

The International Criminal Tribunal for the Former Yugoslavia: paving the way for modern international humanitarian law enforcement

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Introduction

The early 1990s was a period which, arguably, saw a revitalisation of internationalism. This was met with varying degrees of success, from the liberation of Kuwait, to the failed attempts to curb the behaviour of Somalian warlords, but importantly, did effect a revival of the peace-keeping system.¹ An important corollary of the perceived need to intervene in the affairs of states in turmoil was the perception of a need to punish those who had caused the turmoil. Although the establishment of a post-conflict criminal tribunal was not entirely new, there were fundamental practical and theoretical difficulties. In modern international law, the ground for the creation of a truly international body was broken with the establishment of the International Criminal Tribunal for the former Yugoslavia (the Tribunal, or ICTY), and it is from a study of the background and early days of the Tribunal that we can see many of the difficulties – legal and political – inherent in the establishment of an international criminal tribunal. Ultimately, however, it can be seen that the historical lessons available to the founders were diligently applied, to produce a body which has evidenced both legal and practical effectiveness.

The period leading up to the formation of the ICTY was one involving significant regional instability – in a region historically renowned for its political volatility. A feature of that instability was that military action took place against both military and civilian targets. Belated public awareness of these actions eventually led to an outcry and demand for some response and, most importantly, justice for those civilians who suffered at the hands of the military. The call for a response resulted in two major steps being taken: military intervention by NATO and United Nations forces, and later, the establishment of a judicial body to judge those individuals who conducted aggressive military action against civilian populations.

The decision to create an ad hoc tribunal to deal with alleged human rights abuses was not without discomfort both for the United Nations, and certain key states which had been involved in the region: primarily France, the United States and United Kingdom. Accusations of inaction, or at least paucity of action, were levelled at all of these entities prior to the formation of the contemplated body.

¹ See, for example, “UN peacekeeping record”, news.bbc.co.uk/2/hi/health/892592.stm; and M Lacey, “After failures, UN peacekeepers get tough”, *New York Times*, 24 May 2005.

This paper will consider the circumstances giving rise to the establishment of the ICTY, and the criticisms which have been raised in respect to the alleged delays and inactivity. It will be contended that, in fact, the criticisms are somewhat unwarranted, as these states were simply endeavouring to deal with genuine practical difficulties confronting them; these were the same difficulties facing their predecessors after both world wars. It will also be submitted that, ultimately, these obstacles were effectively overcome and a credible judicial body was created. The value of this institution lies not simply in its own contribution to justice in the region, but in its status as a template for subsequent international humanitarian courts.

Legal background to the Tribunal

A formal recognition of the legal force of international law was the subject of some substantial discussion amongst theorists for a considerable period of time. The Roman concept of *ius gentium* governed relations between Rome and its conquests and neighbours. Hugo Grotius developed the principles of *ius gentium*, and sought to systematise the law of nations with his *De Jure in Belli ac Pacis* in 1625, which is considered to be the first comprehensive statement of the law of nations. However, even as recently as 1832, John Austin – one of England’s most influential legal scholars – refused to accept that international law was anything more than a moral code which ought to act as a guide to the behaviour of states.²

Austin’s twentieth-century successor and critic, H L A Hart observed that “international law is at present in a stage of transition”³ towards a level of development which would satisfy the positivists’ definition of what constitutes law. When that transition is complete, according to Hart, international law will be a “developed” legal system, and therefore be capable of being considered properly as law.⁴ Since Professor Hart propounded that idea, the institutional structure of international law has developed significantly, going well beyond being merely a set of moral guidelines for states.

It is therefore submitted that twentieth-century international law gained a degree of force through its institutional structure (particularly in the form of the United Nations), such that now, in the twenty-first century, even Austin may agree that international law is true “law”. The institutions of modern international law now give it a force of compulsion which would be likely to satisfy Austin’s desire for a command and sanction. This is rarely seen more clearly in the international arena than in penalising those who breach standards of international humanitarian law.

Antecedents of the Tribunal

It is commonly believed that the Nuremburg and Tokyo trials which followed the Second World War were the first serious attempt to bring to justice those who misconducted themselves in times of war. In fact, this is far from the case and, as early as 1815, there had been moves and discussions in respect to the trial of purported war criminals. The founders of the Tribunal were able to learn much from the lessons offered by these historical examples.⁵

2 J Austin, *The Province of Jurisprudence Determined*, Lecture V (London: Weidenfeld & Nicholson 1954), p. 187.

3 H L A Hart, *The Concept of Law* 2nd edn (Oxford: OUP 1994), p. 236. It is important to note, however, that this observation was first made in 1961.

4 H McCoubrey, “Natural law, religion and the development of international law” in M W Janis and C Evans (eds), *Religion and International Law* (The Hague: Martinus Nijhoff 1999), p. 178.

5 For example, there was an unsuccessful move to prosecute leading Bonapartists after the surrender of France in 1815; Henry Wirz, the officer commanding Fort Sumter, a confederate prisoner of war camp during the United States Civil War, was executed for murder, as a result of mistreatment of prisoners; and several irregular colonial troops were executed by the British while fighting the Boer War.

At the conclusion of the First World War, the Allies required both the Turks and the Germans to try certain of their citizens for crimes committed during the course of the war. In the case of the Turks, the British sought redress against senior Turkish officials for the massacre of large numbers of Armenians throughout the war. Despite best intentions, the national courts-martial put in place to try accused persons collapsed with very few trials completed, and even fewer convictions, as Turkey descended into civil war.⁶

By 1920, Winston Churchill, then War Minister, urged release of those prisoners held pending trial. Even though Churchill was in favour of pressing charges against war criminals – a position which he had maintained throughout the war⁷ – he recognised the risk to British troops in holding the prisoners for trial. He therefore conceded that it was better to release the prisoners than risk further British loss of life.⁸ This problem of *realpolitik*, in the prosecution of accused persons is an ongoing theme in the field of international humanitarian law, and is certainly one faced by the Tribunal in its early days. The Tribunal relies on the goodwill of individual states for the surrender of accused persons, and at first this was not forthcoming.⁹

The attempted prosecution of German war criminals similarly failed in the period following the First World War. The Allies required the Germans to prosecute some 900 officers and men for various offences which were said to have been committed during the war. Again, the intention was for these offences to have been heard before domestic courts-martial. In fact, there were very few cases heard, fewer convictions, and the lenient prison sentences imposed were substantially truncated. In essence, nothing was achieved through these show trials.¹⁰

These early experiences highlighted two major difficulties inherently associated with establishing a body purportedly exercising international criminal jurisdiction. These were the same difficulties which were experienced almost 80 years later. The first is the question of independence. On the one hand, it is a major potential weakness of credibility for a victorious nation to establish its own tribunal, because it lacks the outward show of independence, as well as suffering from the appearance of an exercise in vengeance, rather than justice. On the other hand, to leave the prosecution in the hands of the home state is simply to invite lethargy or inaction, as the state is likely to be reticent to prosecute its own.¹¹

6 G Bass, *Stay the Hand of Vengeance: The politics of war crimes tribunals* (Princeton: Princeton University Press 2002), pp. 134–5.

7 Note, for example, FO383/32/45699, 17 April 1915.

8 FO371/SO90/E10303, 19 July 1920.

9 *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S/1995/728, 23 August 1995 (hereafter *Second Annual Report*), paras 129, 189, 191.

10 “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” (Jan–Apr 1920) 4(1) *American Journal of International Law* 95–154. The commission found that personal liability could be imposed on accused persons, irrespective of rank. However, the commission also found that each belligerent state could try accused persons before their own courts, whether civil or military.

11 Note, for example, the My Lai massacre in Vietnam, in which estimates of up to 500 civilians were killed by United States troops. Notwithstanding his conviction by a court-martial, Lt William Calley, one of the ringleaders of the massacre, only ever spent four-and-a-half months in prison. More recently, the United States passed the American Service-Members’ Protection Act 2002, which: permits the US President to authorise any means necessary for the protection of American personnel held by the ICC (s. 2008); and contemplates the withholding of military aid to states which are a party to the court (s. 2007). Notwithstanding that neither of these provisions has ever been acted upon, it demonstrates an unwillingness on the part of the United States to allow its citizens to be the subject of international criminal prosecutions.

As will be seen, this problem has been overcome for the Tribunal in the fact that it was created and managed by the United Nations.¹²

The second major problem experienced is that of enforcement. Churchill's acknowledgment that the capture and retention of potential defendants involved an inherent risk to British troops highlights a problem which continued to be a major issue in the Balkans.¹³ In fact, it was arguably even more so, because the conflict itself was entirely unrelated to the states expected to act as police and prison guards. This both heightened the sense of interference for the home state, as well as raising the question of why the "interfering" states were in fact becoming involved, and risking the lives of their troops.

In its *First Annual Report*, the ICTY noted that the Tribunal has been the subject of some criticism because of the lack of compulsive power. Although this certainly was, and remains, a problem, there is an indirect solution available. The mechanism for securing attendance of accused persons is by bringing any non-compliance to the attention of the Security Council, which then has the power to take appropriate steps to assist the Tribunal.¹⁴

Some of these difficulties were addressed immediately after the Second World War, with the formation of the Nuremberg and Tokyo Tribunals. The ICTY was the first war crime tribunal brought into existence since the end of the Second World War, after the work of the Nuremberg and Tokyo tribunals.¹⁵

The establishment of the Tribunal was therefore of major importance in the development of international criminal law. There had been a period of over 50 years in which no such tribunal had existed on the international scene, even though there was a much higher level of internationalism than there had been during the years leading up to the Second World War.¹⁶ Furthermore, given the substantial interval of inactivity in this area of law, and the likelihood of the need for future action to be taken in the field, it was of great importance that the international community should "get it right" in the establishment of a tribunal to deal with highly publicised infringements of human rights.

Of particular importance was ensuring that the state parties in the region would sufficiently trust the process of the Tribunal, such that they would refrain from taking matters into their own hands. A stated objective of the Tribunal has always been not only to restore the rule of law to the region, but also restore peace. As the Tribunal itself has commented: "*One of the main aims of the Security Council was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes.*"¹⁷

It is submitted that the high profile media attention meant that this was not a passing problem for which a temporary solution could be found.¹⁸

12 *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S/1994/1007, 29 August 1994 (hereafter *First Annual Report*), para. 10.

13 In fact, it continues to be a problem today, as is demonstrated by the observations of the President of the Tribunal, when he noted that one of the principal functions of the Tribunal is to encourage individual states to exercise jurisdiction over the relevant offences. See P Robinson, "A critical assessment of the impact of the ICTY on the states of the Former Yugoslavia", address to the University of Zagreb, 12–13 June 2009, paras 2–3.

14 *First Annual Report*, para. 17.

15 M McDougal and F Feliciano, *The International Law of War: Transnational coercion and world public order* (New Haven: New Haven Press 1994), p. 704.

16 *Ibid.* p. 706.

17 *First Annual Report*, para. 11.

18 See R Gutman, "Death camps: survivors tell of captivity, mass slaughter in Bosnia", *Newsday*, 2 August 1992; and E Sciolino, "In Bosnia, peace at any price is getting more expensive", *New York Times*, 10 January 1993.

Historical background to the Tribunal

It ought to be noted from the outset that the Tribunal was not brought into existence to deal with any single conflict. There were, in fact, three major conflicts with which the Tribunal was intended to deal. These were, firstly, the brief conflict between Slovenia and the army of Yugoslavia in 1991, although events subsequently showed that this particular engagement has given rise to the fewest investigations. The second was the war in Croatia from 1991 to 1995. Finally, the war which caused the greatest outrage amongst the international community, and led to the most vocal demand for the creation of a war crimes tribunal, was the war in Bosnia from 1992 to 1995.¹⁹

In addition, the events in Kosovo in 1998 were later added as the subject of the Tribunal's jurisdiction. However, these were substantially after the creation of the Tribunal, and therefore do not figure in this paper's consideration of the circumstances surrounding its establishment.

Importantly, the nature of each of these conflicts was, in part at least, an ethnic or racially based aggression. The corollary of this very specific underlying cause was that, in addition to action being taken to achieve broad military objectives, the protagonists also engaged in substantial military action against civilian populations. The best known of these objectives was the so-called "ethnic cleansing".²⁰

The concept of ethnic cleansing is today so well publicised and well known as to be almost trite. However, this was not the case in the early 1990s when the events were actually occurring and the phrase was being coined. Ethnic cleansing has been described as:

a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group for certain geographic areas.²¹

The acts, which were subsequently said to be war crimes, committed in this region were not, however, limited to ethnic cleansing. They involved the widespread killing of non-combatants, rape and the destruction of civilian property.²²

Although it is today generally accepted that the preponderance of the misconduct was carried out by the Serb forces, military action against civilian populations was one of the primary causes for concern in the region, and that conduct was carried out by all parties.²³ Therefore, the issue of culpability for atrocities committed was not one which could obviously and easily be ascribed exclusively to any one protagonist. This is a point of some interest in respect to the formation of the Tribunal, because it directly impacted upon its credibility, in that it was not a "victors' court" in the sense of the earlier ad hoc tribunals.

In the months following the close of the Second World War, the culpability for causing the war, and subsequent actions during the war, was clear. That was not the case with the Balkans conflicts. There was therefore a high level of credibility to be derived from the establishment of a non-partisan body by an international umbrella organisation, designed to take punitive action against all those who committed international humanitarian crimes, rather than one side of the political conflict. Therefore, the fact the ICTY was not an entity

19 E Sciolino, "US names figures it wants charged with war crimes", *New York Times*, 17 December 1992.

20 A Roberts and R Guelff, *Documents on the Laws of War* (Oxford: OUP 2002), p. 565.

21 *Report of the Commission of Experts Established Pursuant to the United Nations Security Council Resolution 780 (1992)*, S/1994/674, 27 May 1994, para. 130.

22 Article 4(2) of the ICTY statute prohibits this conduct by including it within the scope of the definition of genocide, and Article 2(d) prohibits the destruction of property as one of the "grave breaches of the Geneva Conventions of 1949".

23 S Ricchiardi, "Exposing genocide . . . for what?" (June 1992) *American Journalism Review*.

whose sole *raison d'être* was to punish a losing protagonist added significantly to its value as an independent judicial entity.

Even in the absence of public knowledge of and reaction to these measures, the conflict had already given rise to a determination by the Security Council in September 1991 that the fighting in the region amounted to a threat to international peace and security.²⁴ This allowed the United Nations to take action under chapter VII of its charter, in the form of the imposition of an embargo on the delivery of weapons and other military goods to Yugoslavia. Most importantly, it also allowed the Security Council to create an organ under Article 29 of the charter to give effect to its resolutions.²⁵

The news of the extent of the atrocities occurring in the region first broke in the United States media in July/August 1992.²⁶ As public awareness grew, there was an increasing level of pressure from human rights groups imposed on the principal Security Council nations, as well as the United Nations itself, to take actions to redress the problems in the Balkans. These events subsequently led to a further resolution by the Security Council on 6 October 1992 for the appointment of a Commission of Experts to investigate the allegations made in the media.²⁷ That Commission of Experts delivered its report on 10 February 1993. The report confirmed the factual allegations which had already been widely publicised in the world media.²⁸

Relying on the recommendations made in this interim report, the Security Council adopted Resolution 808 on 22 February 1993, by which it accepted that a Tribunal ought to be established to investigate, indict and hear charges relating to violations of international law. In order to give effect to this resolution, the Security Council subsequently passed Resolution 827 on 25 May 1993, by which the Tribunal was actually established, and the Statute of the Tribunal was adopted.

Criticisms of the early days of the Tribunal

There has been a lot of criticism of both the time it took to establish the Tribunal, and subsequently for the Tribunal itself to take any action to give effect to its mandate. It has been suggested that this was not an important political issue for the Bush administration at the time, and any action which was going to occur was only likely in response to public pressure.²⁹ This is, of course, what happened when it became apparent that there were events such as ethnic cleansing and genocide taking place in an area for which the United States was already partially responsible, through its participation in NATO (North Atlantic Treaty Organisation). It was therefore necessary for groups interested in human rights to exert pressure to make the issue sufficiently political for action to be taken in the Balkans.³⁰

The Balkans was not the major consideration for the Bush administration. By the time these events came to the public eye, the First Gulf War had been over for only a short time,

24 Resolution 713, 25 September 1991. The resolution also called on the parties in the region to refrain from their continued breaches of a cease-fire agreement.

25 Article 29 provides that: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its function."

26 The story was originally brought to light by *Newsday* journalist Roy Gutman in a series of articles from 19 July 1992: "Prisoners of Serbia's war", *Newsday*, 19 July 1992; "Like Auschwitz", *Newsday*, 21 July 1992; and "Bosnia's camps of death", *Newsday*, 2 August 1992.

27 Resolution 780 (1992).

28 See, in particular, *Report of the Secretary-General on the Activities of the International Conference on the Former Yugoslavia* (S/25221), 2 February 1993, Annex I, paras 1–4.

29 B Magas and I Zanic (eds), *The War in Croatia and Bosnia-Herzegovina 1991–1995* (London: Frank Cass), p. 273.

30 *Interim Report of the Commission of Experts Established Pursuant to the United Nations Security Council Resolution 780 (1992) S/25274*, 10 February 1993, paras 5–7.

and threats were being made by the United States and British governments to bring Saddam Hussein before a war crimes tribunal, albeit that such threats were relatively abstract. At a press conference on 1 March 1991, President Bush refused to rule out the possibility of a prosecution of Saddam Hussein.³¹

The benefit for the United States and United Kingdom in bringing that tribunal into existence would have been twofold: firstly, the war was over and there would have been no political complications in creating such a body; and, secondly, given that the war was over and won, there would have been minimal risk to British and American troops in giving effect to the determinations of such a tribunal. There was substantial discussion in the media of the possibility of pursuing such a course. Ultimately, it even became a significant electoral issue in the 1992 US presidential election. However, whether it was because of simple lethargy, or a desire to be free of any further involvement in the territory, or even that it was no longer politically expedient to do so, neither Hussein nor any of his lieutenants were brought before any court to answer for their actions until many years later.

Bass, in his very useful account of war crime trials throughout history, argues that it was a lack of political will on the part of the new US President, Bill Clinton, which resulted in a degree of sluggishness in response to the problems in the Balkans. In particular, Bass cites the President's concerns about committing troops to the region.³² However, this critique of the alleged *realpolitik* of the new American leader is contradicted by the significant material contribution made to the establishment of the Tribunal by the United States. In addition to making the largest single voluntary financial contribution to the Tribunal, the United States also provided 22 professional staff on secondment.³³

It is submitted that, in promoting the Tribunal, the United States administration must have been aware that it was creating an institution which would require "police" services. If the political will were entirely lacking, as Bass suggests, the United States would not have made a material contribution which effectively ensured the survival of the Tribunal. It is certainly accepted that there was a potential political backlash for the new President in committing troops to a foreign conflict. However, the Democrats had made so much of the failure by the Bush administration to prosecute Saddam Hussein that for Clinton to fail to act in the first months of his presidency would have been just as damaging politically.³⁴

Both Britain and France have been subject to particular criticism. This was both in the lead-up to the establishment of the Tribunal, as well as in its immediate aftermath. Britain has been accused of providing virtually no assistance in the creation of the Tribunal; giving no money towards its initial funding; and providing only one staff member. This is in contrast to the United States, whose initial contribution was of substantial funds and the provision of some 20 of the Tribunal's initial 60 staff. This latter point did, however, lead to a criticism that the Tribunal was dominated by an "American mafia". This would appear, however, to be a somewhat unfair criticism, given the fact that no other members of the United Nations seemed willing to be quite so forthcoming in support of the Tribunal.

The French were subject to substantially the same criticism as that levelled against the UK. Both were accused of "foot dragging" in the lead up to the formation of the

31 "After the war: the White House; excerpts from Bush's news conference on post-war plans", *New York Times*, 2 March 1991.

32 Bass, *Stay the Hand*, n. 6 above, pp. 214–15.

33 *First Annual Report*, para. 186.

34 See a series of articles by the *New York Times*' Elaine Sciolino: "The 1992 campaign; Bush's greatest glory fades as questions on Iraq persist", 27 June 1992; "US is said to withhold evidence of war crimes committed by Iraq", 6 July 1992; and "Iraq policy still bedevils Bush as congress asks: were crimes committed?", 8 August 1992.

Tribunal. As with the British, France contributed very little funding, and failed to contribute any staff at all.³⁵

One important explanation for the delay by the British and French governments is their historical experience of the Balkans. The region has long been considered to be a problem for European troops. Historically, it has proven to be one of highly complicated political relationships, and it has been very easy for troops to become embroiled, at great cost to a nation in financial and human terms, without any apparent result, or ease of withdrawal.³⁶ In these terms, resisting involvement in foreign and unrelated conflict is, to a large extent, understandable. The concerns expressed by Churchill in 1920 were no less relevant and applicable in 1993.³⁷

It would appear to be the case that until the full extent of the problem began to be known in the West, the mere existence of a local conflict was not sufficiently shocking for substantial pressure to be brought to bear on governments.³⁸ In this respect, contrast the end of the Second World War, at which time the full extent of the Nazi activities became known and there was an immediate call for action. In those circumstances, there was both a personal aspect, in that Germany was in fact the enemy, as well as a growing awareness of the scale of the misconduct. At the early stages of the Balkan conflicts, there was simply not this level of public awareness and, therefore, the task was left to the media and human rights groups to bring the matter to the attention of states, and to the public, who would then apply the necessary political pressure to governments.

However, this response to the issue seems, with respect, a little simplistic and self-serving. The issue of national self-interest ought not be forgotten. Humankind is inherently self-interested, even in its international relations, although that self-interest must necessarily be tempered by the need to live harmoniously as a community of nations.³⁹ In the period following the Second World War, there was an obvious motivation for prosecuting the vanquished: the desire to wreak vengeance on those who had plunged the world into conflict for the second time in 30 years.

No such personal motivation was at work on the United States, Britain or France in 1993. In fact, the negative political consequence was a factor actively working against those states contributing to establishing a war crimes tribunal. It is the function of the law, and the law-makers, to encourage people to overcome their naturally selfish tendencies.⁴⁰ Thus, the delay on the part of these states is entirely understandable. Perhaps most importantly, when reminded of their duties within the international sphere, they ultimately acted and fulfilled their responsibilities as members of the international community.

However, there is a counterpoint to this proposition. Even in the days prior to the establishment of the Tribunal, the United States sought to effect a peace settlement which would have potentially obviated the need to commit troops.⁴¹ Given the natural human tendency towards self-preservation, it was considered highly unlikely that a peaceful resolution could be reached if there were a serious possibility of legal culpability for war crimes being directed at one or more of the parties involved. Furthermore, Slobodan

35 *First Annual Report*, paras. 184–6. Notably, this carried on into the second year of the Tribunal, although Britain and the United States continued to make material contribution.

36 G Campbell, *The Road to Kosovo: A Balkan diary* (Boulder: Westview Press 1999), p. 116.

37 See n. 8 above.

38 Bass, *Stay the Hand*, n. 6 above, p. 211.

39 This is the basis on which Hugo Grotius proceeded in *De iure Belli ac Pacis*, Prol., paras 8 and 10.

40 Aristotle, *Nicomachean Ethics*, Bk 7.

41 J F Burns, "Balkan war trials in serious doubt", *New York Times*, 26 April 1993.

Milosevic, in a letter from the Prime Minister of Yugoslavia to the Secretary General of the United Nations, made it clear that the establishment of any tribunal was yet another example of the victimisation of Serbia.⁴² It has therefore been suggested that only by keeping a morally neutral tone to matters relating to this conflict could this peaceful resolution be successfully brought about.⁴³

The corollary of that suggestion is that the morally neutral aspect was easier to achieve for the British and French, whose troops were present in the region at the time, and were less partisan in favour of any faction (particularly the Bosnians). Britain and France were more likely to see all parties involved in the dispute as being equally culpable, and therefore, the necessity to institute a tribunal was not as pressing at that time as there was no obvious need to redress a significant injustice.

In addition to this fear was the simple practical fact that no judicial body could have been established in this region without troops to give it effect, both in terms of arresting potential defendants and enforcing its determinations. It was acknowledged that simply establishing a judicial entity would not be sufficient. A military element was a necessary accompaniment to the establishment of the Tribunal. In order to arrest, try and perhaps even give effect to the decisions of the Tribunal, the use of force against potential defendants was always a distinct possibility. In the absence of any United Nations police force, responsibility for this military action would lie with the nations whose troops were present in the region. This possible need to commit further troops gave rise to a degree of French and British resistance to the idea of setting up a Tribunal, with the knowledge that its establishment could result in the deaths of their troops. There were, therefore, immediate and understandable reasons – based on hard historical experience – to explain the British and French resistance to becoming involved in the creation of a war crimes tribunal.

There were similar practical, politically based, reasons for the reluctance of the United States to act. In the context of the domestic political landscape of the United States, these events were occurring within the early months of the Clinton presidency. It was obviously important to any administration not to place United States troops in a position of potential danger. The resistance to action at this early stage was therefore explicable from the perspective of US internal politics.

On the same line of reasoning, yet perhaps adopting a more cynical approach, is the criticism that the major powers – the United States, Britain and France – had a desire to maintain the status quo.⁴⁴ For the United States, this was a means of avoiding any risk to its troops by committing them to an unstable region. For France and the UK, the preservation of the status quo essentially meant preserving their respective positions within the European balance of power, by neither weakening their own military power, nor by propping up any new military force on the European stage.⁴⁵ Balanced against this political desire were the legal obligations associated with membership of the European Community. In a statement made on 1 February 1993, the European Community confirmed its support for the peace process in the Balkans. In particular, in reference to the United Nations' measures to secure peace, it was said: "The European Community and its Member States are prepared to contribute actively to this end."⁴⁶

42 UN Doc. S/25801, 19 May 1993.

43 Magas and Zanic, *The War in Croatia and Bosnia-Herzegovina*, n. 29 above, p. 274.

44 Ibid.

45 Ibid. p. 275.

46 *Report of the Secretary-General*, n. 28 above, para. 20.

This argument would have it that these powers wanted to contain the conflict and let it burn itself out.⁴⁷ They were prepared to maintain a watch on the conflict, ensuring that it did not spill beyond its original borders, but not themselves become sufficiently involved to bring the conflict to an end. In purely domestic political terms, such an approach is highly beneficial to the major powers – and probably more importantly, to the governments of the day, by ensuring that no lives are lost as a result of involvement in another nation's civil war. Of course, the failing of this policy is that it does not take into account the human cost. This safe course would appear to be the one which was initially taken. However, subsequent events overtook the major powers, and their own internal political forces, driven by public opinion, shifted, and forced them to act. In particular, the Tribunal has noted the fact that, in its first year, there were over 600 media articles published throughout the world, and there was a strong element of disapproval for not having achieved more.⁴⁸

Although Britain, France and the United States were the major international players in the region in the early 1990s, there were also other states involved at the time (at the very least at the level of the Security Council), and they too appeared to be reluctant to see the establishment of the Tribunal; if not in express terms, at least in terms of a failure to act. These were nations which broadly come into the category of those with a dubious history of human rights of their own, including, for example, Russia⁴⁹ and China.⁵⁰ Naturally, such states were resistant to the idea of a precedent being set through the establishment of a “modern” tribunal addressing breaches of international human rights law.⁵¹

The Tribunal was created at a time when an International Criminal Court (ICC) was also contemplated, but before it had come into existence. There is scope for a strong argument that both China and Russia, in light of their less than unblemished human rights records,⁵² were, naturally, both reluctant to assist in establishing precedent in the international community for the prosecution of breaches of humanitarian law. However, any attempt at active resistance would have been transparent and almost certainly would have resulted in negative international press, in the same way that the United States' resistance to the ICC garnered negative response.⁵³ Therefore, in a similar response to that of France and Britain, there was simply a failure on the part of these states to take any active steps in support, and, given that the backing of the leading nations involved in the region was essential to the formation of the Tribunal, this failure effectively acted as a *de facto* discouragement.

Similarly, the United Nations itself was the subject of criticism for its failure to take positive action immediately upon the circumstances surrounding the conflict becoming known in the public forum. These criticisms included an allegation of substantial underfunding, in view of the purpose the Tribunal was intended to serve. As an illustration of this point, the initial half-year budget of the Tribunal was \$5.4 million, whereas the 2009 budget was \$290 million.⁵⁴ The limitations and impermanence of initial funding caused the Tribunal substantial difficulty and inconvenience in its early days, in the most basic areas of

47 Bass, *Stay the Hand*, n. 6 above, p. 212.

48 *Second Annual Report*, para. 164ff.

49 Noting Russia's involvement in Chechnya and bearing in mind its own relatively recent invasion of Georgia.

50 Also noting China's involvement in Tibet.

51 It is also interesting to note that, to this day, Russia, China and the United States have still not become parties to the Treaty of Rome, which institutes the ICC.

52 Note Human Rights Watch, *Violations of Humanitarian Law and Human Rights in the Georgia–South Ossetia Conflict*, 1 April 1992; Human Rights Watch, *Human Rights Watch World Report 1998*, 3 December 1997.

53 Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 Agreements*, 2 August 2002.

54 *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S/2010/413, 30 July 2010, para. 94.

obtaining premises and appointing a chief prosecutor.⁵⁵ Arguably, this clear disparity between the practical necessity and the initial budget is attributable not so much to a deliberate attempt to detract from the effectiveness of the Tribunal as a misunderstanding of the depth of the problem, and the extent of the needs of the Tribunal. This is supported by the proposition that once the decision was taken to establish the Tribunal, the parties involved were committed to its success. The success or failure of the Tribunal directly reflected upon them. Therefore, it could be said that the failure to ensure adequate resources in terms of staffing was a reflection of ignorance of the full scope of the problem, rather than any more sinister attempt to defeat the purpose of the Tribunal. Ultimately, this argument is borne out by the subsequent substantial increase in funding and resources.

Structure of the statute of the Tribunal

The statute of the Tribunal was adopted by resolution of the Security Council on 22 May 1993.⁵⁶ The statute establishes the jurisdiction of the Tribunal, both in temporal and territorial terms. Article 1 of the statute provides that the Tribunal has jurisdiction to hear matters arising out of the territory of the former Yugoslavia from 1991 onwards. Importantly, this article refers generally to the prosecution of any person who has committed a relevant offence. In contrast, the Charter of the International Military Tribunal at Nuremberg referred specifically to the prosecution of the “major war criminals of the European Axis”.⁵⁷

Article 2 defines the legal jurisdiction of the Tribunal, which is to hear matters in relation to grave breaches of the Geneva Conventions of 1949. These are described with some specificity within the statute (although, notably, with less detail than is to be found in Article 8 of the Rome Treaty), and include such matters as unlawful deportation. Similarly, Articles 3 to 5 deal with violations of the customs of war, genocide and crimes against humanity respectively. Each area of criminality is defined and described in some detail. Again, this is in contrast with the Charter of the Nuremberg tribunal, which describes the relevant offences in general, inclusive terms.⁵⁸

In contrast with other international judicial bodies, such as the International Court of Justice (ICJ), the Tribunal, through Article 6, has power to deal with natural persons, as opposed to being limited to dealing with states, or entities with an international personality.⁵⁹ Article 7 goes on to impose liability on natural persons who not only commit the offences referred to within the statute, but also on those who plan, instigate, order or abet the offences. This latter provision is in order to give effect to an earlier Security Council resolution to the effect that individuals who commit offences of this nature are to be held personally liable for their conduct.⁶⁰

It is interesting to note at this point that there is no need under either the Security Council resolution, or the statute itself, that there be any submission to the jurisdiction of the Tribunal. This is in sharp contrast to both the ICC and the ICJ, both of which require the member state to accede to the jurisdiction of the court before it is entitled to hear matters before it.⁶¹ To this extent, the Tribunal’s compulsory, albeit limited – jurisdiction

55 *First Annual Report*, paras 28–51.

56 Resolution 808.

57 Charter of the International Military Tribunal at Nuremberg, Article 6.

58 Article 6.

59 Such as the International Committee of the Red Cross.

60 Resolution 764.

61 Note Articles 12 and 36 of the statutes of the respective courts, although submission to the ICJ is effectively deemed as a consequence of membership of the United Nations.

is much closer to that of the Tokyo and Nuremberg tribunals, for which there was no necessity to submit to the jurisdiction. This is also the reason that the armed forces of independent nations were required to assist the Tribunal, and bring accused persons before it: the home states of the accused persons did not necessarily consent to their citizens being charged.

Once again, this is an illustration of the manner in which the founders of the Tribunal benefited from the historical lessons available to them, and produced an entity which amounted to a pragmatically effective institution, while still an appropriate legal compromise. Given the nature of the accusations being made by all parties involved in the various conflicts, it is almost certain that no state involved would have been willing to consent to the jurisdiction of the Tribunal. Thus, the Tribunal would have been ineffective, or at least substantially less effective. Therefore, the imposition of a compulsory jurisdiction by an independent entity (the United Nations) has the effect of ensuring that a practical result is achieved, while justice is also served.

Article 9 recognises a concurrent jurisdiction between the Tribunal and domestic courts. However, it goes on to provide in Article 9(2) that, where there is such concurrency, the Tribunal has primacy. Therefore, from a procedural standpoint, an accused person ought not be brought before two bodies for the same offence. However, the potential weakness of this provision is that it relies upon the goodwill of the national courts for its efficacy. Similarly, Article 10 states that a person shall not be charged before a domestic court for a matter already dealt with before the Tribunal – effectively incorporating a double jeopardy protection for potential defendants.

These latter provisions are clearly essential for the effective administration of justice, and, perhaps more importantly, the transparent appearance of justice. The argument has been made that a potential danger inherent in the concept of universal jurisdiction is the possible political motivation of prospective prosecutors in determining whether or not to bring matters before local courts.⁶² For this reason, granting primacy to a court exercising an international jurisdiction, established by an independent arbiter, and constituted by an international bench protects the rights and interests of the individuals who may be brought before it.

Contrast with the Nuremberg and Tokyo tribunals

While considering the statute of the Tribunal, it is perhaps of interest to note the extent to which the Tribunal was different from the earlier ad hoc tribunals established in Nuremberg and Tokyo after the Second World War. Clearly, there were lessons learned from the establishment and conduct of those bodies which, if not directly applied, were at least understood when the Tribunal was being founded.⁶³ For that reason, it is interesting to examine the areas in which there is divergence, and note what may have been considered to be the failure of the earlier entities, and the improvements in the later one.

Firstly, and perhaps most importantly, is the fact that the Tribunal is a body of a truly international nature. The 11 judges and the prosecutor of the Tribunal were selected from member states of the United Nations, which gave a potential body of almost 200 nations from which these officials could be selected. This is in direct contrast with the four nations – Russia, France, United Kingdom and the United States – from which the prosecutors and

⁶² Throughout the *First Annual Report*, substantial commentary is made on the divergences between the ICTY and its predecessors. However, clearly, those early lessons informed the formation and structure of the Tribunal.

⁶³ Roberts and Guelff, *Documents*, n. 20 above, p. 567.

judges were selected for the Tokyo and Nuremberg tribunals.⁶⁴ The post-Second World War tribunals can, therefore, be subject to the criticism of being little more than vengeance tribunals, in which the victors sought to exact retribution, rather than justice.

This latter proposition is one which goes to the question of the total effectiveness of the body, which is a feature which cannot be understated. For any judicial entity, its effectiveness is, to a very large extent, reliant upon the perception held by the public, and most importantly by those appearing before it. The fact that the Nuremberg and Tokyo tribunals were established by the four leading victorious nations of the war was a feature which detracted substantially from their credibility, because it reflected the limited perspective of the small number of legal systems from which the key players could be drawn. Furthermore, the Charter of the International Military Tribunal at Nuremberg expressly excluded challenge to the membership of the panel.⁶⁵

This leads to the second divergent feature of the Tribunal, which was that it was established by an independent umpire during the conflict, and therefore covered both actual and prospective criminal offences.⁶⁶ The Tribunal therefore reflected an attempt to constitute both a body hearing trials of matters which had already occurred, as well as to amount to a deterrent for future misconduct. The extent to which this was successful will be considered further below.

Under the statute of the Tribunal, rape is expressly included as a crime against humanity.⁶⁷ Similarly, genocide is also expressly included as an offence capable of being tried by the Tribunal.⁶⁸ These are offences which were included within the Geneva Conventions of 1949.⁶⁹ Those conventions were adopted with the benefit of hindsight after the atrocities identified during and after the Second World War. The experience from the earlier bodies was of assistance to the founders of the Tribunal, in that there was a corpus of established crimes, which were recognised as being offensive to international law and were engrossed into the statute as part of its jurisdiction.

Nevertheless, the Tribunal's scope was slightly less expansive than that of the post-war entities. The post-war ad hoc tribunals tried the relatively nebulous offence of "crimes against peace".⁷⁰ The rationale at the time was that all resort to war is unlawful. Therefore, Germany, as the aggressor in the war, committed a crime against the preservation of peace. The jurisdiction of the Tribunal is exclusively defined by the statute, and there is no reference to any offence of the nature of "crimes against peace".⁷¹ This could be said to be a return to the post-World War One position which rejected the prospect of criminal liability for acts of aggression.⁷²

There are two possible explanations for this limitation on the jurisdiction of the Tribunal. The first is that, although the Serbs were arguably the more aggressive party

64 See Article 1 of the Charter of the International Military Tribunal at Nuremberg.

65 Article 3.

66 As opposed to the Nuremberg tribunal being established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945.

67 Article 4.

68 Article 5.

69 McDougal and Feliciano, *International Law of War*, n. 15 above, p. 706; however, Article 2 also deals with "grave breaches" of the Geneva Conventions of 1949.

70 R Jackson, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials: London, 1945*, 25 July 1945 (Washington: USGPO 1949), pp. 381–4.

71 The scope of the Tribunal's jurisdiction is exhaustively established in Articles 2 to 5. There is no mention in any of those articles to any reference approaching "crimes against peace", or "crimes of aggression".

72 "Commission on the Responsibility of the Authors of the War", n. 10 above, p. 119.

involved in the various conflicts, there was no clear and obvious aggressor initiating the disputes. This is in contrast with the Second World War, in which it was universally accepted that Germany and Japan were the initiators of the conflict. Although history does tend to bear out this point, it was not even an issue at the time. It was simply presumed.

The second possible explanation can be based around the individual responsibility aspect of the Tribunal's function. The primary purpose of the Tribunal was to bring to justice individuals who had committed specific offences, and hold them responsible for their actions. The concept of a crime against peace is one which is viewed on a higher scale, in that it is directed more at the state's conduct, rather than at that of the individual. For that reason, the offences which are specifically included in the statute of the Tribunal more adequately satisfy the Tribunal's function of bringing individuals to justice for their misconduct. Other tribunals exist to bring states to justice for their misdeeds.⁷³

Procedure

Unlike the Tokyo and Nuremberg tribunals, the ICTY had a clearly defined procedure from the outset, embodied in the statute itself. Importantly, this procedure was arrived at after an extensive period of consultation with jurists from a wide variety of jurisdictions.⁷⁴ It was intended that the procedure adopted by the Tribunal should take account as much as possible of domestic principles in both the continental European system as well as the Westminster tradition. This is reflected in Article 15 of the statute in which the rules of procedure and evidence are to be found.

In divergence from the rules of the Tokyo and Nuremberg tribunals, no death penalty is available to the judges of the Tribunal.⁷⁵ This is reflective of the United Nations' general move away from the imposition of the death penalty and is consistent with such international instruments as the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights.⁷⁶ This does, however, raise two important and interesting practical questions for consideration.

The first is in relation to accommodation of convicted prisoners. If the maximum sentences which could be imposed under the statute are terms of imprisonment, then there must be appropriate accommodation for the prisoners serving those sentences. To date, this has been provided by the Netherlands, which has devoted a portion of one of its prisons to United Nations prisoners. The second point is that, under Yugoslav law, the death penalty is available for many of the offences which are within the Tribunal's purview. However, it is again reflective of the primacy of the Tribunal's jurisdiction that this is nevertheless not adopted by the Tribunal in its sentencing protocols.

Finally, under the Tribunal, there is an appeals process available to hear both interlocutory procedural matters and substantive appeals from both conviction and sentence.⁷⁷ This is once again a substantial divergence from the operations of the earlier

73 Such as the ICJ and the International Human Rights Commission, although neither of those bodies exercise a criminal jurisdiction per se.

74 In contrast, a very simple procedure is set out in Article 24 of the Nuremberg Charter. The simplicity of this procedure would appear to reflect the inexperience of its draftspeople with the production of rules of international tribunals.

75 Article 27 of the Charter of the International Military Tribunal permits the imposition of the death penalty.

76 As an aside, it is also interesting to note that this is what would have prevented Iraq, or the United States, from executing Saddam Hussein, and it was therefore necessary for a court exercising domestic jurisdiction to pass sentence of death against him.

77 Article 25 of the statute of the Tribunal.

tribunals, whose determinations were final, with no avenue of appeal available.⁷⁸ Again, this adds to the credibility of the Tribunal as a body exercising judicial power, rather than simply an instrument of vengeance.

Limitations of the Tribunal

Notwithstanding these theoretical benefits available to the Tribunal from the source of its legal power, there have been a number of practical limitations, some of which have been canvassed already. These limitations have detracted substantially from the capacity of the Tribunal to operate effectively as a body exercising judicial power.

Perhaps the most important is in respect to bringing accused persons before the Tribunal. This was one of the more difficult features of the Tribunal's operations in its early days. In 1996 and 1997, there was substantial criticism levelled against NATO and United Nations troops for a failure to bring persons under indictment before the Tribunal. This was often the case when it was, in fact, known where those persons were. One commentator has noted that various indictees were known to NATO forces, and sometimes even socialised at the same venues as those forces, but were not arrested.⁷⁹

It has been suggested, from the perspective of the United States, that there were two major reasons for this failure to take any real steps towards the arrest of accused persons. The first is the recent memory of the Somalia debacle, in which a number of United States military personnel were killed or injured in an attempt to bring local warlords to justice, ultimately achieving little benefit for the local populace. The risk of involvement of troops in a similar situation was acknowledged, and obviously there was a hope to avoid loss of life with the same apparent lack of result. In the same vein was the fact that it was recognised from public surveys that as many as 70 per cent of the United States population were opposed to the commitment of their troops in Bosnia.⁸⁰ An increase in the commitment of troops to the region is almost certainly what would have been required to effect the arrest of a large number of those persons under indictment from the Tribunal.

The other major failing of the Tribunal in its early stages was that generally it was only low and middle-level personnel who were indicted and brought before it. At least in the early days, there was no attempt made to indict senior officers or politicians from either side of the engagements. (This has, of course, subsequently been changed, with the most notable being the indictment and trial of Milosevic: that was considered to be a major step forward in the life of the Tribunal.)

It has been suggested that this failing was a symptom of the fact that the Tribunal was attempting to deal with matters in the course of an ongoing conflict. The argument which has been used to justify the failure to take action against senior officials is that there were attempts underway to broker peace with those senior officials.⁸¹ It would have substantially detracted from the capacity of the United Nations to achieve this end of a brokered peace if it were known that, as soon as the peace were achieved, those involved at the highest level would be indicted for serious offences, involving potentially lengthy prison sentences.

There is some validity to this argument, in theory. It is difficult to envision a circumstance in which a senior politician would be prepared to bring an end to a conflict if it were known that such an act would expose him or her to a charge of crimes against

78 Article 26 of the Charter of the International Military Tribunal provides that: "The judgment of the Tribunal . . . shall be final and not subject to review."

79 Campbell, *Road to Kosovo*, n. 36 above, pp. 113–14.

80 Ibid. p. 116.

81 Ibid.

humanity. However, whether that theoretical argument can be transposed into reality, given the relatively limited number of senior personnel who have been charged even to this day is somewhat questionable. Conversely, it may be said that, by charging a large number of low and mid-level personnel, and securing convictions, the Tribunal is at least ostensibly justifying its existence.

Nevertheless, this does raise an interesting issue, which should be considered. That is, whether there is any basis for the suggestion that a tribunal of this nature should only be formed at the conclusion of a conflict, rather than during the course of that conflict. On the side of favouring such a tribunal at the earliest point is that it allows the tribunal to avoid accusations of being created solely for the purpose of retributive justice. This is, of course, the accusation which was levelled regularly against the Nuremberg and Tokyo institutions.⁸² It was one from which they suffered substantially and – in light of other evidence, such as it being a “victor’s court” – is quite a reasonable accusation. As a result, those tribunals experienced loss of prestige and acceptability as bodies exercising appropriate jurisdiction. Therefore, there is a case for the tribunal to be established at the earliest time.

However, the contrary argument also carries significant weight. That is that the creation of an entity of this nature during the course of the conflict does little more than complicate the political situation. That is borne out in the present case, in the argument referred to above that the capacity to bring about a negotiated settlement was complicated by the spectre of criminal charges potentially looming against those with whom the United Nations was negotiating. Similarly, there would appear to be little or no evidence to suggest that the formation of the Tribunal did anything to curtail the very conduct which it was established to investigate. This would therefore suggest that entities of this nature are left with little more than retributive justice, if they cannot be said to fulfil any prophylactic purpose.

The Tribunal versus the ICC

It is to be noted that it is only relatively recently that the Statute of Rome, by which the ICC is brought into existence, has come into effect. That is there have now been the requisite number of ratifications for the statute to come into force and for the court to be created. Some thought must therefore be given to the issue of whether, and if so to what extent, this court will oust ad hoc entities such as the Tribunal.

Part 2 of the Statute of Rome sets out the jurisdiction of the ICC. Most relevantly, Article 5(1) states that the “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”. This is important to the present context, in that it then goes on to include genocide, war crimes, crimes against humanity and crimes of aggression in that category of serious crime. These terms are more clearly defined and delineated throughout the rest of Part 2 of the statute. The offences are defined in much more detail than in the statute of the Tribunal. However, the point of Article 5 is that, on the face of it, the ICC will not entirely obviate the need for ad hoc bodies such as the Tribunal.

The Tribunal’s jurisdiction is not limited to “serious” offences “of concern to the international community as a whole”. Its purpose is to try breaches of the Geneva Conventions of 1949, albeit that it limits that jurisdiction to “grave” breaches of those conventions. Nevertheless, a consideration of the scope of the jurisdiction of the Tribunal shows that the level of seriousness of the offences with which it is concerned is not as

82 H Fox and R Meyer, *Effecting Compliance* (London: British Institute of International and Comparative Law 1993), p. 3.

great as those which the ICC handles.⁸³ Although the latter body is intended to deal with individuals, it is nevertheless exercising a jurisdiction more on the international scale of misconduct than that of the Tribunal. Therefore, it can be said that, notwithstanding the creation of the ICC, bodies such as the Tribunal will nevertheless not be likely to disappear in future.⁸⁴

Conclusion: a promise fulfilled?

It can be seen that the Tribunal was a body created in circumstances of some significant controversy. The historical conditions in which it was formed were characterised by substantial political volatility, in a region in which political instability was endemic. In these conditions, public pressure was placed upon key players in the region: the United Nations, the United States, France and the United Kingdom to take action to restore stability and exact justice from those who had committed serious crimes. Hence, in addition to pressure being imposed for the undertaking of military intervention, pressure was also exerted for the establishment of a judicial body to try such offences. This was the first such ad hoc tribunal since the close of the Second World War.

One of the stated objectives of the Tribunal from the very outset was assisting in the preservation of peace within the region.⁸⁵ For all of the reasons already discussed, it would be unforgivably naive to believe that a judicial institution could achieve this end unaided. The participation of NATO and United Nations troops in the region was essential to the restoration of stability. Nevertheless, the Tribunal has gone some significant way towards assisting in the preservation of that stability, and it is contended that this is for two principal reasons.

The first is found in the imposition of penalties on those who have committed offences in the region. It is submitted that this has secured the perception of justice for those who suffered at the hands of the perpetrators. This must necessarily have had the effect of leading the victims away from taking any “self-help” action. The fact that there was an independent entity securing justice for the victims can be said to have taken away at least some of the sting of the acts themselves.

Secondly, and perhaps more importantly, the Tribunal has worked with the nations in the region to ensure that justice is served at both a domestic and international level. In particular, the Tribunal has gradually been transferring skills,⁸⁶ and ultimately investigative files, to the prosecutors of the states within the region.⁸⁷ This restabilisation of the judicial process in the Balkans has the capacity to aid in achieving both political and military security, by ensuring that each individual state takes a degree of responsibility for maintaining peace and good order. Although this may not be a perfect solution to the problems of the area, it is certainly one which has been shown to be effective thus far, and also represents a somewhat unique use of a judicial institution to achieve international political order.

It is fair to say that in responding to the pressure, those parties satisfied many of the theoretical requirements for such a body. The lethargy with which the Tribunal was

83 Fox and Meyer, *Effecting Compliance*, n. 82 above, p. 7.

84 Note that this is borne out by the creation of the tribunal for Rwanda.

85 *First Annual Report*, paras 7 and 11.

86 *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S/2009/394, 31 July 2009, para. 76ff.

87 *Report of the International Tribunal*, n. 54 above, para. 71ff and 80–5.

established, the paucity of funding at the outset and the absence of any serious attempt in the early years to bring accused persons before the Tribunal have all been said to be indicative of a lack of commitment by the parties involved. Initially, it could be said that they were found wanting in many practical aspects, although this seems to be more a symptom of both seeking to protect their own citizens, as well as misapprehending the enormity of the task, rather than deliberately avoiding the leadership responsibility which they took upon themselves. Ultimately, the theoretical lessons from the Nuremberg and Tokyo tribunals had been well learned, as well as the practical lessons from even earlier attempts to try soldiers for criminal conduct during time of war. The statute of the Tribunal was crafted in such a way that the status and prestige of the Tribunal as an independent judicial entity were preserved, while still imposing personal liability on those individuals who committed atrocious offences. In the end, it is clear that compromise was essential, in order to achieve any effective outcome. In this instance, the compromise which was adopted was one which ensured the operation of a practical and effective judicial institution.