commission's proposal to formulate a permanent criminal court suggests, perhaps, that the international community is realizing the feasibility of such courts. This is so, even if this acceleration is undertaken for multiple reasons.

Now that the ICTY is beginning its crucial third year of existence, let us keep in mind the limits of this endeavor. It has no real precedent and is surrounded by ambiguity (as contained in Profes-

4. See ICTY Yearbook (hereinafter Y.B.), (ch. 5, 1995) at 321: "The General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto (hereinafter the Dayton Agreement) was signed in Paris. The signatories to the Dayton Agreement are the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia for itself and on behalf of the Republic of Sprska (Bosnian Serb authorities.) According to its preamble, the Dayton Agreement was entered into because of the signatories' desire to promote enduring peace and stability in the region of the former Yugoslavia."

5. *Id.* at 322: "In Resolution 1031 (1995), Doc. S/1995/1031, which was adopted after the Dayton Agreement had been signed, the SC authorized the establishment of IFOR for the purposes envisaged for it in the Dayton Agreement and endorsed the establishment of the High Representative."

6. *Id.* at 322: "The SC adopted Resolutions 1021 and 1022 (1995), Docs. S/1995/1021 and S/1995/1022, after the initialing of the Dayton Agreement, but before it was signed. In these Resolutions, the SC noted that '[c]ompliance with the requests and orders of the ICTY constitutes an essential aspect of implementing the peace agreement,' and determined that the [s]ituation in the region [of the former Yugoslavia] continues to constitute a threat to international peace and security."

sor Pellet's inquiry concerning whether it is a bluff or a breakthrough).

The Tribunal's existence is strictly dependent on time and space and is precarious by its very nature. Many jurists and contracting partners in the international community (notably the non-governmental organizations, or NGOs) may have wanted it to be formulated differently. Nevertheless, this Tribunal, born of both reason and emotion, must establish time limits and overcome various challenges regarding the issue of responsibility. This includes the individual responsibility of the persons prosecuted; the responsibility of the SC which created the Tribunal pursuant to its powers under Chapter VII of the Charter; the responsibility of the states which must provide cooperation and resources;⁷ and, of course, the responsibility of the judges of this Tribunal.⁸

I would like to share my ideas on these levels of responsibility. Although we can already speak of a "breakthrough" and, the particular fate that may be in store for this institution, it will no longer be possible to speak of or write about international "procedures" regarding crimes against humanity or genocide. We must now refer to positive law (which no longer belongs in the experimental domain), especially with regard to decisions by the Appeals Chamber when it examined fundamental exceptions raised in the *Tadic* case.⁹

As for the responsibility of the judges, I would like to say here that their profound desire is to accomplish the historic mission that has been conferred upon them.

Addressing the creation of the Tribunal from the dual aspects of its functioning and future prospects serves a dual purpose: to elucidate what has been accomplished in the past two years and to surmise what the future holds for this jurisdiction.

7. *Id.* at 321.

8. The Statute of the International Tribunal (1993) (hereinafter the Statute), Art. 13(1) provides that: "The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall compositions of the Chambers due account shall be given of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

9. The Prosecutor against Duko Tadic, alias "Dule": Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T (Appeals Chamber, 1995.)

To consider the Tribunal's accomplishments, we must remember that since the Tribunal's creation, everything had to be implemented from the beginning, especially its institutional and judicial framework. Judicial proceedings could not be instigated solely on the basis of the thirty-four fundamental articles of the Statute of the Tribunal.¹⁰ The year 1994 was virtually devoted to the creation of our judicial instruments,¹¹ and in 1995 the Tribunal commenced and developed its judicial activity.¹²

In the first part of my paper, I will highlight the most striking features of our judicial practice. I will try to shed light on what I will call advances in procedure and judicial developments.

To consider future prospects of the Tribunal, we must recognize uncertainties inherent in the very structure of the Tribunal. For example, its structure depends on the will of the contracting states. The surrounding area is remote from the territorial jurisdic-

10. Y.B., *supra* note 4, (ch. 1, 1995), at 7: The Tribunal's Statute, which was approved by the SC in Resolution 827 on May 25, 1993, is the source of the Tribunal's jurisdiction. The Statute sets forth the subject matter, personal, territorial and temporal jurisdiction of the Tribunal and also addresses the issue of concurrent jurisdiction.

11. The Rules of Procedure and Evidence (hereinafter RPE) were first adopted on Feb. 11, 1994 and were subsequently amended on a number of occasions. The most recent amendment was in June 1996. *See id.* at 9 & n.2.; Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, May 5, 1994, IT/38/REV.4; United Nations Detention Unit Regulations for the Establishment of a Disciplinary Procedure for Detainees, April 1995, IT/97; Directive on Assignment of Defense Counsel, Jan. 30, 1995. Doc. No. 1/94; United Nations Detention Unit: Complaints Procedure, July 4, 1995, IT/96; United Nations Detention Unit: Disciplinary Procedure, IT/97; United Nations Detention Unit: Regulations Governing Visits and Communications, July 4, 1995, IT/98; United Nations Detention Unit: House Rules for Detainees, July 4, 1995, IT/99.

12. Certain decisions of the Trial and Appeals Chamber during 1995 are as follows: Trial Chamber's Decision on Defense Motion on the Principle of *non-bis-idem* in the *Tadic* Case, Nov. 14, 1995, IT-94-1-T; Trial Chamber's Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Aug. 12, 1995, IT-94-1-T; Trial Chamber's Decision on the Bosnian Serb Leadership Deferral Proposal, May 16, 1995, IT-94-1-T; Trial Chamber's Decision on Defense Jurisdictional Motion, Aug. 12, 1995, IT-94-1-T; Appeals Chamber's Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, IT-94-1-T.

Indictments confirmed during 1995 included the following:

- (a) Indictment Against Dusko Sikirika and others on July 21, 1995;
- (b) Indictment Against Slobodan Miljkovic and other on July 21, 1995;
- (c) Indictment Against Karadzic and Mladic on July 25, 1995;
- (d) Indictment Against Mrs. Radic and Slijvančanin on Nov. 7, 1995;
- (e) Indictment Against Dario Kordic and others on Nov. 10, 1995;
- (f) Indictment Against Karadzic and Mladic, on Nov. 16, 1995.

tion where the law applies and where methods of establishing rules of evidence are still uncertain. In addition, one must also consider the influence of the United Nations' (hereinafter UN) machinery and the problems inherent in the Dayton Accords. The existence or survival of the Tribunal in its present form undoubtedly depends on the Dayton Accords. To a certain extent, however, these accords may also help to solve many of the above-mentioned structural problems.

In the second part of my paper, I will try to sketch out the Tribunal's future prospects by underlying the dual aspect of its structural problems as well as the essential issues raised in the aftermath of Dayton.

PART ONE:
THE TRIBUNAL'S GENERAL RECORD SUPPORTED
BY EVIDENCE

I. PROCEDURAL BREAKTHROUGHS

In 1994, the Tribunal adopted:

- (a) the Rules of Procedure and Evidence (hereinafter RPE) (125 rules)¹³ to supplement the Statute of the Tribunal (34 articles) voted for by the SC;¹⁴
- (b) the Rules of Detention on Remand;¹⁵
- (c) the Rules of Assignment of Counsel;¹⁶
- (d) a series of other tools, *i.e.*, directions for the Registry and the Victims' and Witnesses' Unit.¹⁷

13. The RPE were first adopted on Feb. 11, 1994 and were subsequently amended on a number of occasions. *See* the Statute, art. 13, no.1 (1993.)

14. The Statute was approved by the SC in Resolution 827, Doc. S/RES/827 on May 25, 1993.

15. *See* Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, May 5, 1994, IT/38/REV.4.

16. *See* Directive on Assignment of Defense Counsel, January 30, 1995, Doc. No. 1/94.

17. *Id.* at 44-45: The Victims' and Witnesses' Unit became operational in the course of 1995 with the base objective of providing technical, logistic and emotional support to victims and witnesses, for both the prosecution and the defense, appearing before the Tribunal. It has been very active developing a program of support and protection for witnesses who will testify before the Tribunal. In formulating this program, the unit applied relevant UN standards including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). The unit articulated a number of criteria and guidelines for reimbursement of lost earnings during the period when a witness is required to testify before the Tribunal.

The RPE along with the Statute make up what may be called our Code of Criminal Procedure (hereinafter CPP in French);¹⁸ the Statute of the Tribunal is analogous to the French Criminal Code insofar as it states four series of incriminations.¹⁹ Like any Procedural Code, it is designed to protect the social and public order. In this case, it is an international social order which transcends or supplements the national public order by protecting the victims, as well the suspects, and the accused.

The Tribunal cannot evade this threefold demand. Nonetheless, a number of items have been introduced that are either specific to the *ad hoc* situation or result from the perspectives of judges representing certain domestic legal systems.

To put it briefly, we are dealing with a criminal public order transcending national boundaries. The Tribunal has tried to account for this by invoking its supremacy and by obligating the States to cooperate.²⁰ The Tribunal has further tried to delineate the necessary balance between certain protections (protection of the victims and witnesses²¹ versus protection of the accused)²² by choosing from among various processes, like the adversarial procedure, considered early in the SC debates to be the most efficient method for reaching a fair balance. However, a few adjustments have been introduced. Finally, the singularity of the former Yugoslavia conflict has led the Tribunal to provide a number of provisions in its rules tailored to the needs of the specific problems giving rise to its creation.

18. CODE DE PROCEDURE PENALE (Dalloz, 39th ed., 1997) (hereinafter CPP in French); THE FRENCH CODE OF CRIMINAL PROCEDURE (F.B. Rothman, revised edition, 1988).

19. See the Statute, *supra* note 8, Art.2, Grave Breaches of the Geneva Conventions of 1949; Art.3, Violations of the Laws or Customs of War; Art.4, Genocide; Art.5, Crimes Against Humanity (1993).

20. See RPE, *supra* note 11, 8-13 (1993).

21. See RPE of the Statute, *supra* note 11, Art.22, Protection of Victims and Witnesses; R.34, Victims' and Witnesses' Unit; R.69, Protection of Victims and Witnesses; R.70, Matters not Subject to Disclosure, R.75, Measures for the Protection of Victims and Witnesses, R.95, Evidence Obtained by Means Contrary to Internationally Protected Human Rights, R.96, Evidence in Cases of Sexual Assault.

22. See the Statute, *supra* note 8, Art.20, Commencement and Conduct of the Trial Proceedings; Art.21, Rights of the Accused and more generally, RPE, *supra* note 11, Part IV, Investigations and Rights of the Suspects.

A. Protecting the international criminal public order

The protection of the international criminal public order can be construed from the rules or orders made to the states requiring them to cooperate; it can also be construed from the penalties enacted by the Tribunal itself. Thus, there are two types of supremacy: supremacy intended by the Statute (which might be referred to as supremacy of the international jurisdictional order) and the supremacy intended by the RPE (which could be named the supremacy of the international political order.)

1. The first level of protection of international criminal public order: supremacy of the Tribunal and the States' obligation to cooperate

- i. The States' obligation to cooperate

- (a) The ICTY is different from the Nuremberg and Tokyo Tribunals. Unlike the ICTY, the Allied powers had absolute control over territories in Germany and Japan and the accused were present at the institution of criminal proceedings. Thus, there was no need for State cooperation.

- (b) There is no direct authority on the Member States or on the former Yugoslavia. The Tribunal has no means of direct coercion, nor is any agent entitled to investigate and summon witnesses or to enforce arrest warrants on the territory of the contracting states.

- (c) The Tribunal must rely on the national legal system of each country. This is why all the States are strictly bound to cooperate and to comply with all requests from the Tribunal. This is a very heavy obligation and is unambiguously emphasized in Article 29 of Statute.²³ This obligation is binding on all the States since the Tribunal was created by the SC pursuant to Chapter VII of the UN Charter. All the States must implement national provisions designed to make their legal systems compatible with the Statute.²⁴

23. See the Statute, *supra* note 8, which establishes that: (1) States fully cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law; (2) States shall comply without undue delay with any request for assistance or an order by a Trial Chamber.

24. See Y.B. *supra* note 4, (ch.5, 1995), at 317-18: On Nov.29, 1993, the President of The Tribunal compiled a list of the provisions of the Tribunal's Statute which require action at the national level. These provisions include Art.9, para.2; Art.10, para.2; Art.18; Art.20, para.2;

(d) The obligation to surrender the accused prevails over any legal impediment which may exist under the national law (Rules 56 and 58).²⁵

(e) The ambit is extremely vast. It not only applies to due diligence in executing arrest warrants and any other orders, but it obligates the states to provide all information they may have collected during their own investigation or prosecution. If necessary, the Tribunal may seek support from the SC.²⁶

ii. Supremacy of the Tribunal

The Tribunal does not have exclusive jurisdiction concerning war crimes and crimes against humanity. The Tribunal has been granted concurrent jurisdiction with national courts dealing with crimes occurring in their jurisdiction according to their own national law or the 1949 Geneva Conventions.²⁷

However, the *non-bis-in-idem* principle applies.²⁸ Nonetheless, there may be two situations where that principle does not apply:

Art.24, para.3; Art.28; Art.29; and Art.30.2. During 1994 the President of the Tribunal forwarded letters to States on a number of occasions advising them of the need to fulfill their international obligations to the Tribunal by the enactment of implementing legislation. Subsequently, in 1995, the Tribunal's Registry compiled 'Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of May 25, 1993.'

25. See RPE of the Statute, *supra* note 11, Rule 56, Cooperation of States, provides that: "The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with due diligence to ensure proper and effective execution thereof, in accordance with Art.29 of the Statute." Rule 58, National Extradition Provisions, provides that: "The obligations laid down in Art.29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."

26. See RPE of the Statute, *supra* note 11, Rule 59(B), Failure to Execute a Warrant to Transfer Order: "If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made or action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the SC accordingly."

27. See *Report of the Secretary-General* pursuant to paragraph 2 of SC Res. 808 (1993), Doc. S/25704, para.64-65: "In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the SC to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed, national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. It follows therefore that there is concurrent jurisdiction of the International Tribunal and national courts."

28. See the Statute, *supra* note 8, Art. 10(1), *Non-bis-in-idem*, which provides that: "No person shall be tried before a national court for acts constituting serious violations of

(a) when the act for which the accused was indicted was characterized as an "ordinary crime" by the national court in which he was accused; or

(b) when the national court proceedings were neither impartial nor independent, or if the case was not diligently prosecuted.²⁹

This rule of concurrent jurisdiction is balanced by a fundamental provision: the principle of the supremacy of the Tribunal over the national courts (Rule 9 §2).³⁰ For example, the Prosecutor may request the national authorities to forward all relevant information concerning the investigations or criminal proceedings instituted on their territories (Rule 8).³¹ If deemed appropriate, he may petition the national Trial Chamber to defer the case to the Tribunal.³² The concept of supremacy also means that at any given stage in national court proceedings, the Tribunal may decide to intervene and ask the court to defer to the Tribunal (Articles 9-11).³³

2. The second level of protection of the international criminal public order: when the accused or the State of which he is a citizen tries to evade internal justice

The judges of the Tribunal are aware of the practical difficulties they might encounter if the accused manages to escape or, more likely, if a State refuses to surrender or transfer an accused on the grounds that this conflicts with its national law. In that case, judg-

international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal."

29. See the Statute, *supra* note 8, Art.10(2). *Non-bis-in-idem*, provides that: "A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."

30. See the Statute, *supra* note 8, Art. 9.2. Concurrent Jurisdiction, which states that: "The International Tribunal shall have primacy over national courts. At any stage in the procedure, the IT may formally request national courts to defer to the competence of the IT in accordance with the present Statute and the RPE of the IT."

31. See the Statute, *supra* note 8, Art.8. Territorial and Temporal Jurisdiction, asserts that: "The territorial jurisdiction of the IT shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the IT shall extend to a period beginning on January 1, 1991."

32. See the Statute, *supra* note 8 and note 31, Art.9, Concurrent Jurisdiction; see the Statute, *supra* note 8 and notes 29-30, Art.10, *Non-bis-in-idem*; see the Statute, *supra* note 8, Art.11, Organization of the International Tribunal.

33. See the Statute, *supra* note 8 and note 31, Art.9.

ment by default or proceedings *in absentia* may prove useful. However, the SC Statute and the Rules did not deem it necessary to provide such a procedure, even if accompanied with the necessary guarantees for the rights of the defense.

The Tribunal is aware that most of the institution's credibility hinges on this kind of situation. Therefore, it has not been left powerless against it. Due to the express obligation by the States to cooperate, the Tribunal has devised a mechanism which will take the problem and its potential solution to the SC, or the 'sovereign.' This is what I refer to as the supremacy of the international political order.

Once an indictment has been confirmed by a judge of the Tribunal, an arrest warrant will be transmitted to the authorities of the State in which the accused currently resides, or was last residing.³⁴ If the State is unable to execute the warrant, it must report this to the Tribunal so the latter could execute the warrant and the Prosecutor may take all the necessary steps to effect personal service.³⁵ If, despite these steps, the accused does not make an appearance, the indictment is submitted to one of the Trial Chambers for confirmation.³⁶ The indictment and all the relevant evidence (including the subpoenas of witnesses or of victims) is submitted in open court.³⁷ If the Chamber is satisfied that there are reasonable grounds to believe the accused has committed the crimes with which he has been charged, it issues an international arrest warrant³⁸ which is transmitted to all States by INTERPOL. Thus, the accused becomes an 'international fugitive.'³⁹

In the event that the inability to effect personal service is due to the State's failure or refusal to cooperate, the President shall notify the SC upon the Chamber's request according to a Rule 61

34. See RPE, Rule 61(A)(i) and (ii), *supra* note 11.

35. See *id.* Rule 61(A)(i) and (ii).

36. See *id.* at C.

37. See *id.*

38. See *id.* at D.

39. See Nikolic Decision, Oct. 20, 1995, IT-94-2-R61, Review of the Indictment pursuant to Rule 61 rendered by Trial Chamber I (Judges Jorda, Riad and Odio-Benito), para.2: "In effect, all States in the international community will be bound, if the warrant is issued, to cooperate in searching for and arresting the accused, who would in consequence become an international fugitive."

Procedure.⁴⁰ There is no need to stress the importance of such a provision considering the indictment of leaders and officials in the past. In the second part of this work, we will see how this provision has already been applied this year in the *Nikolic* case.⁴¹

This procedure has recently been improved and is now an even stronger means of control which the Judge uses when executing warrants and furthering the Prosecutor's activity.

B. Seeking a balance between the respective protections of the victims, witnesses and the accused

1. Rights of the defense, especially the rights of the suspects and the accused

The SC Statute states all the fundamental guarantees of a fair and expeditious trial⁴² (this is analogous to international instruments regarding protection of human rights and Article 14 of International Covenant on Civil and Political Rights).⁴³ However, the SC Statute goes even further. Article 18 §3 provides a number of rights for the suspects during the pre-trial proceedings. For example, the suspect shall be entitled to be assisted by counsel (either by counsel of his own choosing or by assigned counsel) as well as having the proceedings translated into a language he speaks and understands.⁴⁴

The RPE express the principle of "a fight on equal terms" and clearly state that the Prosecutor is not to enjoy any particular

40. See RPE, *supra* note 11, Rule 61(E): "If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Art.29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the SC thereof in such a manner as he thinks fit."

41. See Jones, *supra* note 1: "In the *Nikolic* case (IT-94-2-61), the Trial Chamber I certified that the failure to effect personal service was due wholly to the failure or refusal of the Bosnian Serb Administration in Pale to cooperate with the Tribunal and invited the President of the Tribunal to notify the SC accordingly." This was done on Oct. 30, 1995, S/1995/910.

42. See the Statute, *supra* note 8, Art.21(4).

43. In its Decision on the Defense Motion for the Interlocutory Appeal on Jurisdiction in the *Tadic* Case rendered on Oct.2,1995, IT-94-1, para.46, the Appeals Chamber (Judges Cassese, Li, Deschenes, Abi-Saab and Sidhwa) noted that the "fair guarantees in Art.14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Art.21 of the Statute."

44. See the Statute, *supra* note 8, Art.18(3).

advantage as compared to the defense (Rules 66 to 68);⁴⁵ the accused is entitled to a public hearing (Rule 78);⁴⁶ the accused has the right to cross-examine the evidence and witnesses produced by the prosecution and to present evidence for his own defense (Rule 85);⁴⁷ the accused is presumed innocent until proven guilty (Rules 62 and 87);⁴⁸ the accused is not compelled to testify against himself or to confess guilt (Rule 90).⁴⁹

2. Protection of witnesses and victims

i. Protection of witnesses

Because of the difficulties encountered in gathering evidence (*i.e.* threats), it is necessary to ensure that a witness can testify freely and a number of measures have been taken to protect the witnesses' identity. In exceptional circumstances the public prosecution and the defense may be allowed to present evidence in the form of a deposition (Rule 71)⁵⁰ which may prove useful if the witness vanishes. Deposition evidence may be given by means of a video-conference.⁵¹

ii. Victims' and witnesses' unit

This unit was created alongside the Registry and is one of the most innovative provisions in international law. This unit is designed to advise victims and witnesses, to provide them with help and moral support and to recommend protective measures.⁵²

45. See RPE, *supra* note 11, Rule 66, Disclosure by the Prosecutor; Rule 67, Reciprocal Disclosure; R.68, Disclosure or Exculpatory Evidence.

46. See RPE, *supra* note 11, Rule 78, Open Sessions.

47. See RPE, *supra* note 11, Rule 85, Presentation of Evidence.

48. See RPE, *supra* note 11, Rule 62, Initial Appearance of the Accused; Rule 87, Deliberations.

49. See RPE, *supra* note 11, Rule 90, Testimony of Witnesses(F); *see also* the Statute, *supra* note 8, Art.21(4)(g), Rights of the Accused.

50. See RPE, *supra* note 11, Rule 71, Depositions.

51. See RPE, *supra* note 11, Rule 71(E), Depositions; Rule 90(E), Testimony of Witnesses.

52. See RPE, *supra* note 11, Rule 34, Victims' and Witnesses' Unit.

3. The procedure designed for balancing the protections of the accused and the protection of the witnesses

This balance was considered easier within the framework of the adversarial procedure. However, the procedure has undergone a few adjustments and is preferred by the SC (whose only precedent is the Nuremberg and Tokyo trials.)

Statement and description of the procedure:

(a) There will be no 'instructing judge.' The Prosecutor leads the investigation and gathers the evidence.

(b) There will be no *constitution de parties-civiles* or formation of civil parties⁵³.

(c) But once the indictment is confirmed, the defense and the prosecution must receive equal treatment. The defense may gather all the relevant evidence which must be reciprocally disclosed between the parties.

(d) There will be cross-examination.

This procedure has undergone three major adjustments:

(a) There is no real technical rule dealing with the admissibility of evidence. Instead, the judges (not the jury) will assess whether the evidence procured is satisfactory.⁵⁴

(b) The Tribunal may order the production of new or additional evidence (Rule 98).⁵⁵

(c) The rules do not provide for the granting of immunity or for any out-of-court settlement. The Trial Chambers may consider the accused's cooperation⁵⁶ with the Prosecutor as a mitigating factor just as they may take it into account in determining whether pardon or commutation is appropriate.⁵⁷

53. According to French law, any private individual or group of individuals may trigger a criminal prosecution by introducing a claim in court. This is referred to as "la constitution de parties-civiles" ("the formation of civil parties"). If anyone "se constitue partie-civile" against somebody else, the court must prosecute that individual. See CODE DE PROCEDURE PENALE [CPP] art. 721 (Fr.).

54. See the Statute, *supra* note 8, Art.23(2).

55. See RPE, *supra* note 11, Rule 98, Power of Chambers to Order Production of Additional Evidence.

56. See RPE, *supra* note 11, Rule 101(B)(ii), Penalties; see also the Statute, *supra* note 8, Art. 24(2), Penalties.

57. See RPE, *supra* note 11, Rule 125, General Standards for Granting Pardon or Commutation.

C. *A set of rules tailored to the situation*

The *ad hoc* aspect of this institution suggests that:

(a) The Tribunal was obligated to concern itself with armed conflict in the former Yugoslavia.

(b) This is not a state of war between armies but between the various fighting parties on the scene (*i.e.* regular armies, militias, paramilitary groups).

(c) This is an ethnic and religious conflict involving genocide, mass rapes, and other international human rights violations.

(d) There is terror and anguish among the civilians which deter witnesses (who were also frequently the victims) from testifying. This problem had already been addressed when procedural choices were implemented.

1. Evidence of a consistent pattern of conduct

The Tribunal will evaluate the general behavior of groups or military units as well as the conduct of the accused. It will have to establish that such crimes tend to indicate a consistent pattern of behavior, defined in Rule 93 as a “consistent pattern of conduct.”⁵⁸

This rule will be most useful in cases of systematic rape or genocide in order to establish “the intent to destroy a group in whole or in part.”⁵⁹

2. Sexual violence

Many women are victims in this conflict.

The RPE have special provisions concerning “the introduction of evidence”⁶⁰ and the credibility of the witness which may be used as a defense.

It must be stressed that no corroboration of the victim’s testimony is required.⁶¹ The victim’s prior sexual conduct is irrelevant and cannot be admitted as evidence.⁶² Before evidence of the victim’s consent is allowed to be submitted, the accused must convince

58. See RPE, *supra* note 11, Rule 93, Evidence of a Consistent Pattern of Conduct.

59. See the Statute, *supra* note 8, Art.4, Genocide.

60. See RPE, *supra* note 11, Rule 96(i), Evidence in cases of Sexual Assault.

61. See *id.*

62. See *id.* at 96(iv).

the Trial Chamber *in camera* that this evidence is credible and pertinent.⁶³

II. JUDICIAL DEVELOPMENTS

Judicial activity began in 1995 and developed throughout 1996 as the Tribunal was gathering more momentum. At the same time, the Tribunal was also proving its enhanced ability to determine which countries bear responsibility. The Tribunal can now be said to operate as a jurisdiction.

What does this judicial activity consist of? During its first year, one can reasonably state that the judicial activity that occurred tested the most important aspects of our legal instruments, particularly whether the Tribunal is able to accomplish the mission with which it was entrusted.

Indictments:

(a) On June 20, 1996, the Prosecutor asked the judges of the Tribunal to confirm 14 indictments concerning 57 accused, 7 of whom are currently detained in the UN's penitentiary quarters in The Hague.

(b) Arrest warrants have been served in all cases.

(c) Confirmed indictments reveal that every party involved in the conflict must bear responsibility, not just the political or military parties. This procedure indicates that the Tribunal follows the general mission with which it was entrusted by the SC.

Thus, a number of parties have been indicted for war crimes,⁶⁴ crimes against humanity⁶⁵ and serious violations of both the Geneva Conference⁶⁶ and the Genocide Convention.⁶⁷ These parties include:

(a) heads of camps such as Nikolic;⁶⁸

63. *See id.* at 96(iii).

64. *See* the Statute, *supra* note 8, Art.3, Violations of the Laws or Customs of War.

65. *See* the Statute, *supra* note 8, Art.5, Crimes Against Humanity.

66. *See* the Statute, *supra* note 8, Art.2, Grave Breaches of the Geneva Convention of 1949.

67. *See* the Statute, *supra* note 8, Art.4, Genocide.

68. The Prosecutor Against Dragan "Jenki" Nikolic, IT-95-2-R61, Decision of Trial Chamber I, Review of the Indictment Pursuant to Rule 61, rendered on Oct. 20, 1995.

(b) high-ranking officers such as Mrskic;⁶⁹

(c) top-government officials who are either Croatian (such as Dano Kordic,⁷⁰ Vice-President of the Croatian Community in Bosnia-Herzegovina) or Serbian (such as Radovan Karadzic⁷¹ and Milan Martic,⁷² Presidents of the self-proclaimed Serbian Republics in Bosnia-Herzegovina and Croatia, respectively);

(d) high-ranking officials in the military and paramilitary hierarchy or the police, such as General Mladic⁷³ and Mico Stanisic.

Requests for Deferral which have been sent to:

(a) Germany in the case of *Tadic*;⁷⁴

(b) Bosnia-Herzegovina in the cases of members of the Serb hierarchy in Pale,⁷⁵ such as Karadzic, Mladic and the Home Secretary Stanisic. In these cases, the Chamber declared that "the official position of any accused person even when carrying out *de facto* official functions did not relieve that person of criminal responsibility."

Regardless of this judicial activity, if the Tribunal is to be judged by other criteria than those necessary to assess judicial institutions on a national level, it must clearly explain either the first judicial decisions by the Trial and the Appeals Chamber or their contributions on an international level.

During the first judicial developments of the *Tadic* case, the *Nikolic*, *Vukovar*, *Karadzic* and *Mladic* cases and the *Erdemovic* case, the Tribunal had the opportunity to use the Rule 61 Procedure:

69. The Prosecutor Against Mile Mrskic, Miroslav Radic, Veselin Slijivancanin, IT-95-13-R61, Decision of Trial Chamber I, review of the Indictment Pursuant to Rule 61, rendered on Apr. 3, 1996.

70. The Prosecutor Against Dario Kordic, Tihomar Blaskic, Mario Cerkez, Ivica Sanitic, Pero Skopljak, Zlatko Aleksovski (Lasva River Valley), indictment rendered on Nov. 10, 1995.

71. The Prosecutor Against Radovan Karadzic and Ratko Mladic, IT-95-5-R61, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, rendered on July 11, 1996.

72. The Prosecutor against Milan Martic, IT-95-11-R61, Decision of Trial Chamber I, Review of the Indictment Pursuant to Rule 61, rendered on March 8, 1996.

73. Trial Chamber Decision on the Bosnian Serb Leadership Deferral Proposal: in the matter of a proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, IT-95-5-D, rendered on May 16, 1995.

74. See Defense Motion for Interlocutory Appeal, *supra* note 12.

75. See Bosnian Serb Leadership Deferral, *supra* note 73.

(a) due to preliminary motions made by the accused such as objections based on: lack of jurisdiction, the illegality of the Tribunal's creation, the supremacy of the Tribunal over national courts and lack of competence *rationae materiae*;⁷⁶

(b) due to preliminary motions made by the Prosecutor in order to obtain protection measures for the victims and witnesses;⁷⁷

(c) due to objections based on the *non-bis-idem* principle and those based on defects in the indictment made by the Trial Chamber.⁷⁸ By using Rule 61, the Tribunal asserted its wide-ranging jurisdiction, increased its potential for action and sharpened legal concepts.

My purpose is to invoke indictments only within the present report by addressing a number of legal issues raised during the *Tadic* trial.

A. *The legal problems raised in the Tadic trial*

At the judicial level, the *Tadic* case has allowed the Tribunal to make important decisions in the field of international law by linking the judicial proceedings with the accused's assigned counsel.

The accused's counsel has, in effect, moved for relief before the Trial Chamber. These three preliminary motions included:

(a) objections based on the illegality of the Tribunal and its lack of jurisdiction *ratione materiae*;

(b) objections based on defects in the indictment;

(c) objections based on the *non-bis-idem* principle.

The preliminary motion based on lack of jurisdiction raises three legal issues:

(i) the illegal creation of the Tribunal;⁷⁹

(ii) the improper supremacy of the Tribunal over national courts;⁸⁰

(iii) the lack of competence *ratione materiae*.⁸¹

The most important issue was whether the creation of the Tribunal was legal. Because this issue was an integral part of the pre-

76. See *Tadic Motion for Interlocutory Appeal*, *supra* note 12.

77. See *Protective Measures for Victims and Witnesses*, *supra* note 21.

78. See *Tadic Motion on Principle of non-bis-in-idem*, *supra* note 12.

79. See *Tadic Motion for Interlocutory Appeal*, *supra* note 12.

80. See *id.*

81. See *id.*

liminary motions, the Chamber's decision regarding this issue was the only one that could give rise to an appeal.

1. The Definition of jurisdiction

There is currently a narrow definition of jurisdiction limited to *ratione temporis, loci, personae* and *materiae*. More fundamentally, this is a judicial power and a legitimate power to "state the law."⁸²

A narrow conception of jurisdiction can be justified in a national legal system (*i.e.*, an integrated judicial system ensuring an orderly allocation of work to the various courts), but it cannot apply to international law where each court is a self-contained system.⁸³ If the IT was not legally created, it could not have been granted the legitimate power to decide dates, places, persons or lack of jurisdiction *ratione materiae*.

B. Admissibility of the appeal based on the illegality of the Tribunal's creation

This raises two legal issues:

(a) Is the International Tribunal competent to re-examine its creation by the SC?⁸⁴

(b) Is this creation a political question and, as such, not capable of judicial review?

1. Is the Tribunal competent to re-examine its creation?

First, one should refer to the SC's intentions. This approach ignores any residual power that may arise from the conditions of "the judicial function."⁸⁵ In fact, the competence referred to in Article 1 of the SC Statute does not represent "the whole scope of the competence of the Tribunal" (Trial Chamber); rather, "it (represents) the original, primary, or *ratione materiae* competence."⁸⁶ If only the SC's intentions are taken into account, then the IT is viewed as a "subsidiary organ" of the SC, created to its very last detail by "its founder and at its mercy." However, the SC has actually created "a special type of subsidiary organ, a Tribunal."

82. *Id.* at para. 10.

83. *Id.* at para. 11.

84. *Id.* at para. 13.

85. *Id.* at para. 14.

86. *Id.* at para. 2.

Rather, the obligation to determine the Tribunal's competence falls within the judiciary branch. For example, in the International Court of Justice's (hereinafter ICJ) advisory opinion on the Effect of Awards of the United Nations Administrative Tribunal (hereinafter UNAT or AT), the Court deduced the legal characteristics of the AT from the use of certain terminology in the SC Statute.⁸⁷ Among the characteristics of effective legal functioning is "the competence of competence," or "the competence to decide what falls within its own jurisdiction," considered a necessary ingredient to effective legal functioning.⁸⁸ In the words of Judge Cordova, "The first obligation of the Court, like that of any other judicial organ, is to determine its own competence."⁸⁹

However, there is no provision restricting that power in the SC Statute. The problem for the IT is not to establish itself as a constitutional court by reviewing the SC's decisions. Rather, the issue is whether the IT, by exerting its "subsidiary" competence, can examine the legality of its own creation by the SC in order to determine its own primary competence concerning the cases which it handles.

In the Advisory Opinion Concerning Namibia,⁹⁰ the Trial Chamber of the IT believed that it was not entitled to judicially review the decisions made by the relevant UN organs.⁹¹ The Appeals Chamber argued that this advisory opinion was valid as an exercise of "primary" competence. However, it is quite a different matter when the ICJ reviews the legality of other organs' decisions as "subsidiary" competence, in order to determine and make it possible to exercise its "primary" competence in the cases it handles.⁹²

87. *Id.* at para. 16, *citing* Effects of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Rep. 47, 60 (1954).

88. *Id.* at para. 18, *citing* the Statute of the International Court of Justice, art. 36.

89. *Id.* at para. 18, *quoting* the Advisory Opinion on the Judgment of the Administrative Tribunal of the ILO upon complaints made Against the UNESCO, ICJ Rep. 77, 163: "The first obligation of the Court—as with any other judicial body—is to ascertain its own competence." (1956) (Cordova, J., dissenting).

90. *Id.* at para. 20, *citing* the Decision on the Defense Motion on Jurisdiction in the Trial Chamber of the International Tribunal, Aug. 12, 1995, IT-94-1, para. 5.

91. *Id.* at para. 21, *citing* Legal Consequences for States by the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding SC Resolution 276, 1971 ICJ Rep. 16, para. 89 (1970).

92. *Id.* at para. 20.

In sum, the more the SC's power expands, the more the IT's power (even concerning its subsidiary competence) is restricted. This does not mean that this power disappears altogether, particularly in cases in which there is a conflict between the principles and the goals of the Charter.

The Appeals Chamber submits that the IT is competent to examine the objection concerning its illegality by the SC.⁹³

2. Is this a political question and as such not capable of judicial review?

The Trial Chamber accepted this argument.⁹⁴ The Chamber notes that doctrines concerning "political questions" and questions that are not capable of judicial review are traces of limitations pertaining to the "sovereignty" and "national honor" of another branch.⁹⁵

The ICJ has consistently dismissed this argument as an obstacle to the investigation of a case. As long as the case referred to it is based on a legal issue likely to get a legal answer, the Court considers itself bound to exercise its competence whatever the political context of the question may be. The Appeals Chamber dismissed the claim of the so-called "political" question incapable of judicial review.⁹⁶

C. The problem of constitutionality

The appellant argues that the IT's creation is illegal according to the UN Charter. The arguments are based on the limits of the SC's powers pursuant to Chapter VII of the Charter.⁹⁷

Three issues may be worded as follows:

(a) Was there really a threat to peace justifying reference to Article VII?⁹⁸

(b) If so, was the SC empowered to take any measure it deemed reasonable or did it have to choose from the measures

93. *Id.* at para. 25.

94. *Id.* at para. 23.

95. *Id.* at para. 24.

96. *Id.* at para. 25.

97. *Id.* at para. 24.

98. *Id.* at para. 27.

expressly specified in Articles 41 and 42 in order to restore or maintain peace?⁹⁹

(c) In the former case, how can the IT's creation be justified when such a creation was not included among the measures the SC was empowered to take?¹⁰⁰

Can the SC rely on Chapter VII for its power? Chapter VII, which begins with Article 39, indicates that the SC plays a crucial role and enjoys much discretion.¹⁰¹ However, this discretion cannot exceed the limits of the Organization's competence. Neither the letter nor the spirit of the UN Charter conceive the SC as *legibus solutus* (evading the law). Rather, the SC has more specific powers.¹⁰²

1. The ambit and limits of the SC's powers (Article 39)

The SC determines if a situation exists justifying the application of "exceptional powers" under Chapter VII of the UN Charter. The SC will determine if it should react either by making recommendations or by using its special powers and ordering the relevant parties to comply with Articles 41 and 42 to maintain international peace and security.¹⁰³

The SC must determine whether this situation is a "threat to peace," a "breach of peace" or an "act of aggression." Although it is rather difficult to spell out an exact definition of a "threat to peace," this determination must not violate the purposes and principles of the Charter.¹⁰⁴

The moment the Chamber has determined that there is a threat to peace, there is no need to attempt to analyze the limits of the SC's discretion. The first reason is that an armed conflict existed before the creation of the IT. It was either an international armed conflict and therefore a "breach of peace" or else it was a domestic armed conflict and a "threat to peace."¹⁰⁵ The second reason is a change in the appellant's attitude. The appellant no longer ques-

99. *See id.*

100. *See id.*

101. *Id.* at para. 28.

102. *See id.*

103. *Id.* at para. 29.

104. *See id.*

105. *Id.* at para. 30.

tions the existence of a “threat to peace” but instead, questions the judicial legality and the measures implemented by the SC.¹⁰⁶

2. The ambit of the provisional measures under Chapter VII

Once a situation is examined and determined as a “threat, breach or aggression,” the SC may exercise its “special powers.”

Is the SC’s decision limited to the provisional measures under Articles 41 and 42 of the Charter or does it enjoy greater discretion in the form of general powers designed to maintain and restore peace? The SC enjoys great discretion in deciding what measures shall be taken, and it is not necessary to determine if each measure taken by the SC falls within the limits of Articles 41 and 42 or perhaps Article 40.¹⁰⁷

Articles 41 and 42 confer a wide range of powers. Such powers are coercive not only with regard to the state or organ considered blameworthy, but also with regard to other member states by obligating them to cooperate with the Organization (Art. 2 §5, Art. 25 and Art. 48) in executing measures determined by the SC.¹⁰⁸

3. The creation of the IT pursuant to Chapter VII

The SC has great discretion in determining which measures to apply. This discretion is not unfettered, but rather is limited to the measures provided in Articles 41 and 42.¹⁰⁹ Resolution 827 states that “the creation of an IT would contribute to restoring and maintaining peace.”¹¹⁰

The appellant argues that:

(a) This creation was never intended by the authors of the Charter;

(b) The SC is constitutionally incapable of creating a judicial organ since it is itself an executive organ devoid of judicial powers;¹¹¹

106. *See id.*

107. *Id.* at para. 31.

108. *See id.*

109. *Id.* at para. 32.

110. *See id.*

111. *See id.*

(c) The creation of the IT has neither been encouraged nor been able to promote international peace.¹¹²

- i. Which article in Chapter VII is the basis for the IT's creation?

On the one hand, there is no express reference to the IT's creation in Articles 41 and 42. This is obvious because Article 42 provides for military action, thereby implying the use of armed force. It is equally obvious that Article 40 provides for provisional measures and can be compared to urgent police action. Because such measures are not enforcement measures under Article 40, they are not subject to the limitations of Article 2 §7 of the Charter. The controversial issue is whether such measures are considered recommendations or obligations.¹¹³

On the other hand, the IT's creation may correspond to the provision in Article 41 of "measures not involving the use of armed force" because the measures provided in Article 41 are merely illustrative examples and do not exclude other measures as long as they do not require the use of armed force.¹¹⁴

Nothing in Article 41 states that such measures must be taken by Member States. However, if the organization can take measures which the States may apply, it can *a fortiori* take measures which may be applied by its own organs. (This is a preventative measure designed to involve the States, thereby revealing the Organization's lack of resources.)¹¹⁵

In sum, the IT's creation falls within the powers of Article 41.¹¹⁶

- ii. May the SC create a subsidiary organ endowed with judicial powers?

The argument is that the SC is not endowed with judicial powers. However, this view indicates a misunderstanding of the UN Charter and its constitutional framework. The SC's primary function is to maintain peace and international security. It has created a

112. *See id.*

113. *Id.* at para. 33.

114. *Id.* at para. 34.

115. *Id.* at para. 35.

116. *Id.* at para. 36.

judicial organ in the form of an IT for the exercise of this primary function.¹¹⁷

Similarly, the UN General Assembly does not need to be endowed with military powers to create the United Nations International Fund (UNIF) in the Middle East or the United Nations Administrative Tribunal (UNAT).¹¹⁸

- iii. Is the creation of a Tribunal an appropriate measure?

According to Article 39, the SC has the means to evaluate political situations at its disposal. However, it is a mistake to test the legality of the measures *ex post facto* according to their success or failure to reach their aims.¹¹⁹

The creation of the IT is only one of the measures the SC has taken.

4. Does the Tribunal's creation contravene the general principle of the creation of Tribunals governed by the law?

The appellant argues that the Tribunal was illegally established,¹²⁰ but we can refer to:

(a) Article 14 § 1 of the International Covenant on Civil and Political Rights: "Every person has the right to have a fair and public hearing of his case by a competent, independent and impartial court established by law";¹²¹

(b) Article 6.1 of the European Convention of Human Rights,¹²²

117. *Id.* at para. 38.

118. *See id.*

119. *Id.* at para. 39.

120. *Id.* at para. 41.

121. *See* International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, art.14, para.1.

122. Article 6.1 of the European Convention on Human Rights provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4. 1950, 213 U.N.T.S. 222, art. 6, para. 1.

(c) Article 8.1 of the American Convention of Human Rights;¹²³

(d) Article 38 of the Statute of the ICJ.¹²⁴

All States are required to organize a system of national criminal justice which provides the establishment of a court entrusted with hearing cases. However, this does not mean that an international criminal tribunal may be created by the mere whims of a group of government officials. This tribunal must also be established according to legal principles.¹²⁵

The phrase "established by law" can be interpreted in three different ways:

(a) It may mean "established by a legislative organ." The appellant argues that the creation of the IT resulted from the decision of an executive organ and not by a democratic process designed to create a judicial organ in a democratic society.¹²⁶

The jurisprudence of the European Convention of Human Rights supports the appellant's argument. Moreover, it may be said that a legislative organ aims to ensure that the administration of justice is not left solely to the discretion of the Executive.¹²⁷

However, the allocation of powers (legislative, executive, judicial) in the national systems does not apply within the framework of the United Nations.¹²⁸ The ICJ is the "main judicial organ." Neither a legislative organ nor more generally a "Parliament" exists in the world community; therefore, there is no such thing as a legislative entity designed to promulgate laws. It is thus impossible to classify organs of the UN according to the above-mentioned divisions that exist in national law.¹²⁹

(b) It may mean "established by an organ which, although not a Parliament, is nonetheless endowed with limited power to make coercive decisions." In this sense the SC is one such organ. The

123. Article 8.1 of the American Convention for Human Rights provides: "Every person has a right to a hearing, with due guarantees and within a reasonable time by a competent, independent tribunal established by law [. . .]." American Convention on Human Rights, Nov.22, 1969, O.A.S. Treaty Series No.36, at 1, O.A.S. Off. Rec. OEA.Ser/L/V/II.23 doc. rev. 2.

124. See Tadic Motion for Interlocutory Appeal, *supra* note 12.

125. *Id.* at para. 42.

126. *Id.* at para. 43.

127. See *id.*

128. See *id.*

129. See *id.*

appellant submits that because the UN system is so different from the national systems involving the separation of powers, the UN cannot create such a council unless the Charter is amended.¹³⁰

This argument may be dismissed. The fact that the UN does not have any legislative organ does not mean that the SC cannot create the present Tribunal provided it acts pursuant to the powers conferred by its Charter.¹³¹ Furthermore, its creation has been approved several times by the General Assembly (the “representative” organ of the UN) by electing judges and adopting the budget without prejudice to the various resolutions expressing encouragement and satisfaction.¹³²

(c) “Established by law” may mean created according to a rule of law (in the international law context) judged by appropriate international standards, *i.e.* it must provide all the necessary guarantees for fairness, justice and impartiality.¹³³

When Article 14 of the International Covenant on Civil and Political Rights was worded, a number of countries wanted to insert the phrase “pre-established by law.” This was not done because this precondition would result in no country ever reorganizing its courts. It may be held that the Nuremberg Tribunal was not legally created (and therefore did not exist) at the time Nazi crimes were committed.¹³⁴

Yet the Nuremberg Tribunal is thought to have meted out fair justice.

The problem is not so much knowing whether a tribunal has been pre-established but whether it is has been established by a competent organ according to the relevant judicial procedures. On this point, one should refer to the interpretation of the expression “established by law” by the United Nations Human Rights Committee when applied to special courts and *ad hoc* tribunals. The adopted criterion is that the accused must be offered the safeguards inherent in a fair trial.¹³⁵

130. *Id.* at para. 44.

131. *See id.*

132. *See id.*

133. *Id.* at para. 45.

134. *See id.*

135. *See id.*

An examination of the SC Statute and Rules of the IT reveal that it has been established according to the rule of law. Article 21 of the SC Statute uses the same terms as Article 14 of the European Convention. Article 13 § 1 of the SC Statute sets forth the requirements to act as a judge and the provisions regarding the equality of legal instruments and the fairness of the trial.¹³⁶

In conclusion, the IT has been established according to the appropriate procedures within the framework of the UN Charter.¹³⁷

PART TWO: THE FUTURE AND THE QUESTIONS IT HOLDS

The future of the institution depends on the response to two series of questions which are not unrelated.

Some difficulties are inherent in this Tribunal's structure which has very limited precedent and which has glaring weaknesses that are still evident after two years of existence. Such difficulties can be identified and a solution can be implemented for some of them.

Other weaknesses are more problematic insofar as the existence or the survival of the Tribunal depends on the successful application of the Dayton Accords. Nonetheless, the Dayton Accords may be thought to have reaffirmed the jurisdiction's existence. After the signing of these accords, the Tribunal has entered a new and crucial period in which no definite answers have been proposed to many of the questions raised.

However, the sum total of such uncertainties vary. Since we are dealing with an operational institution, problems affecting the short-term future of the Tribunal may be identified, even though great weaknesses are still evident. On the other hand, the long-term future of the Tribunal completely hinges on the future of the Dayton Accords. Many hopes and uncertainties depend on them.

A. The short-term future: the Tribunal as an institution still exhibits great weaknesses

Many obstacles still make the Tribunal's judicial construction extremely weak. On the whole, the institution has risen to the com-

136. *Id.* at para. 46.

137. *Id.* at para. 47.

munity's challenge. But in turn, the Tribunal is entitled to address the community and make it realize that the judges are no longer responsible for many difficulties which may still imperil the institution.

Such weaknesses include:

(a) financial difficulties linked to the UN's budget which forces the Tribunal to experience ups and downs similar to those in our national institutions. However, the crucial difference is that the UN's fiscal difficulties also affect the investigative proceedings.

(b) difficulties in obtaining cooperation from the States;¹³⁸

(c) difficulties in rendering justice while armed conflict is raging in a remote country.¹³⁹

1. The problems of resources and budget

To give you an idea of the severity of the crisis, people must realize that the Tribunal's budget for two years (1994 and 1995) was only approved as late as July 1995. Until that date the Tribunal depended on provisional resources.¹⁴⁰ In 1996 a budget in the amount of \$39,095,900 million had been decided for one year.¹⁴¹

Difficulties currently exist because such an innovative institution was created without foreseeing all the implications inherent in its development, the most serious being the expenses of investiga-

138. See Antonio Cassese, Address by the President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations, Nov.7, 1995, ICTY Y.B. 1995, at 312: "Outstanding Problems: 1. Difficulty in obtaining State cooperation—First, the decisions, orders and requests of the International Tribunal can only be reinforced by other, namely national authorities. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where crimes have been allegedly committed. For all these purposes, it must turn to State authorities and request them to take action. Our Tribunal is like a giant that has no arms and no legs."

139. *Id.* at 313: "By contrast, our Tribunal has been called upon to dispense justice while armed conflict continues and while the planners and perpetrators of crimes shelter under the protective umbrella of military or political power. Plainly, no suspects will be surrendered to the Tribunal by those authorities which have been criminally complicit, or at least criminally negligent in preventing or stopping serious violations of international humanitarian law."

140. *Id.* at 314.

141. See Second Annual Report of the International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law committed in the territory of the Former Yugoslavia since 1991, ICTY Y.B. 1995, at 273, para.122: "Under the Resolution, the General Assembly decided to appropriate \$39,095,900 (net) to the Special Account for the Tribunal for the period from 1 January 1994 to 31 December 1995."

tive proceedings, the expenses incurred for witnesses' safety, and the costs of defense.

However, we have made a positive first step. We are now able to manage our expenses directly, which will enable us to better prioritize our budget in the future. In addition, the aid and assistance from our host country is exemplary.¹⁴²

2. The difficulties inherent in any international criminal jurisdiction called upon to hear reports of crimes committed in a remote country involved in armed conflict.

Examples of such difficulties are:

(a) Specialized investigative services cannot be sent over when crimes have been committed if only national jurisdictions have access to logistical information;

(b) Information often comes through an NGO which is hardly ready for scientific and technical analysis by the police;¹⁴³

(c) The Prosecutor's Office is supplied with 80 investigators in all (a ration of 10 murder cases for every Prosecutor in national law);

(d) There is a difference between "national" and "international" crimes due to the large number of perpetrators as well as the large number of victims.

Generally speaking, judicial standards and institutions are created *a posteriori* and endorse the new undertaking. Presently, however, there are new victims (essentially civilians) as well as high-ranking officials who have planned or even committed war crimes who may still be able to escape prosecution due to their military or political positions.¹⁴⁴

This situation leads to a refusal to cooperate. Until now, the consequences have been drastic. Investigators are incapable of going to areas still considered unsafe and witnesses are afraid. There is also indecisiveness on the part of those who can picture the incited nationalists and their accomplices as tomorrow's heroes or even as political leaders, regardless of which side they support.¹⁴⁵

142. *Id.* at 276, para.140.

143. *Id.* at 278, para.152-161.

144. See Antonio Cassese Address, *supra* note 138, at 313.

145. See *id.*

B. The long-term future: an evaluation of the after-Dayton period

1. An Evaluation of the Dayton Accords

i. The agreements themselves

There are limited obligations imposed on Croatia and the Federal Republic of Yugoslavia. Most of the obligations are made on Bosnia-Herzegovina and the two entities of which it will consist. Although the IFOR has pledged to cooperate with various organs, including the IT,¹⁴⁶ the IFOR has no mandate to act on behalf of Croatia or the Republic of Yugoslavia.

Concerning Bosnia-Herzegovina:

(a) The accords seem to provide all the necessary conditions for the IT to become very efficient.

(b) The IFOR's powers are general and exhaustive. Article X of the Dayton Accords provides that "the parties shall fully cooperate with all the entities contributing to the implementation of the agreements or with any other entities authorized by the Security Council (SC) of the United Nations (UN), including the International Tribunal (IT)."¹⁴⁷ One of the key issues is understanding how this clause will be interpreted.

(c) The High Representative's (HR's) powers are extensive. The HR is in charge of the follow-up and implementation of all the civil aspects of the Peace Agreement.

(d) The International Police Task Force (hereinafter International Police) also plays a major role, i.e. "the follow-up, observation and inspection of police activities." More specifically, it must inform the IT when it receives reports of credible information concerning human rights violations. The Parties must cooperate with the above-mentioned organizations in investigations by police forces and by officials of these forces.

(e) There are very strict obligations made on the parties to cooperate with the International Police. A sanction mechanism reinforced by Resolution 1022 of the SC is provided in case of failure to cooperate.¹⁴⁸

146. See Dayton Accord, art. X:

147. See *Id.*

148. See S.C. Res. 1022, U.N. SCOR, 53rd Sess., U.N. Doc. S/1995/1022.

ii. Constitutional provisions concerning the Tribunal

(a) Direct application of the European Convention and especially Article VII regarding the *nullum crimen* principle.¹⁴⁹ This principle states that a person guilty of an act which, when committed, was criminal, according to the general principles of law acknowledged by civilized nations, will not be relieved from judgment and punishment.

(b) Bosnia-Herzegovina becomes a party to the international agreements, especially to the Genocide Convention and the Geneva Agreements.

(c) Bosnia-Herzegovina must have unlimited access to the IT and to all the international human rights control agencies by complying with orders made pursuant to Article 29.

(d) The general principles of law are an integral part of the legislation in Bosnia-Herzegovina.

(e) Generally speaking, these constitutional provisions are consistent with international law and are regarded as absolute and imprescriptible imperatives.

iii. Evaluation of the Dayton Agreements

Legal evaluation:

(a) They provide a sound and useful basis for reinforcing the efficacy of our Tribunal's action;

(b) There is no amnesty for war crimes;

(c) All the parties are legally strictly bound to cooperate with the IT;

(d) Within a framework which (at best) is still to be determined, the IFOR could provide assistance that may include the suspects' arrests;

(e) The IFOR has exhaustive powers closely associated with the IT's powers.

149. See EUR. CONV. HUM. RTS., *supra* note 122, art. VII: 1. No one shall be held guilty of a criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.

(f) The Commander of the IFOR and the High Representative must report failures to cooperate to the UN, the European Union, and the States that promoted the Accords.

2. The prospects for effective implementations

i. Reinforcement of the Accords by the SC

Reinforcement is especially clear in Resolutions 1022¹⁵⁰ and 1031¹⁵¹ of the SC. In Resolution 1022, the obligation to comply with requests for assistance and orders by the IT is an essential aspect of the implementation of the Peace Agreement.

Three points are worth emphasizing:

(a) "Significant failure" to comply may include the repeated and constant refusal to execute arrest warrants or to hand over the accused;

(b) Sanctions will almost automatically be reimposed, thus escaping the possibility of a veto;

(c) This resolution is aimed at the Federal Republic of Yugoslavia and the Serb authorities in Bosnia but not at Croatia nor at the Federation of Bosnia's Croats. (See Resolution 1031, adopted Dec. 15, 1995, particularly paragraphs 4 and 5.)¹⁵²

150. See S.C. Res 1022., U.N. SCOR, 53rd Sess., U.N. Doc. S/1995/1022.

151. See S.C. Res. 1031, U.N. SCOR, 54th Sess., U.N.Doc. S/1995/1031.

152. *Id.* at para. 4-5: Subsequently, presentations were made to the conference by my Special Representative for the Former Yugoslavia, by the Force Commander of the Nations Protection Force (UNPROFOR) by the United Nations High Commissioner for Refugees and by the United Nations High Commissioner for Human Rights. The President of the World Bank and a representative of the International Monetary Fund (IMF) also made statements.

The present report addresses the following aspects of implementation of the Peace Agreement that affect the United Nations:

- (a) The transition from UNPROFOR to the Implementation Force (IFOR) of the Peace Agreement;
- (b) Coordination of the United Nations contribution to implementation of the Peace Agreement;
- (c) The United Nations role as regards:
 - (i) humanitarian relief and refugees;
 - (ii) demining;
 - (iii) civilian police;
 - (iv) human rights;
 - (v) elections;
 - (vi) rehabilitation of infrastructure and economic reconstruction.

ii. The On-Site Reality and the Criminal Policy of the Tribunal

What are the prospects for effective application of the Dayton Accords within a judicial framework which could hardly be expected a few months ago? Much depends on the attitude of the contracting States. We cannot fail to notice that the cooperation of the parties with the ICTY is far from satisfactory.

3. In such conditions, where does the Tribunal stand at the onset of this new period?

I think a distinction must be made between *the political sphere* and *the legal sphere*.

The political sphere consists of the States which must assess the mixed (at best) results of the agreements and draw all the relevant conclusions. The Tribunal is thus associated with an intense politico-judicial activity centered around two themes: the extradition of the accused and cooperation in the near future.

Concerning the legal and judicial sphere:

More than ever the judges must pursue the course in which they are engaged and which, I believe, is essential to the moral survival of the Tribunal. This involves (at the very least) the indictments of leaders and political officials as well as the universal denunciation of their criminal behavior outlined in Article 61.¹⁵³

In order to achieve this goal, the procedure had to be altered. From now on it will be under the strict control of the judges.

CONCLUSION

Finally, I would like to express a few personal opinions. The Tribunal has entered a crucial, new period which challenges the international community to face its responsibilities. In this sense, the judges are less isolated than they were previously, and the surrounding skepticism has, in the last two years, been replaced by a kind of recognition. Surely, the weight of the "judicial environment" surrounding the reestablishment of peace provided by the Tribunal is now evident. Obviously, investigating and sentencing the guilty were not only conceived as an integral part of the agree-

153. See RPE, *supra* note 11, Rule 61, Procedure in Case of Failure to Execute a Warrant.

ments, but as a necessary condition for their survival. In other words, there can be “no lasting peace without justice.”

Nevertheless, we are far from having solved all problems.

Without going back over the problems and questions that I have raised before you, I would like to say that in the period ahead of us, everything is possible, including the worst. For example, the demise of the institution may occur due to lack of suitable institutional and judicial instruments, or worse still, due to the failure to act in a climate of total indifference and passivity. The reason is simple enough if we consider that (except for Nuremberg, where a totally different set of conditions applied) there has never been any international judicial body that has benefited from so many organs since the signing of the Dayton Accords. If the Tribunal fails in the oncoming months, its failure will not only signify that much international crime will go unpunished, which will blemish the international community, but also that the very idea of organized, permanent criminal justice will regress for a long time to come.

Two conditions must be quickly fulfilled if we want to take up the challenge with a reasonable chance of success:

(a) In the immediate future, the accused whose crimes have been reported should be speedily arrested according to a scale of responsibility.

(b) The Prosecutor’s criminal policy should be more stringent with regard to primary criminal liability which corresponds to universal standards of a criminal court of this nature and scope. This means that the Court may either have to review the current indictment or lay out priorities for the future.

If unsuccessful, the Tribunal would run the risk of remaining at a standstill. You may have guessed that my apprehension changes according to whether these prospects convey a fear of the void, of the useless, or of the excess, without setting any true example.

The wheel has come full circle. Is it a bluff or a breakthrough? We have not yet come to the stage where we can resolve this issue by putting together all the pieces of the puzzle.

It may be said that our present achievements will leave a mark in modern international criminal law. Let us remember that only two years ago, there was no budget, no headquarters, no courtroom, no administrative, judicial, or technical team, no code and for a period of nine months, no prosecutors and barely a few investiga-

tors. But as a judge, I will not be content with such achievements. I share the sentiments of most of my colleagues who are fully determined and look forward to future accomplishments.

In conclusion, I would like to borrow the words of the admirable United States Prosecutor Jackson at Nuremberg as he commented on that Tribunal and considered it to be the result of “the desperate effort of humanity” to apply the law to those who used their powers to undermine the foundations of world peace. The desperate effort of humanity! Don’t these achievements amount to that? This may be the only true question that many are still unable to answer.