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SUPPORTING ADVOCATES FOR PEACE

On the Record for a Criminal Court

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Special report on the two tribunals: for the former Yugoslavia, and Rwanda

From the AP Editorial Desk

After one week in Rome

On the Record is now a week old. Comments are starting to reach us, and we're glad to find most of them enthusiastic. But they do prompt us to explain our coverage.

Many of the larger members of the NGO Coalition for a Criminal Court are preoccupied by a limited number of key issues, like admissibility, the role of the prosecutor, and the ICC's links with the UN Security Council. We share that interest, but we also want to do justice to those who will gain most from the creation of a Court: children; women; survivors/victims; peace groups; and humanitarian agencies. During the first week, we tried to introduce you to several of these groups.

This week, the conference will move from plenary statements to working groups. Our coverage will reflect this: tomorrow we will bring you a summary of positions on the key issues.

Some of you find our articles too long. But we are trying to provide a service of substance that will help to place this debate in a wider context and also remain useful after Rome ends. This explains the background analysis on the two tribunals in today's issue. We need to hear more from you on this.

Finally, On the Record is intended to be an advocacy tool. In the days ahead, we will start to contact interest groups, with suggestions on how they can follow up at home. Please help us with your ideas. Please, too, feel free to reproduce any material, citing On the Record.

The Search for Justice in Rwanda and the Former Yugoslavia

Last week, Judge Gabrielle Kirk McDonald, president of the two ad hoc tribunals, argued that there are important lessons to be learned from the efforts to prosecute war criminals from the former Yugoslavia and Rwanda. In this special issue, OTR looks at the experience of the tribunals, and how it pertains to the creation of an international court.

The two ad hoc tribunals were a belated response to massive and sustained government violence. It began in the former Yugoslavia in the late 1980s, when the federation of Yugoslavia began to disintegrate. Two of the country's six republics, Croatia and Slovenia, declared independence on June 25, 1991. The Yugoslav army intervened halfheartedly in Slovenia, but massively in Croatia. Several months of savage fighting followed, culminating in the siege of the Croatian city of Vukovar. After the surrender of the Croatian forces, over a hundred wounded soldiers were taken from the hospital, shot and buried in a mass grave. This is one of the crimes under investigation by the Hague tribunal.

Bosnia declared independence in March 1992, following a referendum. Unlike the other five Yugoslav republics, Bosnia did not have a dominant ethnic group, but was comprised of three groups (Serbs, Croats, Muslims), none of which was in a majority. The Serbs boycotted the referendum, allowing Serbian propaganda to raise fears that Bosnia's Serbs would get swallowed up in the newly independent Bosnia. On April 6, 1992, the Yugoslav army linked up with the Bosnian Serb army, in a combined assault against non-Serbs across a wide arc of northern Bosnia.

Thousands of unarmed Bosnian Muslims and Croats were killed. As villages were seized, women and children were expelled – "cleansed" – and the men were sent to concentration camps, to be starved, tortured and often killed. The first sustained batch of charges to come to the Hague tribunal concerned one of these camps, named Omarska, which is situated to the west of the town of Prijedor. Here, prisoners were murdered and forced to murder each other in gruesome ways.

The UN Security Council responded to the disclosures by setting up a panel of six independent experts to review whether war crimes had been committed. On May 25, 1993 by resolution 827, the Council went further and established the tribunal in the Hague, with a mandate to prosecute individuals for war crimes, genocide, crimes against humanity, and violations of the laws of war.

By now the Muslims were facing extinction. They had been driven from the north by the Serbs. Sarajevo, the capital, was under siege. In the east, a few remaining Muslim pockets were surrounded: one of them, Srebrenica, was shelled mercilessly in the spring of 1993. In the west, they were under attack from the Bosnian Croats.

The UN Security Council was paralysed by the violence. All five permanent members agreed that there would be no military response to the Serb assault, and the Council resorted to humanitarian aid instead. Supplies were delivered with great courage by relief agencies under the UN High Commissioner for Refugees (UNHCR). But the weakness of the Council showed the Serbs that they could kill with impunity. As their attacks redoubled, the humanitarian crisis worsened. The UN system was caught in a vicious circle.

Rwanda. The Central African country of Rwanda comprises two ethnic groups, Hutu and Tutsi. By 1993, a large and well-trained army of Tutsi rebels was based in Uganda. The UN brokered a peace agreement in Arusha, Tanzania, under which Hutu and Tutsis would share power in Rwanda. Hutu extremists in Rwanda began plotting to seize power and exterminate the Tutsis once and for all.

In January 1994, the UN military commander in Rwanda, General Romeo Dallaire, warned his UN superiors in New York that genocide was being planned by Hutu paramilitary (interahamwe). This was ignored. In April, the presidents of Rwanda and Burundi died when their plane was shot down, and the interahamwe and Hutu army launched a campaign of slaughter. Between 500,000 and a million Rwandans were killed.

When UN chiefs appealed for more troops at the height of the massacres, the Security Council decided to reduce the number of peacekeepers to just 270. It was not until June, when the killers were on the run, that the Council decided to beef up the UN force. Several months later, on November 8, 1994, the Council established a tribunal to punish Rwandan war criminals, based in Arusha Tanzania (Resolution 955).

The Two Tribunals – Ad Hoc Response

As of now, sixty-one individuals are under indictment by the ICTY. Twenty-seven are in custody, and two have been sentenced; 13 trials are under way, of which four are currently in progress at the tribunal's three courtrooms in the Hague. The Rwandan tribunal has now indicted 35 individuals, of whom 31 are now in custody. Three trials have been held so far.

The two tribunals share a common prosecutor and appeals chamber, to avoid duplication or the creation of conflicting legal principles. They can invoke the same body of applicable law – genocide, war crimes, crimes against humanity, and violations of customary law or the laws of war.

But there are also important differences. The ICTR is limited to investigating events that occurred in Rwanda during 1994. But the ICTY is under no such time limit (which means it can intervene in Kosovo.) On the other hand, the ICTR is empowered to investigate war crimes and crimes against humanity that occurred during internal armed conflict. This does not fall within the purview of the ICTY.

The establishment of these two tribunals sets a major precedent for any permanent criminal court. It is too soon to render a definitive verdict on their impact. The number of those indicted is certainly tiny compared to the scale of the crimes. The number of arrests is even smaller.

Both tribunals are often criticised for not apprehending "big fish." It is true that the ICTY has yet to prosecute Ratko Mladic, the former Serb army commander, and Radovan Karadzic, the Serb civilian leader during the war. The ICTR, however, has several big fish in custody. These include Theoneste Bagosora, who acted as the Minister of Defense when the massacres began in Rwanda; Jean Kambanda, who was Prime Minister for a time; and Pauline Nyiramasuhoku, a former Minister of the family and the first woman be charged with war crimes before an international court.

Imposed by the Security Council

Much of the debate at Rome centers around the relationship between the proposed international court and governments. This begins with the method by which the court will be established.

The ICC will be set up by a treaty, that governments will be free to join (ratify). The two tribunals, in contrast, were set up by the UN Security Council under Chapter 7 of the UN Charter, which allows the Council to enforce international peace and security. This had several advantages, but also carried drawbacks. On the one hand it avoided the long process of drafting a treaty – and with the Bosnian Muslims under siege in 1993, time was clearly of the essence. In addition, the Security Council's resolutions are also binding on member states – which means they allow for no dissent or refusal.

By the same token, however, this short-cut risks is being seen as high-handed by governments. Formally, they might be obligated to obey; but this would not necessarily ensure respect for the tribunals or help them arrest war criminals. Many governments were angered by the Council's decision to pay for the ICTY from the UN's regular budget instead of peace-keeping. This led to a long dispute over funding, which crippled the tribunal during its first, crucial period. This is examined later in this report.

Strengthening International Law

The first major achievement has been to consolidate and strengthen existing international law. For example, the ICTY has indicted seven individuals on counts of genocide. The tribunals have also clearly established rape as a war crime. The ICTY has just opened a case against Anto Furundzija, a Croat, on a charge of rape.

Another important legal achievement is to reaffirm individual responsibility, even when acting on the order of superior officers. This was perhaps the most important legal principle to emerge at Nuremberg. In many respects, it goes to the heart of the debate, because a soldier has a duty to obey orders. One of the most dramatic cases to come before the ICTY has been that of Drazen Erdemovic, a 22-year-old Bosnian Croat, who served in the Serb army and took part on the July 1995 massacre of Muslims at Srebrenica.

Erdemovic surrendered voluntarily and provided the ICTY with critical evidence about the massacres. He also told the court that he had been acting under orders and would have been killed if he had refused. The court refused to accept this as an excuse, and sentenced Erdemovic to ten years imprisonment. But this was subsequently reduced to five years, in mitigation.

"Due obedience," as it is known, remains a controversial issue. Many military chiefs are unhappy with the idea of higher rules, which supercede the chain of command. In the course of the last ten years, the government of Argentina has even passed several laws which reaffirm the principle of due obedience. These accept that the Argentinian kidnappers were acting under orders when they murdered and killed thousands of unarmed civilians in Argentina's infamous dirty war.

Rules of Procedure

Many different factors will determine whether the ICC is credible – and whether national authorities are prepared to surrender suspects and abide by its decisions. Much of this will center on whether defendants are given a fair trial.

This is viewed as one of the achievements of the two tribunals, both of which preclude trials in absentia and the use of the death penalty. The judges have developed rules of procedure for both tribunals that balance the two systems of law – common and civil. They have tried to find a compromise between the rights of defendants, and the needs of the prosecution.

Many are not completely satisfied with the results. Although defendants' rights have generally been respected, there have been some dramatic exceptions. General Djordje Djukic, a Bosnian Serb army officer who was arrested in early 1996 after he mistakenly drove behind Muslim lines, was flown to the Hague by NATO and held for weeks in the Hague in solitary confinement while he was terminally ill without being charged. This angered the Serbs and alarmed many ITCY officials. (Djukic was released on humanitarian grounds, and died soon afterwards).

The French feel that the judges in the ICTY have made too many changes in the rules of procedure. The main reason is that the judges have been making up procedure as they go along. There is also very little precedent to go on. (In an important change, the judges defined, and then redefined, rape).

The Americans have expressed concern that defendants may be prevented from knowing the identity of their accusers, (which is an American constitutional right). The ICTY rules do permit the prosecution to ask the chamber to keep the identity of the witness from the defendant, in order to protect the witness. But this has yet to be requested.

Some are worried about the issuance of sealed indictments. These are kept secret until the arrest, so as not to alert the suspect. This is partly because the Bosnian Serbs have taken to issuing false identity papers to their key people. But the most compelling argument for the sealed indictment is the ICTY's inability to enforce its judgements. As long as states are reluctant to help, it will have to devise new methods of arrest – which could conceivably infringe individual rights.

Witness Protection

The two tribunals have done pioneering work in protecting witnesses, even if much more could have been done. This will be critically important for the new international court, and the lessons need to be carefully reviewed.

Unlike the Nuremberg tribunal, which was able to use millions of documents, the two tribunals have had to rely mainly on eye-witness evidence. Investigators have interviewed hundreds of witnesses, and scores have been called to the Hague and Arusha. The first problem has been intimidation. Several former, or potential, witnesses to the ICTR have been murdered. It is still not known whether this was linked directly to their testifying, but it certainly seems possible. One prominent Rwandan Hutu, Seth Sendashonga, was recently killed in Nairobi. Sendashonga had been Minister of the Interior in the first post-genocide government, and was an important opposition figure. But according to one lawyer in Arusha, he had also agreed to testify as a defense witness.

No witnesses to the ICTY have been murdered, but many have been intimidated. In one case against several Bosnian Croats who are accused of masterminding ethnic cleansing in the Lasvah

valley in 1993 and 1994, half the witnesses who were interviewed by the prosecutors have decided not to testify in the Hague after being threatened. One witness who testified against Tihomir Blaskic under a promise of confidentiality was publicly identified by the Croatian President and denounced as a traitor.

Generally speaking, European governments have agreed to provide asylum and protection for key witnesses and their families. Given that many are already refugees in their countries, this is relatively straightforward – although it required a shift of policy from Germany, which is committed to returning Bosnian asylum seekers. Africa remains more problematical. Scores of witnesses to the Arusha have been relocated and given new identities in Rwanda, but it is still unclear how safe they will be.

Against this background, all are agreed that the permanent court must make provision to protect witnesses. This has to start with adequate funding. Initially, no funds were built into the budget of the ICTY for witness protection, and funding was left voluntary. Given that entire families may need to be relocated, the demands could be considerable. It must also provide for the psychological needs of witnesses, particularly women who have been raped and must not be retraumatised in recounting their ordeal. (During trial in the tribunals, the identity of several witnesses can be shielded from the public by various means: a 30 minute delay in the transmission of court proceedings allows for sensitive material to be withheld, and images and voices can be disguised.)

There is some question about whether the ICC witness support unit will be located under the registrar (like the two tribunals) or the prosecutor. On the Record is finding support for the registrar. Not only do the needs of defense witnesses differ from the defense, but their needs extend beyond the trial. Women's groups point out that in many countries, prosecutors have shown little interest in rape victims once they have given testimony. Richard Goldstone, the former Hague prosecutor, also argued that the prosecutor should not have to manage the entire witness support unit.

Outreach

Richard Goldstone has pointed out that as prosecutor of the two tribunals, he spent much of his first year explaining the tribunals to governments. (He did the job so well that many felt he ignored important management issues in the Hague and Arusha).

In spite of this, both tribunals have singularly failed to explain their work to the outside world. Their press relations have been disastrous, even though the press is a vitally important ally. The first war criminal to be sentenced by the ICTY, Dusan Tadic, was exposed by an enterprising German journalist. In spite of this, information officers in both tribunals have found it hard to identify, co-opt, and feed key journalists with "pegs." There has also been no attempt to explain the tribunals to the nongovernmental world. Very few of the members of the CICC coalition are familiar with what happens in the Hague or Arusha. The ICC must do better.

Relations between the tribunals and other UN agencies have also been tense. UNHCR officials in Rwanda and Yugoslavia witnessed events, or heard testimony from refugees, that was obviously

useful to the prosecuting teams. But the fear was that this would also expose the official to reprisals. Given that scores of UN officials have died in both theaters, this was a real issue.

The concern has if anything grown as the tribunals have moved from investigations to trials, because it increases the chance of UN officials being called to testify. It caused an uproar when General Romeo Dallaire, the former UN commander in Rwanda, was allowed to testify in Arusha on condition that he did not talk about the UN involvement in the 1994 Rwandan massacres. UNHCR officials have also testified, but reluctantly: the fear is that it could make it harder to deliver relief and expose them to reprisals.

Louise Arbour, the prosecutor, has taken a tough line and warned agencies like UNHCR that they will be expected to comply. One of her colleagues said they will have to "change their mindset." But neither side wants a confrontation, and it should be easy to avoid. In fact, the precedent is firming up. Several British soldiers who served with UNPROFOR in Bosnia have given testimony. Nor is there any evidence yet of intimidation. Clearly, both UNHCR and the tribunals must work at understanding how they can benefit from cooperating. UNHCR has been asked to screen thousands of Rwandan refugees in Central Africa, and weed out the war criminals. This, clearly, should be done with the ICTR prosecutors, who would then be able to identify their own suspects. It underscores the need for the ICC to explain its mission – to friends as well as foes.

Administration and Budget

Both tribunals have been plagued by administrative and financial blunders. The Arusha tribunal languished for a year before it started to work effectively. In February 1997, UN inspectors issued a harshly critical report of mismanagement and corruption, which caused the registrar to be replaced. The ICTY's main problems early on were caused by a lack of funds, as noted above.

Structurally, both tribunals also suffered from the fact that they were linked, initially, to the UN's Office of Legal Affairs, in New York, which had never had experience of administering a field operation and was itself suffering from budget cuts. This meant that the tribunals were unable to hire, or even issue checks, for months. It had a particularly serious impact on the Arusha tribunal, which was already a hybrid – with a prosecutor and appeals judges in the Hague, its court in Arusha, and its deputy prosecutor in Kigali. Deprived of funds, enthusiasm, staff, or contacts, the prosecution languished for months.

Several options are being discussed for funding of the ICC, and these will be followed by On the Record. The main issue is whether the ICC should be funded from the UN regular budget or by states parties. There are good arguments on either side, and both should be discussed seriously.

But in discussing the ICC's link with the UN, it is important that delegates not be dictated to by the United States, whose Congress is ideologically opposed to multilateralism and legal international commitments. Americans need to understand that this greatly weakens their bargaining position. Nor should the ICC automatically be deprived of a close link to the UN system simply because of the UN's disastrous failure in Rwanda and Bosnia. To a large extent,

the UN was a casualty of the timidity and weakness of its member states, particularly the permanent five members of the UN Security Council.

Cooperation from States

The single most important issue facing the new court will be whether it can secure the cooperation of governments. Last week, drawing on her experience as the president of the ICTY judges, and of the appeals chamber for both tribunals, Judge Gabrielle Kirk McDonald told the plenary conference that this could not be taken for granted. She was speaking from experience.

The lack of support for the tribunals has been most notable from those countries that are most affected. In the former Yugoslavia, Serbia and Croatia have both ignored repeated requests from the ICTY prosecutor for information, for witnesses, and – most important – for suspects. The government of Croatia gave refuge to several prominent Bosnian Croats who were indicted for the massacre of Muslims in the Lasvah valley. But Croatia only surrendered these individuals after intense pressure from the US government, which threatened to vote against loans to Croatia in the World Bank and IMF. The US Congress passed a law to this effect.

Croatia has now surrendered all indicted Croats to the Hague, but the obstruction continues. Croatia has refused to hand over evidence that is needed for the case against Tihomir Blaskic. It has declined to restrain Bosnian Croat police chiefs in the Lasvah valley, who are known to be intimidating potential witnesses.

Serbia's record is even worse. From the start, the government of President Milosevic (now president of what remains of Yugoslavia) has refused to accept the ICTY's jurisdiction. Milosevic allowed the prosecutor to open an office in Belgrade, but has adamantly refused to hand over suspects. These include a general in the Yugoslav army who is wanted in connection with the 1991 Vukovar massacre, and Ratko Mladic, the Bosnian Serb army commander who is living in Belgrade.

The ICTR, in Arusha, has suffered from a poor relationship with the key country, Rwanda. Rwanda was the only member of the UN Security Council to oppose the creation of the ICTR, because its statute does not call for the death penalty. Between 1994 and 1997, Rwanda and the ICTR proceeded in opposite directions. Rwanda arrested tens of thousands of suspected genocidaires, and crammed them into unsanitary, overcrowded prisons. Two months ago, Rwanda executed 22 in public. The ICTR, meanwhile, languished. Its rate of arrest was pitiful, and it was slow starting trials.

Neither of these extremes was remotely satisfactory, and it is heartening that the ICTR at least is improving its rate of arrests and the pace of trials. Rwanda's determination to imprison and execute remains deeply troubling, because of flaws in the justice system. The hope must be that the tribunal can act as a moderating influence, but this will depend on the ICTR achieving credibility. Rwanda has started to let detainees go to Arusha to give testimony, which is another promising example of growing cooperation between the two. But the gulf remains wide.

Central Africa has been polarized by the feud between the Rwandan Tutsis and Hutu. Between 1994 and 1996, the government of Zaire sided with the Hutu and gave refuge to thousands of Hutu genocidaires in camps. Several other governments were wary of the Tutsi-led government that took over in Kigali. This affected their attitude towards the search for Hutu war criminals. Kenya's president Daniel Arap Moi threatened to arrest any ICTR investigators who entered Kenyan territory.

The situation has changed dramatically following the fall of Zaire's government and Mobutu's replacement by Laurent Kabila, an ally of the Rwandan Tutsis. As the Rwandan Tutsis' influence has risen in the region, governments are more willing to hand over Hutu war criminals to the ICTR. Kenya, Gabon, Congo (Zaire), Congo (Brazzavile), Zambia, and Cameroun have all sent indicted individuals to Arusha. Just last week, Gabon sent another six indicted suspects to Arusha. This is exceptionally heartening, even if cooperation with the Security Council should not depend on political expediency.

On the other hand, an extraordinarily small number of states have formally agreed to cooperate with the prosecutor of both tribunals, as formally required by the Security Council resolutions. In the case of the ICTY, only 20 governments have amended their legislation. While some constitutions do not necessarily require a change of law to cooperate with Security Council resolutions, this is an extraordinary statement of indifference by the international community. Not one government from the south has formally adhered to the ICTY. Only three have contributed to the voluntary trust fund. Given that Nazi war criminals are still turning up in southern countries, like Argentina, this could imperil any prolonged attempt by the tribunal to arrest suspects.

It is even more alarming that almost no governments have agreed to help the tribunals enforce their sentences. Once sentenced by the two tribunals, convicts will serve out their sentences in national jails. The UN has asked states to offer prison space. So far, only three have agreed: Norway, Finland and Italy. Seven have said they may: Bosnia, Croatia, Iran, Pakistan, Sweden, Denmark and Germany.

The ICTR in Arusha has had even less support. Five or six European governments have made vague promises to enforce sentences, but only Belgium has made an unconditional commitment. Officials from the tribunal are looking for offers within Africa. Several governments have asked for aid to upgrade their own prisons first**.**

Enforcement in Bosnia

Enforcement is the litmus test of government cooperation with the tribunals, just as it will be with the new international court. A long as the UN lacks a police force, it will be up to governments to arrest those indicted. Will they help?

The burden of arrest in the former Yugoslavia has fallen most heavily on European governments. The first person to be tried in the Hague, Dusan Tadic, was arrested by Germany after Bosnian refugees in Munich recognized him. But the question of enforcement has been overshadowed by NATO's unwillingness to use its firepower in Bosnia to arrest indicted war criminals.

Commanders of IFOR/SFOR, the NATO force in Bosnia, have been reluctant to order arrests for fear that it would antagonize the Serbs and cause them to withdraw from the Dayton peace plan. They were so concerned that they refused to provide a military escort for forensic scientists who were exhuming the mass graves near Srebrenica. Generally speaking, NATO has taken the approach of waiting it out until the Serbs themselves tired of Karadzic and Mladic and turned them in voluntarily.

As of now, NATO troops have arrested just six individuals in the Balkans. Another suspect was killed resisting arrest. UN peacekeepers arrested another suspect, the former mayor of Vukovar. This inconsistent record has created havoc at the ICTY, where suspects have been put on trial as they come in, rather than as a group. It means, for example, that three trials are currently under preparation for one indictment involving just six individuals. This ties up three courtrooms instead of one at great expense, and is one reason why the prosecutor decided recently to drop indictments against 14 individuals who worked at the fearsome Omarska prison. Human rights groups were outraged, but the ICTY simply cannot handle the workload.

How genuine is NATO's concern? At times, NATO has seemed more interested in maintaining relations with the criminals than seeing them behind bars: according to recent reports, a French liaison officer in IFOR alerted Karadzic that NATO was planning his arrest. Whatever the reason, NATO's unwillingness to enforce the ICTY has undermined Dayton and also the ICTY's credibility. It has allowed Radovan Karadzic, the Bosnian Serb civilian chief, to regain his stature among Serbs, manipulate the peace process, and corrupt the Serb economy. It exposed the ICTY's lack of teeth.

And if NATO was unable to make arrests with 50,000 armed troops, what hope will there be for an ICC?

The Role of the UN Security Council

The Rome conference is deeply divided over the linkage between the proposed court and the UN Security Council. The United States is insisting that the Council control the court's agenda. Many states feel that this would politicize the court, and want as little Council involvement as possible.

The experience of the two tribunals is highly relevant, but it also shows the Council in a different light from the overbearing, dominant body conjured up by critics. Both in Rwanda and Bosnia, the Council has been timid, disunited, and indifferent.

This started with the decision to avoid any military confrontation with the Bosnian Serbs in the summer of 1992, following the reports of torture and murder in northwest Bosnia. The Council then decided to appoint a commission of experts, but denied it any budget for investigations. The British government actively opposed the creation of a criminal tribunal, for fear that it would compromise the peace efforts of Lord David Owen, the European mediator. In one secret document, Britain argued against prosecuting heads of state, and for leaving superior orders out of the statute.

Once the ICTY was established in May 1993, the Council spent a year squabbling over a prosecutor. Britain, the US and Russia all vetoed the others' candidates. The lack of a prosecutor deprived the tribunal of leadership during a critically important phase of the war.

Council members then compounded the damage by insisting on a funding formula for the ICTY that was certain to antagonize the nonaligned. After deciding to impose the tribunal on the world under its mandate for peace and security, the Council demanded that the entire UN assume the burden of payment. This suggested to many that the United States (which owed a billion dollars to the UN) was more interested in saving money than seeing justice done, and it caused a prolonged dispute with the UN General Assembly. Once again, the impact on the ICTY was disastrous. For the remainder of the Bosnian war, it had to depend on temporary budgets. In 1994 – one of the key years – it received just $10.8 million.

In another extraordinary display of indifference towards their creation, the five permanent members of the Council have delayed until formally agreeing to cooperate with the ICTY prosecutor. France passed the implementing law on January 2, 1995, but the US did not join until January 22, 1996 (after Dayton). Britain adhered in March 1996. Russia and China have yet to adapt their laws to cooperate. It is hardly surprising that Serbia feels under pressure to cooperate with the Hague, or that the ICTY has such little support among third world governments. The Security Council has done everything in its power to undermine its own work. This is politicization – and a strong argument for the new court to maintain its independence from the Council.

The Prosecutor

Richard Goldstone, who served as the first prosecutor of the two tribunals, made an eloquent plea for an independent ICC prosecutor last week, both in his address to the plenary and in a briefing for NGOs. Without independence, he said, his office would never have been able to operate effectively.

NGOs heard the opposite from the American delegate, David Scheffer. Scheffer warned, as he has done frequently, that an independent prosecutor who is empowered to launch ex officio prosecutions, will be overburdened by requests from the NGO community and turn into a human rights ombudsman. Without clear guidelines and parameters that are set by the Security Council, says Scheffer, the prosecutor would be overwhelmed. In addition, he makes it clear that the US would not entrust such sensitive decisions to any individual.

This is an extraordinary vote of no confidence in Goldstone and his successor, Louise Arbour. During their term as prosecutor, both have developed a clear view of the sensitive political context. They have balanced the need to indict the big fish (Mladic, Karadzic, Bagosora) together with the small fry (Tadic, etc). They have been forthright when it came to demanding more arrests and insisting on cooperation from states. But Arbour has also been cautious about jumping into the current crisis in Kosovo. Nor has she shrunk from decisions that would anger human rights groups – hence her May 8 decision to drop indictments against the Omarska 14. They may have issued some questionable decisions, but no one could accuse these two

prosecutors of not being in control, or not having a clear vision of their job. There is simply no reason to assume that an ICC prosecutor would act differently.

In fact, as Goldstone said here, governments will have many different ways of ensuring against a rogue prosecutor – from pre-trial hearings to removal. Once again, the ball is in the court of governments to make the ICC work or not. The argument for an independent prosecutor is overwhelming: the argument against has yet to be made.

Conclusion

Reviewing the record of the two ad hoc tribunals, the best argument for establishing a permanent court is that they were ad hoc. As Richard Goldstone said, the fact that the UN Security Council has singled out just two mass abuses when so many more deserve action, is an example of politicization. It has made states like Serbia much less inclined to cooperate.

The role of the Security Council in setting up the tribunals, and imposing them on the world, has created problems for Goldstone and his successor. This is seen as highhanded and arrogant – particularly as the Council has failed to support the tribunals consistently. The lack of enthusiasm among powerful nonaligned governments is also alarming. Once again, it might have been moderated with a little more tact: many were angered that there have been no Muslim judges on the ICTY, even though the main victims in the Bosnian war have been Muslims. Taken together, these are compelling arguments for establishing an ICC by consent and treaty, and for keeping the Security Council's role to a minimum during the creation of the ICC and during its functioning.

But it is also vital to balance this with real enforcement, and with guarantees that states will not be able to ignore the ICC's rulings, refuse to cooperate with the prosecutor, or opt out of provisions they do not like.

There is, on this, a salutory warning in the ICTY's response to the massacre at Srebrenica. Ratko Mladic and Radovan Karadzic were indicted by the prosecution on July 25, 1995, at a public hearing. Witnesses were heard and an international arrest warrant issued for the two men. The hope was that it might mitigate the Serbs' behaviour at Srebrenica, which was reaching a climax. An estimated 7,000 Muslim boys and men were slaughtered in the largest massacre in Europe since the Second World War.

Was this a comment on the ICTY's impotence, or on Mladic's confidence that governments would never enforce its rulings? Either way, the international community must not make the same mistake again. That is why so many governments, and nongovernmental groups are determined that the ICC will have a strong mandate, an independent prosecutor, and a commitment to enforce from states. There can be no more Srebrenicas.

Annex: Individuals Indicted by the Tribunals

The following lists were compiled by the Washington-based Coalition for International Justice. For more information on this and issues related to Rwanda and the former Yugoslavia, check the CIJ's website; or contact CIJ Executive Director John Heffernan.

A: The Former Yugoslavia

As of June 8, 1998, the Tribunal has publicly issued outstanding indictments for 61 people, including 7 people who were indicted for genocide. In all, 39 Bosnian Serbs, 1 Croatian Serb (who had been the Mayor of Vukovar), 15 Bosnian Croats (14 of whom fought with Bosnian Croat forces and 1 of whom fought with Bosnian Serb forces), 3 former Yugoslav army officers, and 3 Bosnian Muslims have been indicted. Currently, 27 of the suspects are in custody in the Tribunal's jail facility near The Hague and one (Milan Simic) has been provisionally released due to health reasons. Those in custody are:

Dusan Tadic, (a Bosnian Serb), accused of murder, torture, and rape in Serb-run camps in Bosnia in 1992, whose trial, the first of the Yugoslav Tribunal, concluded in December 1996. In a May 7, 1997 verdict of the first international war trial since World War II, Tadic was acquitted on 9 murder charges, but found guilty of 11 of 31 counts of war crimes and other crimes against humanity. On July 14, 1997 Tadic was sentenced to a 20-year prison term. Tadic has appealed against the 20-year prison term.

Zdravko Mucic (a Bosnian Croat), Zejnil Delalic, Hazim Delic and Esad Landzo (Bosnian Muslims), who are charged with serious violations of international humanitarian law committed against Bosnia Serbs at the Celebici camp in central Bosnia and whose joint trial began March 10, 1997.

Drazen Erdemovic, a Bosnian Croat, who served in the Bosnian Serb army, charged with participation in the execution of Muslims in Srebrenica, who pled guilty and received the first sentence of the Tribunal (a ten-year jail term) which in March 1998 was reduced to five years.

Tihomir Blaskic, a Bosnian Croat, who is charged with ethnic cleansing in the Lasva Valley in Bosnia, is currently under house arrest at an undisclosed location in The Netherlands and is awaiting trial.

Zlatko Aleksovski, a Bosnian Croat, accused of mistreating Muslim prisoners while a camp commander at Kaonik, Bosnia, was transferred to The Hague on April 28, 1997. His trial began in January, 1998.

Slavko Dokmanovic, a Croatian Serb, former Mayor of Vukovar, indicted for participating in a massacre of 261 civilians, mostly Croats, taken from Vukovar hospital in November 1991. Arrested by Tribunal investigators in cooperation with the UNTEAS in Eastern Slavonia on Friday, June 27, 1997. This had been a sealed indictment.

Milan Kovacevic, a Bosnian Serb charged with genocide, whose sealed indictment, headed the hospital in Prijedor. SFOR troops apprehended him on July 10, 1997. On the same day he was transferred to The Hague.

Ten Bosnian-Croats surrendered and were transferred to the Tribunal in The Hague on October 6, 1997. Four of the ten, including: Dario Kordic, charged with commanding troops who murdered Muslims in central Bosnia (Lasva Valley). Mario Cerkez, has also been charged with persecuting Bosnian Muslims of the Lasva Valley area in Central Bosnia. The other suspects who turned themselves in are: Dragan Papic, Drago Josipovic, Vladimir Santic, and Zoran and Mirjan Kupreskic. Kupreskic's trial is tentatively scheduled to begin on August 17, 1998.

In December of 1997, Dutch IFOR forces arrested two other suspects: Anto Furundzija, a Bosnian Croat under a sealed indictment, and Vlatko Kupreskic, another Bosnian Croat under public indictment. Both men were transferred to The Hague in December 1997.

Goran Jelisic, surrendered to NATO troops on January 22, 1998. Jelisic, who once described himself as the "Serb Adolf," is charged with genocide and accused of having run the Luka detention camp near the Bosnian town of Bijeljina.

Milan Simic and Miroslav Tadic surrendered to the Tribunal on February 14, 1998. Simo Zaric surrendered to the Tribunal on February 24, 1998. All three are among six Serbs indicted in July 1995 for alleged crimes against humanity and war crimes. They allegedly took part in the a 1992 Serb terror campaign aimed at driving Bosnian Croats and Muslims out of the town of Bosanski Samac. Milan Simic has been provisionally released due to health reasons. Once his trial begins he will remain in Tribunal custody.

Dragoljub Kunarac surrendered to French and German troops at a base in the village of Filpovici near Foca. Kunarac is charged with orchestrating sexual assaults against Bosnian women and raping three victims himself.

Miroslav Kvocka and Mladen Radic were arrested by British SFOR troops in the Prijedor district (northwestern Bosnia) on April 8, 1998. Both are indicted in their alleged capacity as superiors to others in the Omarska concentration camp. Both are individually charged with Crimes Against Humanity, Violations of the Laws and Customs of War, and Grave Breaches of the Geneva Conventions. Radic is also charged with rape.

Zoran Zigic, was taken by NATO troops from a military prison in Banja Luka, where he had spent the last 5 years serving a 15-year murder sentence, on April 16, 1998. Zigic is one of 13 Bosnian Serbs charged with beating, torturing, and killing hundreds of Muslims and Croats in the Keraterm camp near Prijedor in northwest Bosnia.

Milojica Kos, was arrested in Banja Luka by British SFOR toops, May 25, 1998. Kos was one of three deputy commanders at the Omarska camp, where more than 3,000 Muslims and Croats from the Northwestern Prijedor area were confined and tortured in the early months of the Bosnian war. Charged with Violations of the Laws and Customs of War, Crimes Against Humanity, and Grave Breaches of the Geneva Conventions.

General Djordje Djukic, a Bosnian Serb who was indicted in March 1996 for his role in the shelling of Sarajevo, had been held in the Tribunal facility but was released for humanitarian reasons due to a terminal illness. He has since died.

Simo Drljaca, a Bosnian Serb charged with genocide, was the former Prijedor Chief of Police and Head of Secret Police alleged to have played a major role in the organization and management of the concentration camps, including Omarska, in the Prijedor area. He was shot and killed while resisting arrest by SFOR (British) soldiers on July 10, 1997.

The 32 suspects (This includes Milan Simic who shas been temporarily released for health reasons) still at large or otherwise not in the Tribunal's custody include Bosnian Serb leader Radovan Karadzic and Bosnian Serb army commander General Ratko Mladic. Karadzic and Mladic are accused of Genocide and Crimes Against Humanity.

What recourse does the Tribunal have if suspects avoid apprehension?

Rule 61 of the Tribunal's Rules of Procedure and Evidence addresses the case where an arrest warrant issued by the Tribunal has not been executed and the indicted individual remains at large. At the Rule 61 hearing, the prosecutor may present the full range of evidence upon which the original indictment was based, as well as the public testimony of witnesses. If the Judges reasonably believe that the accused has committed the crimes, they may re-confirm the indictment and issue an international arrest warrant.

Rule 61 hearings are not trials in absentia, which are not considered permissible under the Tribunal's Statute. Rule 61 hearings, by contrast, serve a documentary function. They essentially afford a means of redress for the victims of the absent accused's alleged crimes by giving them an opportunity to testify in public and to have their testimony recorded for posterity. Moreover, if an international arrest warrant is issued, the suspect becomes an international fugitive. There have been five Rule 61 hearings involving eight indictees: (1) Nikolic, October 1995; (2) Martic, February 1996; (3) "Vukovar Hospital" (Mrksic, Radic and Sljivancanin), March 1996; (4) Rajic, April 1996; and (5) Karadzic and Mladic, July 1996.

B. Rwanda

As of May 21, there are 22 indictments against 35 people. Twenty-four of the indicted are in the custody of the ICTR at the Tribunal's facility in Arusha and one (Elizaphan Ntakirutimana) is being held in Texas pending final decision in US court proceedings, leaving 10 indictees still at-large. Those in Arusha include:

Jean Paul Akayesu - former Mayor of Taba in central Rwanda. Arrested in Zambia in October 1995 and transferred to Arusha in May 1996. Trial began in January 1997 and concluded shortly thereafter. Judges' verdict is still being awaited. Charged with Genocide and Crimes Against Humanity, including charges of sexual violence.

Theoneste Bagosora - former Director of Cabinet in the Rwandan Department of Defense, former Colonel and commander of a military base in Kigali during the 1994 Genocide that killed over 500,000 people. Bagosora is thought by many to be the architect of the Genocide. Arrested in Cameroon, January 1997, transferred to Arusha in February 1997. Charged with Genocide, Crimes Against Humanity, and violations of Article 3 common to the Geneva Conventions.

Jean Bosco Barayagwiza - former Director of Political Affairs/Minister of Foreign Affairs during the 1994 Genocide. Arrested in Cameroon in March 1996 and transferred to Arusha in February 1997.

Samuel Imanishemwe - former Rwandan military commander in Cyangugu during the 1994 geonocide. Arrested in Kenya, August 1997, transferred to Arusha same month. Charged with Genocide, Crimes Against Humanity, and serious violations of Article 3 common to Geneva Conventions.

Gratien Kabiligi - former Brigadier-General in FAR, arrested in Kenya, July 1997, transferred to Arusha that same month.

Jean Kambanda - Rwandan Prime Minister during the 1994 Genocide and leader of the Democratic Republican Movement. While in office, made statements to incite the massacres of Tutsis and allegedly contributed to the establishment of a civil defence program, which, in fact, allegedly served to arm the militia who engaged in massacres of the Tutsi population. On May 1, 1998, the former Prime Minister plead guilty to all charges against him. The Trial chamber entered a guilty verdict on the same day. A pre-sentencing hearing is scheduled for late August.

Joseph Kanyabashi - former Mayor of Ngoma commune. Transferred from Belgium to Arusha in November, 1996. Charged with Genocide, Crimes Against Humanity and violations of Article 3 common to the Geneva Conventions.

Clement Kayishema - former Prefect of Kibuye, joint trial with Obed Ruzindana. Arrested in Zambia, May 1996, transferred to Arusha that same month. Charged with Genocide and Crimes Against Humanity, trial began in April 1997.

Alfred Musema - former Director of the Gisovu Tea Factory in Kibuye Prefecture. Transferred to Arusha from Switzerland in latter part of May, 1997. Charged with Genocide, Crimes Against Humanity, and serious violations of Article 3 common to the Geneva Conventions.

Ferdinand Nahimana - former Director of Radio Television Libre des Milles Collines (RTLM). Arrested in Cameroon, March 1996, transferred to Arusha, January 1997. Charged with conspiracy to commit Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, and Crimes Against Humanity.

Elie Ndayambaje - former Mayor of Muganza commune. Charged with Genocide, Crimes Against Humanity, and violations of Article 3 common to the Geneva Conventions. Arrested in Belgium, June 1995, transferred to Arusha in November 1996.

Hassan Ngeze - Chief Editor of Rwandan newspaper, "Kangura". Pleaded not guilty to the three counts charging him with participation in the 1994 Rwanda Genocide. Charged with one count of Direct and Public Incitement to Commit Genocide, and two counts of Crimes Against Humanity. Judge Lennart Aspegren dismissed one count charging the accused with Genocide when confirming the indictment against Ngeze on October 3, 1997. Arrested in Kenya in July 1997, and transferred to Arusha that same month.

Sylvain Nsabimana - Former Prefect in Butare. Charged with Genocide and Crimes Against Humanity. Arrested in Kenya, July 1997, transferred to Arusha that same month.

Anatole Nsengiyumva - former Colonel and Commander of Military Operations in Gisenyi prefecture. Charged with Direct and Indirect Public Incitement to Commit Genocide, Crimes Against Humanity, and violations of Article 3 common to the Geneva Conventions. Arrested in Cameroon, March 1996, transferred to Arusha, January 1997.

Aloys Ntabakuze - former commander of battalion in FAR. Arrested in Kenya, July 1997; transferred to Arusha same month.

Andre Ntagerura - former minister of Transport and Communications of Rwanda during 1994 Genocide and prominent member of the former ruling party, the Mouvement Republicain pour la Democratie et le Developpement (MRDD). Arrested in Cameroon March 1996, transferred to Arusha January 1997. Charged with Genocide, Conspiracy to Commit Genocide and Crimes Against Humanity.

Arsene Shalom Ntahobali - Store manager in Butare Prefecture during 1994 Genocide. Son of Pauline Nyiramasuhoko (also indicted). Charged with Genocide, Complicity in Genocide, Crimes Against Humanity and Rape. Arrested in Ivory Coast, October 1996, transferred to Arusha, November 1996.

Alphonse Nteziryayo - former Commanding Officer of the Military Police and later Prefet of Butare during 1994 Genocide. Charged with Genocide, Crimes Against Humanity, and serious violations of Article 3 common to the Geneva Conventions. Arrested in Burkina Faso in late April 1998 and transferred to the Arusha ICTR facilities in May 1998.

Pauline Nyiramasuhuko - former Minister of Family and Women's Affairs during 1994 Genocide. First woman to ever be indicted for war crimes. Arrested in Kenya, July, 1997; transferred to Arusha same month.

Georges Ruggiu - Journalist and former radio broadcaster for Radio Television Libre des Milles Collines during the 1994 Genocide. Arrested in Kenya, July 1997, transferred to Arusha same month. Charged with Direct and Public Incitement to Commit Genocide and Crimes Against Humanity.

Georges Rutaganda - Businessman and former Vice-President of Interhamwe during 1994 Genocide. Arrested in Zambia, October 1995, transferred to Arusha, May 1996. Trial temporarily adjourned between April 16, 1998 and May 25, 1998 due to defendant illness.

Obed Ruzindana - former commercial trader in Kigali and Rwamatamu Commune during 1994 Genocide. Arrested in Kenya and transferred to Arusha, September 1996.

Three trials have begun: The first is that of Jean-Paul Akayesu, the second that of Georges Anderson Nderubumwe Rutaganda, and the third is the joint trial of Clement Kayishema and Obed Ruzindana. The Akayesu trial has concluded and is awaiting the announcement of the

judges' verdict. The trial of Theoneste Bagosora was scheduled to begin in March 1988, but has been postponed.

How are the indictees apprehended?

Once indictments have been handed down by the Tribunal, an arrest warrant is issued. Because the Tribunal has no police authority, it is unable to locate and apprehend those indicted. Consequently, the Tribunal is dependent on international cooperation for apprehension and surrender. While some governments have been cooperative with the efforts of the Tribunal, a number of nations have continued to harbor those indicted or sought by the government of Rwanda, which is conducting its own prosecutions.

Additional information about the ICTR

The ICTR itself will focus upon bringing the leaders and instigators of the Genocide to justice, leaving the government of Rwanda to deal with others who may have participated in these crimes.

The Rwandan government is conducting its own investigations and trials of those suspected of committing crimes, but with over 120,000 people jailed awaiting trial, and a legal system which had virtually been destroyed during the war, it will be difficult for that government to resolve all of these cases.

May 21, 1998

Coalition for International Justice