

# Problems, Obstacles and Achievements of the ICTY

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## 1. Introduction

When I compare my experience at the International Criminal Tribunal for the Former Yugoslavia (ICTY) with my service as a federal judge in the United States, where I had the benefit of an established infrastructure and staff, with rules of procedure and evidence and clear precedent to look to, the progress of the Tribunal is absolutely amazing. When we 11 original Judges met in The Hague in November of 1993, we had none of that. We had no premises, no permanent staff and, critically, we had no legal framework to guide the work of the prosecution staff and the Judges.<sup>1</sup> In light of these difficulties, it is indeed a major accomplishment that the Tribunal not only has survived to mark its 10th anniversary, but has developed into the effective institution it is today.<sup>2</sup>

Serving as Presiding Judge over the first full trial of the Tribunal was certainly a high point for me personally during the six years I was with the Tribunal.<sup>3</sup> In addition to myself, the Trial Chamber consisted of my able colleagues and dear friends, Judge Ninian Stephen and Judge Lal Vohrah. It faced major challenges in interpreting and applying the Rules of Procedure and Evidence without precedent and crafting procedures to make the trial efficient that were not addressed by the Rules. Much has been written about that trial and the jurisprudence it spawned and, as much as I am

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1 *First Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/49/342-S/1994/1007, 29 August 1994, paras 24–42 (providing a full discussion of the difficulties that the Tribunal initially faced).

2 The first few years were particularly challenging and, without the tenacity of President Cassese and the tireless efforts Richard J. Goldstone, Prosecutor, the Tribunal may not have survived.

3 Sentencing Judgment, *Tadić* (IT-94–1-T), Trial Chamber, 14 July 1997; Opinion and Judgment, *Tadić* (IT-94–1-T), Trial Chamber, 7 May 1997.

tempted, I will not follow that tack.<sup>4</sup> Rather, in this paper, I will discuss the effect of the Tribunal's lack of direct enforcement powers on its efforts to function effectively when confronted with overwhelming non-compliance by states. I will also provide a brief assessment of the Tribunal's contributions and its impact on the former Yugoslavia.

## 2. The Problem of Enforcement

Unlike municipal criminal judicial systems, the Tribunal is not part of a framework that ensures that its arrest warrants and other orders will be executed. Also, unlike the Nuremberg and Tokyo Tribunals, it does not have the support of the Allied Powers that wielded full authority and control over Germany and Japan. Rather, the Tribunal must rely on states and international organizations to carry out these functions. A state's obligation to cooperate with the Tribunal 'flows from the fact that the Tribunal has been established by a decision of the Security Council taken under Chapter VII of the Charter. That decision is, therefore, binding on all states by virtue of Article 25 of the United Nations Charter.'<sup>5</sup> States, therefore, have a binding obligation to 'take whatever steps are required to implement the decision'.<sup>6</sup> Article 29 of the Statute of the Tribunal sets forth the obligation of all states to cooperate with the Tribunal and comply with its requests for assistance or orders.<sup>7</sup> However, the Tribunal does not have the direct power to compel this cooperation.<sup>8</sup> Instead, in the event of non-compliance, it must rely on the Security Council to enforce its orders and requests.<sup>9</sup>

While I was a member of the Tribunal, a number of measures were taken to ameliorate the consequences of non-cooperation. For example, Rule 61 was adopted, which enabled a Trial Chamber to receive evidence of the commission of crimes when an arrest warrant was not executed. This and other rules called for the President to

4 See, e.g. G.K. McDonald, 'Trial Procedures and Practices', in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer Law International, 2000) 546–622, at 559–574; M.P. Scharf, *Balkan Justice* (Durham, North Carolina: Carolina Academic Press, 1997); K.D. Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY', 37 *New England Law Review* (2003) 903–914; T. Meron, 'Answering for War Crimes: Lessons from the Balkans', 76 *Foreign Affairs* (1997) 2–8, at 6–7.

5 *First Annual Report of the ICTY*, *supra* note 1, at para. 84.

6 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1998)*, UN doc. S/25704, 3 May 1993, para 125; *see also* Art. 25, UN Charter.

7 Article 29 ICTYST. ('States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber').

8 See D.A. Mundis, 'Reporting Non-Compliance: Rule 7bis', in R. May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 421–438, at 421 ('In the event that States fail to comply with the orders and decisions of the Tribunal, the Tribunal possesses no independent police or military force to ensure compliance. Rather, as a subsidiary organ of the Security Council, the Tribunal must look to that body to enforce its orders in the event of non-compliance by States.').

9 *First Annual Report of the ICTY*, *supra* note 1, at para. 86; *see also* Art. 41, UN Charter (authorizing the Security Council to decide what measures are necessary to give effect to its decisions).

report state non-compliance to the Security Council.<sup>10</sup> Ultimately, however, these procedures were merely tools, used to increase the likelihood of gaining the cooperation and compliance of states and international organizations, without which the Tribunal could not even begin to fulfil its mandate.<sup>11</sup> Only the Security Council had the power to take action to enforce the duty of cooperation.

### **A. Rule 61**

When the Judges met for the first time in The Hague, we were well aware that the Tribunal would face non-cooperation from some, if not all, of the republics of the former Yugoslavia, which, at that time, were still embroiled in conflict.<sup>12</sup> Some in the international community even thought it best to establish a tribunal only after the conflict in the region came to a close.<sup>13</sup> Others doubted that major figures would or

10 See Rules 7bis, 11, 13, 59 and 61 ICTY RPE.

11 There are various forms of cooperation that may fit within the rubric of Security Council Resolution 827, including passing implementing legislation. The Tribunal lacks a facility for the incarceration of persons convicted by the Tribunal and, thus, it enters into enforcement of sentences agreements. Also, states are called upon to agree to accept persons who fear for their safety after testifying. Financial contributions to the Tribunal's Trust Fund are also needed. The Dayton Peace Agreement reiterates the duty of parties to cooperate with the Tribunal, including the NATO peacekeeping force. See, e.g. *Sixth Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/54/187-S/1999/846, 25 August 1999, paras 186–202 (addressing the importance of state assistance with regard to implementing legislation, the enforcement of sentences and voluntary contributions); *Fifth Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/53/219-S/1998/737, 10 August 1998, paras 248–270 (same); *Fourth Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/52/375-S/1997/729, 18 September 1997, paras 148–170 (same); *Third Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/51/292-S/1996/665, 16 August 1996, paras 181–198 (same). A discussion of these cooperation obligations is beyond the scope of this article, although President Cassese and I both developed contacts with states and organizations, seeking this support.

12 When the judges first met, on 17 November 1993, Carl-August Fleischhauer, the Under-Secretary-General for Legal Affairs of the United Nations, told us that we could expect little cooperation in the gathering of evidence, the hearing of witnesses and the arrest and surrender of the accused from the states in the former Yugoslavia. ICTY, Press Release – 'Representative of United Nations Secretary-General Declares Open the First Meeting of International War Crimes Tribunal for the Former Yugoslavia', 17 November 1993, at 3 (on file with author).

13 R. Gutman, *A Witness to Genocide* (New York: Macmillan, 1993) 151.

should appear 'in the dock'.<sup>14</sup> Given these well founded fears of non-cooperation, a proposal for trials *in absentia* was advanced. While I opposed any trial in the absence of the accused, unless he absconded after submitting himself to the jurisdiction of the Tribunal, I did propose a procedure that would have allowed for the preservation of evidence, should the accused fail to appear.<sup>15</sup> It was through a mediation of these concerns that Rule 61 was established.<sup>16</sup>

Pursuant to Rule 61, if a state has failed to execute an arrest warrant, a Trial Chamber may conduct a public proceeding, in which it receives documentary and testimonial evidence from the Prosecutor. If it finds that there are reasonable grounds to support a finding that the accused has committed any or all of the crimes charged, the Chamber essentially 'reconfirms' the indictment and an international arrest warrant is issued.<sup>17</sup> Further, the Chamber may find that the state has, therefore, failed to cooperate with the Tribunal and, in such a case, the President can notify the Security Council.

These proceedings proved to serve a number of valuable purposes at a time when states failed to execute the Tribunal's warrants and orders.<sup>18</sup> First, the proceedings gave some solace to victims, as an opportunity to testify about the atrocities they alleged to have been subjected to and thereby inform the international community of the egregious violations that had occurred during the conflict. Secondly, although not trials, they permitted the Tribunal to publicize its work and make its existence known. Finally, they were one method of triggering the reporting of state non-compliance by

14 *Ibid.*, at 150–151 and 154 (reporting that 'Kalshoven [Chairman of the UN Commission of Experts] says he was instructed by "authoritative persons" in the UN not to pursue Serbian politicians such as Soloban Milošević ... and Radovan Karadžić'); *ibid.*, at 155 (however, Kalshoven denies making this statement); *First Annual Report of the ICTY*, *supra* note 1, at paras 43–45 (discussing Tribunal skeptics); see also 'War Crimes Tribunal marks 10th anniversary', *Deutsche Presse-Agentur* (11 November 2003).

15 This proposal provided that when the relevant national authorities have failed to execute, in good faith, an order for the accused to appear, issued by a judge of the Tribunal, and when this order provides that the hearing may be held if the accused fails to comply with the order to appear, the Trial Chamber, or a Judge of the Trial Chamber, may, upon motion by the Prosecutor, initiate proceedings to preserve evidence. This proposal also provided that all evidence admitted during such a proceeding would be made public and the accused would be entitled to have counsel appointed on his behalf during such a proceeding.

See McDonald, *supra* note 4, at 555 (footnote omitted) (citing Doc. No. IT-INF.5/Add.2, 18 January 1994); see also L.C. Vohrah, 'Pre-trial Procedures and Practices', in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer Law International, 2000) 479–545, at 503 (discussing the legality of trials *in absentia*).

16 The ICC has provided for a similar procedure in its rules. See Rules 125–126 ICC RPE.

17 The accused is thus made a pariah in his own state, subject to arrest if he attempts to leave.

18 At the time that the *Third Annual Report of the ICTY* was submitted, the ICTY had indicted 75 individuals, yet only seven were in custody. *Third Annual Report of the ICTY*, *supra* note 11, at paras 8 and 88.

the President to the Security Council.<sup>19</sup> Five such proceedings were held from late-1995 through to mid-1996, including one involving the indictments against Radovan Karadžić and Ratko Mladić.<sup>20</sup> They certainly garnered the attention of the media, as one report stated that, '[t]he ICTY is keeping alive in our consciousness a demand for justice which could otherwise be forgotten'.<sup>21</sup>

## ***B. Reports of Non-Compliance and Responses***

In addition to Rule 61, there are other rules that concern the reporting of non-compliance to the Security Council.<sup>22</sup> Unfortunately, this enforcement scheme has never truly worked effectively because the Security Council has failed to respond in a meaningful way. During his presidency, Antonio Cassese reported state non-compliance to the Security Council on five occasions.<sup>23</sup> Each of the states and entities in the former Yugoslavia were the subject of his reports.<sup>24</sup> The Security

19 ICTY, 'Rule 61: The Voice of the Victims', *Bulletin No. 3* (1995), available online at <http://www.un.org/icty?BL/03art2e.htm> (visited on 7 January 2003) (unofficial UN document, issued by the ICTY, Press and Information Office). It has been suggested that these proceedings may have contributed to the change in policy that resulted in SFOR's beginning to detain accused persons in the summer of 1997. See B. Hildreth, 'Hunting the Hunters: The United Nations Unleashes its Latest Weapon in the Fight Against Fugitive War Crime Suspects – Rule 61', 6 *Tulane Journal of International and Comparative Law* (1998) 499–524, at 511.

20 *Third Annual Report of the ICTY*, *supra* note 11, at paras 50–61.

21 *Ibid.*, at para. 160 (referring to 'The memory of Srebrenica', *Le Monde*, 6 July 1996 (original in French)); see also *Fourth Annual Report of the ICTY*, *supra* note 11, at para. 125 (noting that 'internal and external factors have shaped the evolution of the Tribunal in the media').

22 Rule 11 allows the President to report a state's failure to comply with a deferral request to the Security Council. If a state does not permanently discontinue proceedings against an individual already tried by the Tribunal, then the President can report this behaviour to the Security Council. See Rule 13 ICTY RPE. When a state refuses or fails to execute an arrest warrant or a transfer order, Rule 59 enables the President to report this obstruction to the Security Council. Finally, Rule 7bis provides a means for the President to report state non-compliance that is not covered by the previously mentioned rules. Pursuant to Rule 7bis(A), a Judge or Trial Chamber can advise the President of non-compliance related to proceedings before that Judge or Trial Chamber, and the President is obligated to report the matter to the Security Council. If a state fails to comply with a request from the Prosecutor pursuant to Rule 8, 39 or 40, the Prosecutor can notify the President and, if the President is satisfied that a state has failed to comply, the President must report the matter to the Security Council. See Rule 7bis(B) ICTY RPE.

23 Antonio Cassese served as the Tribunal's first President from November 1993 through to November 1997. Four of the reports were made pursuant to Rule 61 and one, based on information provided to him by then prosecutor Richard J. Goldstone, regarding the unfettered attendance of indicted persons at a funeral in Belgrade, was seemingly made pursuant to Rule 59. Mundis, *supra* note 8, at 426, note 18.

24 *Letter dated 16 September 1996 from the President 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 Addressed to the President of the Security Council*. UN doc. S/1996/763, reprinted in *ICTY Yearbook 1996*, 219 (telling the Security Council that Trial Chamber II had certified that the Republic of Croatia and the Federation of Bosnia and Herzegovina failed to execute an arrest warrant for Iвица Rajić); *Letter dated 11 July 1996 from the President 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 Addressed to the President of the Security Council*. UN doc. S/1996/556, reprinted in *ICTY Yearbook 1996*, 214–218 (notifying the Security Council of Republika Srpska's and the FRY's failure to arrest Radovan Karadžić and Ratko Mladić); *Letter dated 22 May 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious*

Council issued a resolution with respect to only one report, with three others meriting only a statement by the President of the Security Council, and a fourth eliciting no response at all.<sup>25</sup> Under these circumstances, it is not surprising that President Cassese sought to garner the support of the international community by calling for the expulsion of Yugoslavia from the Olympic Games for its failure to arrest Radovan Karadžić and Ratko Mladić,<sup>26</sup> and ‘making entreaties to States, the Security Council, the General Assembly, the Council of Europe and the Peace Implementation Council on the obligation to arrest indictees’.<sup>27</sup>

As of spring 1998, however, the Tribunal had issued some 205 arrest warrants and only six had been executed by the states.<sup>28</sup> The Tribunal acknowledged the effect of this lack of cooperation in its *Fourth Annual Report*, transmitted to the General Assembly and the Security Council: ‘... the Tribunal remains a partial failure – through no fault of its own – because the vast majority of indictees continue to remain free, seemingly enjoying absolute immunity.’<sup>29</sup>

During the first year of my presidency, however, the Tribunal was benefiting from increased cooperation from international organizations and by the ‘collective activism’ of some states.<sup>30</sup> The Tribunal had a record number of 27 persons in custody, brought about by the support of the NATO-led Stabilisation Force (SFOR) in detaining

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*Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Addressed to the President of the Security Council.* UN doc. S/1996/364, reprinted in *ICTY Yearbook 1996*, 213 (reporting the presence of General Mladić and Colonel Šljivančanin in Belgrade, the previous day, for a funeral and the FRY’s failure to execute the Tribunal’s orders); *Letter dated 24 April 1996 from the President 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 Addressed to the President of the Security Council.* UN doc. S/1996/319, reprinted in *ICTY Yearbook 1996*, 212 (informing the Security Council of the FRY’s failure to arrest the ‘Vukovar Three’ – Mile Mrkšić, Miroslav Radić and Colonel Veselin Šljivančanin); *Letter dated 31 October 1995 from the President 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 to the President of the Security Council.* UN doc. S/1995/910, reprinted in *ICTY Yearbook 1995*, 288–289 (reporting the failure or refusal of the Bosnian–Serb Administration in Pale to execute an arrest warrant for Dragan Nikolić).

25 Mundis, *supra* note 8, at 425, nn. 15–22.

26 ICTY, Press Release – ‘The President of the International Criminal Tribunal for the former Yugoslavia Calls for a Sports Boycott’, 13 June 1996, available online at <http://www.un.org/icty/pressreal/p088-e.htm> (visited 7 January 2004).

27 J. Cina and D. Tolbert, ‘The Office of the President: A Third Voice’, in R. May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 85–97, at 94.

28 G.K. McDonald, ‘International Support for International Criminal Tribunals and an International Criminal Court’, 13 *American University International Law Review* (1998) 1413–1439, at 1431.

29 *Fourth Annual Report of the ICTY*, *supra* note 11, at para. 175.

30 McDonald, *supra* note 28, at 1429–1430 (noting the cooperation of the United States, Great Britain and the Netherlands).

accused and the 'voluntary surrenders' encouraged by the United States.<sup>31</sup> The Prosecutor's practice of issuing sealed indictments also made the accused wary of being 'snatched' by SFOR.<sup>32</sup> The Tribunal engaged in such an unprecedented amount of pre-trial, trial and sentencing activity that the *Fifth Annual Report* stated '... [t]he present reporting period has been characterised by the unprecedented growth and development of the institution, which has now, without any doubt, become a fully-fledged international criminal institution'.<sup>33</sup> This is further proof positive that the cooperation of states and international organizations is essential to the effective functioning of an international criminal institution.

Despite these steps forward during the first year of my presidency, in the second year, we witnessed another tide of violence in the former Yugoslavia, as tensions in Kosovo exploded. During this year, I was forced to make six reports of state non-compliance to the Security Council.<sup>34</sup> In response to my fourth report of non-compliance, the Security Council adopted Resolution 1207, said to be 'undoubtedly the strongest response to any of the reports made by the President of the Tribunal'.<sup>35</sup> This resolution unequivocally ordered the Federal Republic of Yugoslavia (FRY) to transfer three indicted persons and facilitate Tribunal access to Kosovo.<sup>36</sup> Yet, even this strong response failed to bring an end to the blatant non-compliance.

In each of my addresses to the General Assembly, I called upon that body not to

31 *Fifth Annual Report of the ICTY*, *supra* note 11, at 1 (summary); R.S. Gelbard, 'Dramatic Steps Toward Lasting Peace, Stability in Bosnia', *USIA Electronic Journal*, April 1998, available online at <http://usinfo.state.gov/journals/itps/0498/ijpe/pj28toc.htm> (visited on 8 January 2004) (noting that it was pressure from the United States that was 'largely responsible for the voluntary surrender of ten indicted war criminals' in 1997); see also M. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', 48 *DePaul Law Review* (2000) 925-979, at 959-963 (discussing change in SFOR's policy regarding the arrest of war criminals).

32 *Fifth Annual Report of the ICTY*, *supra* note 11, paras 110, 114 and 123.

33 *Ibid.*, at para. 276.

34 Three of these reports, made pursuant to Rule 11, dealt with the FRY's failure to defer to the competence of the Tribunal. See *Sixth Annual Report of the ICTY*, *supra* note 11, para. 94 ('The Security Council was notified of the continuing failure of the Federal Republic of Yugoslavia to arrest and transfer the three accused on four occasions - 24 April 1996 and 8 September, 2 October and 8 December 1998.'). A fourth report concerned the refusal of the FRY to provide the Prosecutor and her investigators with the travel documents, necessary to enter the territory to begin investigations, as requested by the Security Council in Resolution 1160 (1998). *Ibid.*, at para. 95. A fifth report related to a pattern of non-compliance by the FRY. *Ibid.*, at para 96. I also reported the non-compliance of the Republic of Croatia for its refusal to arrest and transfer two persons indicted by the Tribunal. *Seventh Annual Report of the ICTY to the General Assembly and Security Council of the United Nations*. UN doc. A/55/273-S/2000/777, 7 August 2000, para. 160. The last three reports were made pursuant to Rule 7bis, which was adopted in July 1997. *Fourth Annual Report of the ICTY*, *supra* note 11, at para. 56. Like Rule 59, under 7bis, the President may report to the Security Council without a prior finding of non-compliance by a Trial Chamber. Rule 7bis was found to be 'within the authority of the International Tribunal' in the *Blaškić* subpoena Appeals Chamber Decision. Judgment, *Blaškić* IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, para. 34. In making the findings under Rule 7bis, I declined to make a finding on the character of the conflict, which I considered to be the province of the Trial or Appeal Chambers.

35 Mundis, *supra* note 8, at 432.

36 SC Res. 1208 (1998).

countenance these repeated violations of international law.<sup>37</sup> I also addressed the Security Council twice on this issue, noting that 'recent events in Kosovo threaten to destabilize further the Balkan region'.<sup>38</sup> I also informed the Contact Group, the Peace Implementation Council and the North Atlantic Council of the non-compliance of the FRY.<sup>39</sup> Finally, before my departure from the Tribunal, I sent a final letter report to the Security Council on outstanding issues of state non-compliance, stating:

On the verge of the twenty-first century, it is simply unacceptable that territories have become safe-havens for individuals indicted for the most serious offences against humanity. It must be made absolutely clear to such States that this behaviour is legally – as well as morally – wrong. The Security Council has the authority and wherewithal to rectify this situation. For the benefit of all the peoples of the former Yugoslavia, I urge you to act.<sup>40</sup>

The international community largely ignored these and other appeals and we saw the violence in Kosovo escalate, and, once again, horrific atrocities were being committed in the region where the Tribunal was to bring peace. Perhaps the conflict re-emerged, this time in Kosovo, precisely because of the impunity that evolved as a result of the refusal of the international community to demand compliance with the Tribunal that it had established.

The Tribunal did its job as best it could, hindered by the absence of direct enforcement powers. Both the Trial Chamber and the Appeals Chamber in the *Blaškić* subpoena decisions found that the Tribunal had the power to issue binding orders for

37 ICTY, Press Release – 'Address to the United Nations General Assembly, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia', 8 November 1999, available online at <http://www.un.org/icty/pressreal/p445-e.htm> (visited 1 December 2003); ICTY, Press Release – 'Address to the United Nations General Assembly, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia', 19 November 1998, available online at <http://www.un.org/icty/pressreal/SPE981119.htm> (visited 1 December 2003); see also *Sixth Annual Report of the ICTY*, *supra* note 11, at paras 5–6 and 90–100 (noting Presidential reports of non-compliance to the Security Council and additional efforts to seek international support); *Fifth Annual Report of the ICTY*, *supra* note 11, at 229 (recalling Presidential statements to the Peace Implementation Council regarding repeated violations of international law).

38 ICTY, Press Release – 'ICTY President McDonald Addresses the Security Council', 19 April 2000, available online at <http://www.un.org/icty/pressreal/p4349-e.htm> (visited 1 December 2003).

39 These are organizations overseeing the peace agreements in Kosovo and Bosnia and Herzegovina. See, e.g. *Sixth Annual Report of the ICTY*, *supra* note 11, at 229; ICTY, Press Release – 'President McDonald Writes to NATO Ministers of Foreign Affairs on Situation in Kosovo', 8 April 1999, available online at <http://www.un.org/icty/pressreal/p394-e.htm> (visited 1 December 2003); see also Cina and Tolbert, *supra* note 27, at 93–95 (discussing the expanding role of the President and means used by Presidents Cassese and McDonald to garner state cooperation to obtain accused in custody and to obtain adequate resources for the Tribunal).

40 *Letter from President McDonald to the President of the Security Council Concerning Outstanding Issues of State Non-Compliance*. UN doc. S/1999/1117, 2 November 1999. See also ICTY, Press Release – 'Letter from President McDonald to the President of the Security Council Concerning Outstanding Issues of State Non-Compliance', 2 November 1999, available online at <http://www.un.org/icty/pressreal/p4444-e.htm> (visited 1 December 2003).



the production of information and evidence to states.<sup>41</sup> Both Chambers delineated the same consequences for a state's failure to abide by the binding order.<sup>42</sup> Both Chambers rejected Croatia's assertion that the Tribunal did not have the power to judge or determine its national security claims.<sup>43</sup> Thus, eight judges agreed that the Tribunal had the coercive powers that are so necessary for a criminal court. The recognition of this power created 'the most fundamental cultural change around the Tribunal', according to Louise Arbour, former Prosecutor for the Tribunal.<sup>44</sup>

Despite all of these efforts by the Tribunal, in the end, as we knew in the beginning, states, individually, and the international community, collectively, would determine whether the Tribunal realized its full potential. Slobodan Milošević was indicted a few months before I left the Tribunal.<sup>45</sup> He is currently at trial in The Hague – ironically, the first Serbian national to be transferred to the Tribunal. Milošević was turned over to the Tribunal because of the collective action of states, threatening to withhold financial aid to Yugoslavia unless it demonstrated compliance.<sup>46</sup>

Will the International Criminal Court (ICC) be similarly plagued by state

- 41 Judgment, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, para. 26; Judgment, *Blaškić* (IT-95-14-PT), Trial Chamber, 18 July 1997, para 150; see also G. Sluiter, 'Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation', 44 *Netherlands International Law Review* (1998) 87–113, at 88 ('... both the Trial Chamber and the Appeals Chamber, have re-affirmed the duty requiring UN member states to provide the Tribunals with evidence necessary for a fair and effective prosecution of crimes within their jurisdiction.'). The Trial Chamber also concluded that the binding order could be denominated a subpoena, as provided for in Rule 54, even when directed to states, since reporting non-compliance to the Security Council was in the nature of a penalty, but considered that 'the heart of this dispute in fact concerns the International Tribunal's authority and power to issue binding compulsory order, rather than the particular nomenclature used for such orders'. Judgment, *Blaškić*, Trial Chamber, 18 July 1997, paras 14 and 62. The Appeals Chamber reversed the Trial Chamber, holding that a binding order addressed to states could not be denominated a subpoena, and that a binding order may not be addressed to state officials acting in their official capacity. Judgment, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997.
- 42 Judgment, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, para. 33; Judgment, *Blaškić* (IT-95-14-PT), Trial Chamber, 18 July 1997, para. 62.
- 43 Judgment, *Blaškić* (IT-95-14-AT108bis), Appeals Chamber, 29 October 1997, para. 61.
- 44 Institute for War and Peace Reporting, 'Louise Arbour – Farewell Interview', *IWPR Tribunal Update 141* (9 September 1999), available online at <http://www.iwpr.net/archive/tri/tri-141-1-eng.txt> (visited 19 November 2003).
- 45 ICTY, Press Release – 'President Milošević and Four Other Senior FRY Officials Indicted for Murder, Persecution, and Deportation in Kosovo', 27 May 1999, available online at <http://www.un.org/icty/pressreal/p403-e.htm> (visited 12 January 2004).
- 46 Yugoslavia risked losing \$50 million in assistance from the United States if it did not demonstrate compliance with the Tribunal by 31 March 2001. Slobodan Milošević was arrested by Yugoslav police on the day before the deadline. 'Official: Milošević Arrested', *CNN.com* (30 March 2001) available online at <http://www.cnn.com/2001/WORLD/europe/03/30/milosevic.arrest.02/> (visited 15 December 2003). Milošević was transferred to the ICTY on 29 June 2001 – the day that Western officials met for an international donor's conference for Yugoslavia in Brussels. The conference, which was chaired by the European Commission and the World Bank, had demanded Milošević's transfer to the ICTY. Yugoslav officials were hoping to raise \$1.3 billion at the conference and they were successful in raising \$1.28 billion. 'Billion dollar Yugoslav aid agreed', *CNN.com* (2 July 2001) available online at <http://www.cnn.com/2001/WORLD/europe/06/29/milosevic.aid/> (visited 15 December 2003).

non-compliance? The ICC was established by the Rome Statute and not by the Security Council. An Assembly of State Parties is given the responsibility to seek to enforce the ICC's orders,<sup>47</sup> but it, too, may face difficulties, 'except, perhaps, in extraordinary cases where there is international political consensus'.<sup>48</sup>

### 3. Assessment of the Tribunal

In spite of the obstacle of state non-cooperation, there is much for which we can be proud. From an institutional perspective, the Tribunal grew in size and stature. The Security Council approved a request for three additional judges. As more and more accused were transferred to The Hague, the length of the trials became an issue. New rules were adopted in 1998, to provide for, among other things, a Pre-Trial Judge, and 25 other Rules were amended to increase trial efficiency.<sup>49</sup> Finally, with much satisfaction, I was able to 'cut the ribbon' for two new courtrooms, constructed by donations from Canada, the Netherlands, the United Kingdom and the United States.

The Tribunal has attained these achievements, however, by straining within a structure established by its Statute, which may not be best suited for trials of complex international crimes. The Prosecutor is given sole responsibility for conducting the investigations. The evidence unfolds only during trial. As new tribunals are designed, it may be appropriate to rethink the singular reliance on the initiation of investigations by a prosecutor and, instead, provide for the early, active involvement of Judges to shape the presentation of evidence.<sup>50</sup>

47 Articles 87(5), 87(7), 112(2)(f) ICCSt.

48 J.K. Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', 27 *Yale Journal of International Law* (2002) 111–140, at 137, see also Art. 112(2)(f) ICCSt. (the Assembly of State Parties has the authority to '[c]onsider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation.'). Art. 87(5) ICCSt. (providing that '[w]here a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council'), see Art. 87(7) ICCSt. (providing that '[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council').

49 *Fifth Annual Report of the ICTY*, *supra* note 11, at paras 105–108. An Expert Group, appointed by the Secretary-General, made a series of recommendations, including the adoption of new Rules to address the issue of 'prolonged trials'. *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*. UN doc. A/54/634, 22 November 1999, paras 89–94. Additional amendments were made to the Rules after I left the Tribunal in 1999. See D.A. Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence', 14 *Leiden Journal of International Law* (2001) 367–382, at 370–374.

50 Compare Art. 7 Statute of the Iraqi Special Tribunal, 10 December 2003, available online at [http://cpa-iraq.org/audio/20031210\\_Dec10\\_Special\\_Tribunal.htm](http://cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm) (visited 6 January 2004) (regulating the duties and powers of investigative judges who are responsible for 'investigat[ing] individuals for the commission of crimes stipulated in [the Statute]) with Art. 15 ICCSt. ('vesting the Prosecutor with the sole authority to investigate alleged violations of the Rome Statute).

Furthermore, during my presidency, it seemed to me that my duties as a Judge were subjugated by the political demands of the office. I was required to spend an inordinate amount of time seeking international political support to overcome the effect of state non-cooperation, especially by the Federal Republic of Yugoslavia as the crisis in Kosovo unfolded, after I assumed office. Additionally, I travelled the world, seeking enforcement of sentences and witness relocation agreements with numerous states, and sought financial support. Therefore, although first and foremost a judge, it appeared to me that I most often functioned as an ambassador. However unanticipated, this ambassadorial role perhaps could only be assumed by the President.<sup>51</sup> However, future tribunals should not allow the office to be shaped by unanticipated events such as state non-cooperation and should provide an organizational structure that could absorb these competing obligations.<sup>52</sup>

From a global perspective, the contributions of the ad hoc Tribunals for the former Yugoslavia and for Rwanda are undisputed. First, there has emerged an insistence on accountability. The culture of impunity that enabled leaders to commit atrocities, free of criminal culpability, has been irrevocably altered. Secondly, they have demonstrated the ability of the international community to ensure that individuals accused of even the most heinous violations of humanitarian law receive fair trials. Thirdly, the Tribunals have demonstrated that international criminal justice is, indeed, possible and, thus, have paved the way for the establishment of the ICC and other courts in Sierra Leone, East Timor and Kosovo. Finally, they have enriched the jurisprudence of international humanitarian law.<sup>53</sup>

The Tribunal has contributed more to the jurisprudence of international humanitarian law in 10 years than had been developed in the entire half-century since the Nuremberg and Tokyo trials. As important as this is, the very specific mandate of the Tribunal should be considered when an assessment is made and it is too early to make a final judgment about its achievements in this regard. However, the Tribunal has had a significant impact on the former Yugoslavia and its people, as they strive to put their lives back together. This horrific conflict was ongoing and increasing with intensity when the Tribunal was established and it was unrealistic to assume that the mere establishment of a court, that essentially existed on paper only, could bring an end to the violence. Unfortunately, there were many atrocities committed in the two-and-a-half years after the establishment of the Tribunal, but before the Dayton Peace

51 Certainly, the Prosecutor could not carry out these functions because of her responsibility for prosecuting crimes and the ICTY Statute did not afford the Registrar's position sufficient international stature.

52 Cina and Tolbert, *supra* note 27, at 96–97 (for proposals for reform of the Office of the President of the ICTY).

53 Askin, *supra* note 4, at 907–910. The contributions have been many. One commentator has noted that the Tribunal's 'most important jurisprudential achievement has been to clarify that rape and other crimes of sexual violence can constitute genocide, torture, war crimes, or crimes against humanity'. G.R. Watson, 'The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2003) 871–885, at 872; see also 'The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade', 37 *New England Law Review* (2003) 865–1080 (symposium issue).

Agreement was reached. Furthermore, similar crimes were committed later, during the conflict in Kosovo. Nevertheless, the indictment and prosecution of persons responsible for these crimes are crucial elements in the effort to establish a lasting peace.

Yet, the Tribunal was established with the expectation that bringing to justice persons responsible for widespread violations of international humanitarian law in the former Yugoslavia would halt the threat posed by that conflict to international peace and security, and contribute to the restoration and maintenance of that peace. In that regard, the effect on the former Yugoslavia has been substantial. First, the Tribunal has removed a 'criminal element' from the region – political and military leaders, the rank and file, and common criminals – thereby beginning to lay the foundation for a lasting peace and, ultimately, reconciliation. Secondly, the Tribunal developed substantive and procedural law that may be applied by the local courts in the region. Finally, it provided a forum for the suffering of the victims to be revealed and recorded, and, thus, the development of a partial historical record, thereby guarding against revisionism. Whether this has been enough to meet the Tribunal Statute's lofty and very specific mandate, only time will tell.

However, before the Tribunal can be truly effective and achieve its mandate, the people in the region must share a consensus that the Court is legitimate. They must know, understand and appreciate the work of the Tribunal. This was the goal of the Outreach Programme and any assessment of the Tribunal must include a review of this programme, which has proven critical to the success of the Tribunal.<sup>54</sup> When I was President, it became apparent to me that the Tribunal was the subject of widespread misrepresentation in the former Yugoslavia. In a sense, this was not surprising, for the virulent propaganda machine that enflamed the passions of victimized and fearful ethnic groups, priming them to respond to the call to violence by leaders who were motivated by a desire for personal and territorial gains, continued to preach the same paranoia and falsehoods with respect to the Tribunal.

I realized that there was a need – a necessity, really – for the Tribunal to do more: to actually communicate with the people of the former Yugoslavia, living hundreds of miles away from the Tribunal that had been established for their benefit.<sup>55</sup> I sent a mission to the region, to meet with local and international actors and to discuss ways

54 These comments are taken from my keynote address at the University of Texas School of Law conference, entitled 'International War Crimes Trials: Making a Difference?'. See G.K. McDonald, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia', Keynote Address at University of Texas School of Law Conference: International War Crimes Trials: Making a Difference? (6 November 2003) (providing a more detailed discussion of the Outreach Programme) (on file with author).

55 The downsides of 'remote justice', such as its lacking in local relevance, have been recognized. See S. Power, 'How to Try Saddam Hussein. Unpunishable', *The New Republic* (29 December 2003) 18–21, at 20. The ad hoc tribunals established after the ICTY and the ICTR are 'hybrid' courts, composed of local and international judges. The courts created for Sierra Leone, East Timor and the one envisioned for Cambodia all utilize a 'hybrid' approach. See, generally, L.A. Dickinson, 'The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo', 37 *New England Law Review* (2003) 1059–1072, at 1059.

to improve the situation. In 1999, the Outreach Programme was established, to 'provide a comprehensive pro-active information campaign stressing the [Tribunal's] impartiality and independence, as well as countering the endemic misconceptions that had prompted widespread disillusionment with the Tribunal in the former Yugoslavia'.<sup>56</sup> In October 2003, I visited Sarajevo, to get a first-hand view of the activities of the Outreach Programme, and was impressed with the outstanding quality and breadth of its projects. However, I found that there is still a pressing need to explain the work of the Tribunal, especially the components of its 'completion strategy'. Thus, the Security Council appropriately encouraged 'the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes'.<sup>57</sup> This enterprise is critical to the Tribunal's achievement of its mandate, for it has established a necessary and meaningful link between the work of the Tribunal and the people of the former Yugoslavia.<sup>58</sup>

## 4. Conclusion

Looking back 10 years, the nay-sayers clearly outnumbered those who expected this novel experiment to develop into the fully functioning Tribunal it is today, especially with so many military and political leaders of the conflict in the dock. The first trial of a national leader indicted while still in office is now well under way in The Hague and the interim President of Rwanda entered a plea of guilty at the Rwanda Tribunal several years ago.<sup>59</sup> Ninety-one accused have been brought to the Tribunal.<sup>60</sup> Twenty-eight trials have been conducted for 46 individuals.<sup>61</sup> The Tribunal has completed construction of the infrastructure and legal framework necessary for the effective operation of the Tribunal. Yet, 20 indictees remain at liberty,<sup>62</sup> including

56 Proposal for Contribution to the UN Voluntary Fund for the continued operation in 2003 of the ICTY Outreach Programme at 3 (15 August 2002) (on file with author); see, generally, L.C. Vohrah and J. Cina, 'The Outreach Programme', in R. May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 547–557; McDonald, *supra* note 54.

57 SC Res. 1503 (2003).

58 Although the Tribunal is now assisting with the development of the War Crimes Chamber in Bosnia, the national judicial systems previously have been virtually ignored by the Tribunal. One noted commentator has observed that '[t]he ICTY has had little impact on the region's justice systems or on war crimes prosecutions and proceedings'. D. Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings', 26 *Fall Fletcher Forum of World Affairs* (2002) 7–18, at 18. He notes that this was not a part of the Tribunal's mandate from the Security Council – a 'failure that tarnishes the successes that the tribunal has seen'. *Ibid.*

59 ICTR, Press Release – 'Ex-Rwandan Prime Minister Jean Kambanda Pleads Guilty to Genocide', 1 May 1998, available online at <http://www.ictcr.org/wwwroot/ENGLISH/PRESSREAL/1998/118.htm> (visited 8 January 2004).

60 ICTY, *Key Figures of ICTY Cases*, 5 January 2004, available online at <http://www.un.org/icty/cases/factsheets/procfact-e.htm> (visited 8 January 2004).

61 *Ibid.*

62 *Ibid.*

major leaders – not because of any fault of the Tribunal, but because the international community has not squarely given it the support it needs to truly meet its mandate.

This enforcement scheme is not unusual in international law, but it requires that justice and power operate in tandem. In its early years, as the Tribunal sought to discharge its mandate, it encountered blatant non-cooperation – obstructionism, really. As required by its constituent documents, it relied on the Security Council to compel compliance. The Tribunal's President reported non-compliance; however, the Security Council failed to adopt concrete measures in response to these reports. For so long, the NATO peacekeeping force failed to detain persons indicted by the Tribunal. Faced with these obstacles, creative procedures were adopted so that the Tribunal would not just sit idly by, waiting for its warrants and orders to be executed. In addition to the reports of non-compliance, the President worked to increase the profile of the Tribunal, seeking to obtain support from the international community. These procedures and efforts may well have saved the Tribunal from early extinction.

If justice is to support the maintenance of peace in the former Yugoslavia, however, it must be from a judicial system that is understood and considered to be legitimate by those for whom it was established. Thus, the Tribunal's Outreach Programme is critical to the achievement of its mandate. This is the only concrete link between the Tribunal, located hundreds of miles away from the scene of the commission of the crimes, and the victims of these crimes. Therefore, the proactive information campaign that informs the people of the region of the impartiality and independence of the Tribunal and the associations that the Programme has developed with the local legal communities, non-governmental organizations, the media, educational institutions, victims' associations, women's groups and other professional bodies must be supported and enhanced.

The ICC is also a beneficiary of the experiences of the Tribunal. Its effectiveness will be impacted by the level of cooperation that it actually receives from the states that have evidenced a willingness to provide such help by ratifying its treaty. At a minimum, however, the successes of the ICTY and the International Criminal Tribunal for Rwanda, in conjunction with the birth of the ICC, demonstrate that international criminal justice is well on the road to no longer being an experiment, but a reality.