

Diplomarbeit

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ICTY - Rule of law or politics?
Success despite the lack of political will

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I would like to dedicate this thesis to my family and to especially thank my mom who has always supported me unconditionally, guided me throughout the years and given me the strength I needed to complete my studies

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Acronyms and Abbreviations

BH – Bosnia and Herzegovina
DOS – Democratic Opposition of Serbia
EC – European Community
EU – European Union
EUFOR – European Union Force
FRY – Federal Republic of Yugoslavia
HDZ – Hrvatska Demokratska Zajednica (Croatian Democratic Union)
HDZ-BiH – Hrvatska Demokratska Zajednica Bosne i Hercegovine
(Croatian Democratic Union of Bosnia and Herzegovina)
HRW – Human Rights Watch
HVO – Hrvatsko Vijeće Obrane (Croat Defence Council)
HZ H-B – Hrvatska Zajednica Herceg-Bosna (Croatian Community of Herceg-Bosna)
ICC – International Criminal Court
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
IFOR – Implementation Force
IMT – International Military Tribunal
JNA – Jugoslovenska Narodna Armija (Yugoslav People's Army)
KLA – Kosovo Liberation Army
NATO – North Atlantic Treaty Organization
NGO – Non-governmental Organization
OSCE – Organization for Security and Co-operation in Europe
SDA – Stranka Demokratske Akcije (Democratic Action Party)
SDS – Srpska Demokratska Stranka (Serbian Democratic Party)
SFOR – Stabilisation Force
UN – United Nations
UNPROFOR – United Nations Protection Force
US – United States

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1. Introduction

After the main chapters of this thesis were already finished the breaking news was announced that one of the two war crimes suspects most wanted by The Hague was apprehended. Radovan Karadzic, the war-time president of Republika Srpska in Bosnia and Herzegovina and former supreme commander of the Bosnian Serb Army, charged with genocide, among other crimes, was arrested on 21 July 2008 by the Serb authorities after spending thirteen years on the run. The first indictment against Karadzic was already confirmed in July of 1995 but it took over a decade for him to reach the Tribunal. He is charged with some of the worst atrocities committed during the war in Bosnia and Herzegovina, such as the genocide committed in Srebrenica where close to 8,000 Bosnian Muslim men and boys were murdered, and the campaign of shelling and sniping of civilians in Sarajevo which resulted in the killing and wounding of thousands. Radovan Karadzic finally reached Tribunal's custody on 30 July and made his initial appearance the following day.

Already in his initial appearance in the courtroom Radovan Karadzic stated, among other things, that he wished to represent himself and also brought up a matter which will be discussed in one of the chapters dealing with his indictment and non-arrest which is the alleged deal he had made with Richard Holbrooke who was a U.S. special envoy to the Balkans, explaining in this way the reasons why it took thirteen years for him to reach The Hague. Karadzic claims that the deal existed, that it was made with Holbrooke who acted on the behalf of not only the U.S. but of all the permanent members of the Security Council and that it was the reason why NATO did not want to arrest him.

In the highly anticipated first appearances Karadzic's attitude in the courtroom as well as towards the Tribunal resembled each time more and more the one of Slobodan Milosevic. Beginning with his wish to represent himself, bringing out accusations against NATO and putting in doubt the courts credibility as well as its jurisdiction to prosecute him, one can already presume that the attitude of the accused will only continue in the direction of buying time, making political speeches and accusations rather than conducting his defence. How the trial will proceed and just how complicated the process will be remains to be seen; in any case one can only hope that the lessons of the Milosevic trial have been well learned.

As far as this thesis is concerned, the arrest of Radovan Karadzic and his arrival at The Hague represent only an additional argument in favour of its hypothesis which is that the Tribunal has ultimately made enormous accomplishments and that its work can be regarded as successful despite countless difficulties encountered during its mandate. The intention is to show that the Tribunal was primarily established as a response to the mounting public pressure to stop the atrocities being committed in the Balkans and as an alternative to a military intervention, with an additional purpose of serving as a political instrument in resolving the conflict but also as a means of restoring the credibility of the international community reluctant to intervene and stop the massive human rights violations.

Despite constant lack of support in all aspects of its work, states' disregard of their legal obligations, various obstructions of the Tribunal and denial of financial and military means essential for it to function properly, the ICTY has ultimately managed to ensure that states complied with their obligations listed under its statute and has managed to produce excellent results in prosecuting the serious violations of international humanitarian law committed in the former Yugoslavia. In order to demonstrate that from the Tribunal's establishment onwards there was a constant lack of political will to cooperate and assist the Tribunal in its tasks from the states which established it and were most involved in the resolution of the Balkan crisis, with a special emphasis on the role of U.S., France and Great Britain, the thesis will be divided into two main parts.

The first part will deal mostly with the difficulties which the Tribunal has encountered, on primarily three levels: financial, military assistance and transfer of evidence material to the Tribunal. The first part will be accompanied by an analysis of the cases of Radovan Karadzic and Ratko Mladic, the two most wanted indictees of the Tribunal, since their cases represent the best example of the lack of political will.

The second part will be focused on the achievements of the Tribunal, the positive changes in the conduct of its work and the accomplishments it has made. In addition to this part there will be a special analysis of the case of Slobodan Milosevic, his arrest and trial, which can be regarded as one of Tribunal's biggest accomplishments, with other achievements also being mentioned such as a few especially significant cases and judgements. As an introduction to the chapters concerning the establishment and the work of the Tribunal a short background of the conflicts in the Balkans which followed the dissolution of Yugoslavia will be given since they ultimately are the subject of Tribunal's work.

In these chapters it is not intended to go much into the causal factors and the conflicts themselves but rather to give a short insight into the events which led to the establishment of the Tribunal and their consequences which ultimately fall under its jurisdiction.

Concerning the theoretical framework, a short history of international criminal justice will primarily be presented.

This will be followed by an analysis of the two main approaches towards international criminal justice which are based on the theory of political realism and the principles of liberal legalism. These two approaches will then be applied to and analysed on the example of ICTY.

Numerous sources were used to state the facts written in this thesis and to confirm its basic claim and hypothesis. Beside numerous books written on the subject -- usually by insiders or people who have in some way participated and have had an insight into its work -- other documents have also served this purpose well. Starting with the basic legal documents of the Tribunal such as its statute, its indictments, judgements, annual reports, as well as its press releases, a significant number of published interviews from individuals such as the chief prosecutors or people employed in the Tribunal were also used. The use of newspaper articles was also an important source of information since the media contributed significantly to bringing the work of the Tribunal as well as its difficulties closer to the public by following it closely and stating the main issues with which the Tribunal has faced. Internet was also an important source of information especially the ICTY website which provided the data necessary to write the statistics on the ICTY cases, such as the number of indictments made, judgements rendered, types of sentences and so on, as well as the information concerning the budget for example.

The use of reports, in this case issued mainly by Human Rights Watch, also provided another point of view concerning the Tribunal and the policy of the international community towards its work, and was important especially in taking account that organizations such as HRW have played an important role not only in the establishment of the Tribunal but throughout its entire mandate by continuously following the issues related to its work and also by providing their support. The goal was to use as many different sources of information as possible to make this thesis not only well documented but also more objective.

2. Theoretical Framework

If the wars in the Balkans in the 1990s and the atrocities that took place, especially in Bosnia, taught us anything it is that the world community usually waits for a crime of such scale and cruelty as to outrage the entire world to take place in order to arouse any kind of decisive reaction. But they have also shown us that lessons of the past have not been learned. The crimes which have taken place in the last 50 years following the ending of the Second World War have taught us that human lives have not yet taken priority over other issues. Although following the atrocities committed in World War II the international community seemed determined to sanction and prevent any future crimes of such scale, by making the commitment of 'never again', this has proven in many cases to be a vain promise. From Cambodia to Iraq, the world community has pushed the issue of war crimes' sanctioning aside. So why was Bosnia any different when it came to the issue of international justice? Why did the world community decide to establish the International Criminal Tribunal for the former Yugoslavia to prosecute persons who committed serious violations of international humanitarian law in the Balkans and was this step taken purely out of reasons of justice or did it have a completely different background? With so many crimes which have taken place since the Second World War, and with almost no significant efforts made to achieve international justice since the establishment of the tribunals in Nuremberg and Tokyo, what became the decisive moment which made the international community establish the ICTY and hold the war criminals accountable?

Perhaps the three most decisive factors can be named. The fact that the conflict and the crimes took place in Europe, which certainly caught much more attention than crimes which took place elsewhere, the fact that the Security Council was finally freed of its Cold War paralysis and the fact that many of the crimes committed, in this case in Bosnia, reminded the world of the crimes committed by the Nazis. But the issues which will be discussed in this chapter would be, among others, states' reluctance to intervene despite the knowledge of the crimes occurring, the main actors which influenced the establishment of the ICTY, in this case non- state actors, and most of all the confrontational views on the issue of war crimes' sanctioning between traditional realists and the human rights advocates or the legalists. The ICTY was ultimately a product of states as the main international actors, but one can not give all of the credit to states, as in the case of Bosnia, the role of the non-governmental organizations and the international media has been an extremely important one.

The first pictures showing terrifying scenes, made in the Serb-run detention camps in Bosnia, were shown to the world thanks to a number of reporters searching for the truth in the seemingly too complicated situation in the Balkans which was often portrayed by Western governments as an inevitable result of ancient hatreds between nations of that region.

In the case of Bosnia the first to react were the international media creating the pressure for action through their constant reporting of the atrocities being committed, and by making the world public aware that horrible war crimes were taking place and that the governments were not responding. At the same time numerous human rights organizations, such as Human Rights Watch, were also calling for a reaction from the international community to prevent the tragedies from occurring, and the human rights organizations would ultimately be the first ones to call for the establishment of an international tribunal. The international human rights organizations as well as the media have certainly played a decisive role in the solution of the Balkan crisis as well as in the establishment of the ICTY. Even though states remain the main actors in international relations, the growing influence of NGOs can be seen especially in the example of the war in Bosnia.

The main claim here is that states have remained persistent in their view of foreign affairs mainly as a pursuit of national interests, usually resisting any actions based purely on moral or ethical grounds, which in this case include preventing and sanctioning of war crimes. The attention is focused mainly on the Western governments, the U.S., Great Britain and France, which have influenced the events in the Balkans as well as the ICTY significantly more than other countries. Either through the contribution of military personnel, the conducting of air strikes, participating in the establishment of the Tribunal or through financial and other types of support for the ICTY, the policies of these particular countries will mainly be discussed. The struggle between the government officials with realist views of state's interests and duties and those who regard the protection of human rights as one of the highest values has been visible in the shifting of Western governments' policies towards the Balkan conflicts as well as towards the ICTY.

The general dispute between those who consider humanitarian interventions as well as legalism on the international level to be undesirable and those who seek to end impunity and to ensure accountability on the basis of legal norms and the respect for human rights will be the subject of this chapter. First a short history of international criminal justice will be given, with an accent on the issues and problems which have constantly accompanied the pursuit of justice on the international level, then the two main approaches to international criminal

justice will be presented and analysed and this will be followed by an analysis of the ICTY example in the context of the same approaches.

2.1. Towards International Criminal Justice

In the past, the record of international criminal justice has not been a very positive one. Following the First World War some of the first attempts were made in the direction of international justice. They would represent an almost complete failure, as impunity once again prevailed in the conflict between states' interests and war crimes sanctioning.

Following the ending of the First World War in 1919 the Allies set up a Commission to investigate the responsibility of the authors of the war. The commission eventually recommended the prosecution of numerous officials, including the German Kaiser, and setting up of an Allied tribunal to conduct such trials. But the Commission's proposals were ultimately not implemented. In 1919 the victorious Allies in the Treaty of Versailles, which ended WWI, announced their intentions to prosecute Kaiser Wilhelm II. The treaty also provided for the prosecution of German war criminals. But as Bassiouni (2006) suggests, the Allies did not seriously intend to prosecute a royal monarch, but merely to make some sort of suggestion that justice was being pursued for some 20 million victims of that war. The Kaiser eventually obtained asylum in The Netherlands, and the Allies agreed to have Germany take over the task of prosecuting German war criminals. The German Supreme Court did eventually try only a limited number of the German officers, handing down a few light sentences. This represented a clear victory for politics but also a first step towards international criminal responsibility. The Allies also decided not to prosecute the Turkish officials responsible for the massacre of, by some estimations, as many as one million Armenians. The reason was, as Bassiouni (2006) writes, the fact that Turkey at the time was a valuable partner to the Western Allies who were facing the new threat of communism. These first attempts to sanction war crimes eventually confirmed the fact that at the time impunity was the rule, and that other states' interests in every aspect had priority over justice. Unfortunately this would not change much over time but a much bigger contribution to international criminal justice would be made after the Second World War. Already before the end of WWII the Allies were discussing the prosecution of Germans responsible for the crimes committed. In the Moscow declaration of 1943 the Allies confirmed their intention to prosecute the German officers who were responsible for the atrocities.

The Nuremberg IMT (International Military Tribunal) was eventually set up by an agreement signed by the four major Allies: The United States, Great Britain, The Soviet Union and France in 1945¹. The court was to try three types of offences: Crimes against peace, war crimes and crimes against humanity. The IMT was to prosecute only the leaders and organizers who conspired to commit the crimes and a total of 24 major Nazi war criminals were put on trial (Ferencz 1998). Although the Allies tried to ensure that the defendants received a fair trial the proceedings were later criticized as ‘victors’ justice’. Although great steps forward were made in the area of international criminal justice, by choosing legal over political solutions, this was still often overshadowed by the criticism that the Nuremberg trials received. The four major Allies also continued to conduct additional trials separately, each in their respective zones of occupation, under the provisions of the Control Council Law 10.

On the other hand, unlike Nuremberg, the International Military Tribunal for the Far East was created by an order issued by General Douglas MacArthur, the Supreme Commander for the Allied Powers in the Far East. The tribunal was created with the intention to prosecute the Japanese leaders. As Bassiouni (2006) writes the reason why this tribunal was established differently than the one in Nuremberg, was the fact that the U.S. did not want the U.S.S.R. to have political influence in post-war Japan, noting that politics had an impact in many ways on the war crimes proceedings in that part of the world, and also pointing out that MacArthur was more concerned about governing Japan than prosecuting Japanese Emperor Hirohito or the members of his family. There was also a lot of criticism directed at the Allies for releasing within a few years all of the prisoners who were not sentenced to death and executed. The prosecutions which took place after the Second World War were mostly regarded in terms of the victors exercising revenge on the defeated. The main reason was the fact that none of the Allied forces was ever held accountable for any war crime. Usually mentioned are the bombing of Dresden and the dropping of the atomic bombs on Hiroshima and Nagasaki. As Ferencz (1998) pointed out, tribunals created by victor nations against vanquished leaders, regardless of how fair the trials were, and no matter how guilty the accused, will have a tarnished image, as long as those who judge could themselves be found guilty of the deeds they condemn. But the significance of the Nuremberg trials was in the fact that the victors had decided to deal with the defeated using legalistic means. Although at the time the Allies were certainly tempted to exercise vengeance on the enemy, by simply conducting summary executions, still the war criminals were given trials, and even the

¹ 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

possibility of acquittals. The reason why states, in this case primarily the U.S. and Great Britain, decided to put the defeated Germans on trial instead of dealing with the war criminals differently, as Bass (2000:148) writes, was the fact that the two liberal countries were constrained by a strong influence from their liberal domestic norms, making them choose legalistic over non-legalistic solutions. Although even liberal countries are tempted to act otherwise, in the case of Nuremberg, legalism had prevailed. Following the prosecutions after WWII, the Cold War would stop any further significant development in the area of international criminal justice. It was a period in which the issue was almost completely overshadowed by political ones. Although in the period following the WWII, first steps towards the creation of an International Criminal Court were made, it was not until 1998 that such efforts finally gave results. The next big development in international criminal justice was the establishment of ICTY in 1993 and the ICTR in 1994, but this does not mean that the period prior to their establishment was any less violent. On the contrary, although states seemed determined to commit themselves to the protection of human rights and never again allow war crimes to go unpunished, these commitments did not hold very long.

Even after the horrific crimes of the Second World War, states were not willing to commit themselves more to the goal of international justice, and even less so to accept any binding legal norms which would have tied their hands when it came to political action. The political will was lacking. A considerable amount of time would pass until international criminal justice started to represent one of the goals of states' foreign policies, although until this day international justice is rarely put above other state interests. In moments when the goals of politics and justice coincide or when states find justice to be politically useful is when perhaps the biggest contributions to its advance are made. The Second World War and the prosecutions which took place afterwards made the international community move forward in giving more attention to human rights. It was in that period that the human rights ideas entered foreign policy debates in the United States as well as in Europe although the development of human rights policies took on a different course in each (Sikkink 1995:139). The change which occurred was obvious from the fact that the European states as well as the U.S., although using different types of engagement, started to introduce the issue of human rights into their foreign policies. In time this progressed up to a point where human rights started representing one of states' foreign policy goals and became sometimes a precondition for conducting any kind of relations with other countries.

Although the issue of human rights has grown significantly as a priority in the foreign policies of these particular countries, even today it often gets pushed aside when it is not considered to be politically expedient.

What is meant is that states today, even the ones which have high regard for human rights on the national level, tend to push this issue aside in international relations when it collides with other national interests, or when there is not enough commitment to pursue the issue internationally, especially when this demands certain investments or risks. Although we could claim that the perception of national interest has changed significantly and that respect for human rights has become one of the segments of national interest of Western countries, one could also claim that the view of state's interests arises even today, mostly from the tradition of political realism, which sees the main priorities of foreign policy in assuring power and security and usually gives less importance to issues based on moral or ethical grounds. Unfortunately the human rights issues as well as the issue of international justice remain overshadowed by other states' interests and inferior issues in international relations. What is still missing is the understanding that the protection of human rights as a foreign policy goal contributes to peace and security in the world and that in the long-term brings more in regard to other state interests.

2.2. Political Realism vs. Legalism

If one raises the question of the necessity of legal norms in international relations or of international war crimes tribunals, the answer is simple and easy to find. History has been characterized by countless conflicts producing so much destruction and so many deaths, which have reached their culmination with the two World Wars; the crimes which occurred and were usually left unpunished, raised the issue of protecting human lives and giving them priority over states' right to conduct wars in order to achieve their interests. The idea of regulating the conduct of war and minimizing victimization is not new, but the problem today as well as in the past has not been so much the lack of norms, or laws which could regulate state conduct, ultimately leading to more security and peace, but rather the unwillingness of states to accept such rules which could limit their action in any way or to accept any kind of enforcement mechanisms whose decisions would be binding and would apply equally to all. Although the need to sanction war crimes and to facilitate accountability has been recognized for quite some time, the resistance towards norms regulating state's activities has continued to undermine the efforts to achieve international justice. Although

important steps have been made in the area of war crimes' sanctioning, today the tensions between the goals of international criminal justice and Realpolitik, which stands for the protection of states' interests regarded as more important and essential to its existence and well being, still continue to exist. And perhaps too often other state's interests prevail over the interests of international justice. To try to explain the developments in the area of international justice, especially the obstacles it faces, it is necessary to single out two main approaches to the issue of war crimes' sanctioning and international criminal justice.

The first approach would be the one based on the tradition of political realism. The reason why realist political thought has such an influence on the issue of war crimes and international justice is because realism has a strong impact on the way international relations are understood and conducted, even today. One cannot deny that the foreign policy of many states is influenced by the ideas of political realism. The realist view of international relations is one where states, as the main actors, coexist in an anarchic environment continuously struggling for power and security (Griffiths 1995). For realists there is not much acceptance for any kind of universal rules which could limit states' actions and especially when those rules are based on moral or ethical grounds. Following the logic of political realism, politicians have often pushed aside the issues of international justice in order to achieve other political goals considered to be more in the interest of their states. Among political realists there is not much belief in the idea that international law or international institutions can contribute to peace and stability. The main terms in which political realism operates are the terms of power and national interest. States are portrayed as selfish actors looking only after their own protection and advantage, regardless of other states, and in such an environment international war crimes tribunals or international justice do not play an important role. So far, when it comes to international justice it seems that the view of political realism has been prevailing in international relations. Bass (2000), taking into account the scepticism of realists towards international justice and war crimes tribunals, argues, on the other hand, that realists tend to disregard the fact that domestic politics and ideals have an important influence on the states' foreign policy, and it is in this fact that one should look for the answer why certain states sometimes pursue international justice and establish war crimes tribunals. In analysing the two main approaches towards war crimes tribunals and international justice, Vinjamuri and Snyder (2004) see the views of political realists in a larger context of the pragmatist approach towards international justice.

A pragmatist approach is mainly focused on the consequences of war crimes trials, taking the position that war crimes trials as well as the pursuit of justice should in any concrete situation be valued on the principle of political expediency. The main characteristic of the pragmatist view of international justice is that it considers justice one of the goals in international relations only when it does not jeopardize other political goals, such as the establishment of peace, and that justice should play a secondary role in international relations. In this case the main difference between the approach of pragmatists or political realists and the approach of legalists towards war crimes trials is in the fact that the pragmatists don't see justice as a precondition to peace, and sometimes even regard it as an endangering factor; on the other hand the legalists see justice as essential to peace and stability in the areas where conflict and war crimes have taken place. More importantly, international justice, in the pragmatist view, should be selective and war crimes trials should only be pursued in certain situations when they are considered to be politically appropriate.

The other main approach when it comes to the issue of international justice is the legalist approach, or the approach of liberal legalism. The legalist approach considers the creation of binding legal norms and the establishment of the rule of law on the international level as the most appropriate way to deal with the constant human rights violations and the atrocities occurring. International criminal justice should, according to the legalist point of view, be one of the main goals in international politics as justice is generally regarded by the legalists as the main precondition for the establishment of lasting peace and security in the post - conflict areas. It rejects the notion that impunity could remain an instrument in international politics used for achieving political goals as it rejects the idea that political solutions are more appropriate than legal ones in dealing with situations where a conflict and serious violations of international humanitarian law have taken place. Legalists favour war crimes trials and accountability for human rights violations regardless of their political expediency. This point of view is primarily based on the belief that legal solutions in the cases of conflict and human rights violations bring better results than political ones in the long term. According to Bass (2000), when it comes to states as the main actors in international relations, the legalistic approach, which supports war crimes tribunals and the development of international criminal justice can be connected exclusively to liberal governments, although even in their case this approach is not always likely to take priority. There are several arguments usually mentioned by the legalists in pointing out the advantages of using legal means in dealing with situations of conflict and human rights violations.

The arguments supporting the establishment of war crimes tribunals and the conduct of war crimes trials are, among others, that this could help prevent future war crimes by intimidating war criminals with the possibility of punishment, they could help place the blame for war crimes on individuals instead on ethnic or other groups, and perhaps the most important argument of all is that war crimes tribunals help establish the truth about the conflict, the war crimes which occurred and their perpetrators and in this way contribute to reconciliation between the former parties in conflict, by helping establish a historic record which can enable a lasting peace.

When considering both of these approaches and the realities of international relations we can conclude that when it comes to state behaviour in dealing with situations of conflict and war crimes, so far the realist point of view has been the predominant one. But although this type of state conduct has been prevailing over legalistic tendencies one cannot deny that improvements are being made, especially through the growing influence of NGOs and the international media which are constantly pushing in the direction of accountability by continuously demonstrating and emphasising the need for international justice. The ICTY, as this thesis intends to demonstrate, has contributed significantly to that cause and provided a number of arguments in favour of the legalistic point of view.

2.3. The Example of ICTY Foreign Policy Realists vs. Human Rights Advocates

The story of the ICTY was characterized by the constant struggle between foreign policy realists and human rights advocates in which the realists have continuously managed to exercise their influence and maintain their predominance but in which the human rights advocates have won a perhaps small and one could even say coincidental victory. The entire work of the ICTY has been a demonstration of the two approaches towards international criminal justice colliding and demonstrating their positive and negative sides in dealing with post-conflict situations. The intention is to show that from several examples analysed in this thesis it becomes evident that the ICTY has provided more than a few arguments in favour of the legalist approach towards dealing with human rights violations and post-conflict situations. In other examples however it becomes clear that foreign policy realists have continued to predominate in determining the policy of states towards international criminal

justice, war crimes tribunals and conflicts in general. ICTY perhaps provides the evidence which confirms that legalism represents a much better solution than any political one in the long term, but it also sharply demonstrates its limits when confronted with states' political agendas formulated by foreign policy realists. The limitations set on international legal institutions and on the enforcement of international legal norms by states were at times successfully surpassed by the ICTY, with the help of numerous human rights advocates showing the power that legal norms can have and the level of independence that international institutions can reach once established.

As one of the biggest accomplishments and steps forward in international criminal justice, it can hardly be said that ICTY was born out of pure desire to sanction war crimes or to end impunity. As will be shown in the following chapters, this institution was not so much envisioned as the appropriate tool for the resolution of the crisis in the Balkans but more as a means of postponing more effective and more demanding actions.

As political solutions, being mostly short-term, already show signs of ruin in Bosnia, one can only argue that the legal ones would, in the long-term, demonstrate to be nothing but a major success born almost accidentally. The struggle between policy conducted in a realist manner -- giving primacy to political and diplomatic solutions, sacrificing justice for the same, exploiting the legal tool when required, using impunity as a trade mechanism and looking only to superficial solutions to a deeply complicated situation -- and the policy favoured and backed by human rights advocates supporting accountability and war crimes' sanctioning is more than evident in the example of ICTY. Here only a few examples of this conflict between the two approaches to situations of conflict and human rights violations will be named and then presented in detail in the following chapters.

The ICTY has demonstrated the power that legal norms, once established, can have but also their weakness when it comes to dependence on political will for their enforcement. It has also demonstrated that the creation of norms is not as problematic as their application. It is more often than not the case that problems arise precisely in the enforcement of legal norms and not so much in their development. With the example of ICTY it became evident that once the norms are set the NGOs, the media and other human rights advocates who pursue their implementation create the necessary pressure for states to comply with the legal obligations they agreed to. The ICTY has also demonstrated that international institutions, although created by states and dependent on their support in almost every aspect, can still reach a high-level of independence in decision-making and can influence state policies.

As discussed in some of the following chapters, the ICTY was willing to investigate the actions of the countries which are its main sponsors as its chief prosecutors were determined to treat all parties involved in a conflict equally and apply its rules equally to all. This was a continuation of the struggle of the ICTY to free itself from the political restraints imposed upon it by its founding states and to ensure that the legal approach gained priority over political settlements in dealing with the situation in the Balkans. From its establishment onwards the ICTY demonstrated how politics can exploit the legal mechanisms in cases when they represent a less demanding option. Although the establishment of the ICTY was an enormous breakthrough and a giant step forward in legal terms when it comes to international criminal justice, for the conflict in question it was a passive and, at the time, mostly useless response of the international community to crimes taking place, one that did not prevent the human rights violations occurring but only promised to prosecute them. The ICTY was never able to clearly distance itself completely from the political agendas of the states which created it, but at times it managed to exercise its influence on the same.

The issue of dependence on the political will of states becomes most evident in the cases of Karadzic and Mladic as well as in NATO's arrest policy in general. The fact that Karadzic and Mladic were not arrested despite the ability of NATO to conduct such arrests was a clear demonstration of the primacy of political agendas and political solutions created by foreign policy realists who regarded their arrest as politically inexpedient, over legal norms and obligations. It was also a clear example of the limits of the legal approach and institutions such as the ICTY, where states easily determine not to enforce the decisions of such legal institutions and to ignore their legal obligations.

The case of Slobodan Milosevic on the other hand, also demonstrated the predominance of the pragmatist approach towards international criminal justice but provided strong arguments for the legalist approach as well. Initially regarded as an indispensable negotiating partner and eventually transformed into a peacemaker, Slobodan Milosevic was considered politically useful for achieving the goal of a peace agreement and was at the time granted immunity for the same purpose. Ultimately Slobodan Milosevic proved how short-term political solutions can be. The war in Kosovo later showed that legal solutions are better in the long term than diplomatic ones and that if war criminals are not brought to justice they are most likely to continue their criminal policies which are better prevented using legal instruments than political deals. Other arguments in favour of the legal approach towards dealing with war crimes and post- conflict situations based on the work of the ICTY will surely be visible in the Balkans in the near future. The fact that the ICTY has managed to

contribute significantly to the establishment of historical facts and basic truths about the conflicts which occurred, makes its work worth-while. Its decisions and rulings become essential for the future of the region and the co- existence of its nations. If one side claims to have been a victim and the other that there was never such victimization, lasting peace does not seem a likely scenario, which is something that politics often ignores. Establishing the truth, a historic record of what happened, contributing to reconciliation and lasting peace are all accomplishments of the ICTY. It is because of numerous human rights advocates who have recognized the significance of ICTY and its work and have helped ensure that states complied with their legal obligations that the ICTY ultimately succeeded in its task of achieving at least a small portion of justice for such a large number of violations. The future developments in international criminal justice will show whether the pragmatist view will continue to prevail or whether war crimes' sanctioning and accountability will finally gain the primacy that they deserve.

3. Dissolution of Yugoslavia

Wars in Slovenia and Croatia

To explain the necessity and the reasons for the creation of an International Criminal Tribunal for the atrocities committed on the territory of former Yugoslavia it is necessary to give an insight into the events that followed the dissolution of this state. Since these events are the subject matter of the ICTY and their investigation and prosecution its main task, a short introduction to the conflicts which took place in the early 1990s will be given, with a special emphasis on the war in Bosnia and Herzegovina. On the other hand, since the creation of the ICTY is directly connected to the events which took place in Bosnia from 1992 to 1995, and more specifically to the response of the international community to these events, a special analysis of the non- intervention policy taken by the international community will be given and the reasons for establishing a tribunal while the war was still raging instead of taking other measures, for example military actions, to intervene and attempt to put an end to the mass violations of international humanitarian law taking place will be discussed. It is also important to show that the policy of the international community towards the war in Bosnia is directly connected to the policy towards the ICTY. The support or lack of it that the tribunal received, especially in the years following its establishment, was closely connected to the political goals pursued by the Western governments during the conflict, such as the signing of a peace agreement.

The importance of history is one thing that should never be underestimated, especially its misinterpretation and misuse. History often makes up the basis for the plans of war and a means to achieve them. Arousing nationalist feelings and creating tensions between the peoples of different faith and nationality, portraying them as enemies and creating a sense of distrust between them was the primary tool in preparing the events which took place in the early 1990s. It was the history of the Balkans, seemingly difficult to understand, that had an enormous impact on the reaction of the international community faced with the conflicts in the area, which they regarded as ancient hatreds coming back to life, ones that could not be solved and refusing to see the clear political goals that hid behind the rhetoric of national hatred, the goals of creating a greater state and occupying of territory at the expense of other national groups.

“What the diplomats often failed to realize is that despite the appearance of chaos, the wars have been prosecuted with terrifying rationality by protagonists playing long-term power games.”(Silber & Little 1996: 27)

From the mid 1980s the rise of Serb nationalism could already be recognized in the use of nationalist rhetoric, especially by Slobodan Milosevic, in his attempts to rise to power by igniting ethnic intolerances in order to create a more centralized Yugoslavia under Serbian dominance.

Slobodan Milosevic, who became the Serbian Communist Party Chief in 1986 managed to use nationalism as a way to gain power and control over Serbia and use the Serb-dominated Yugoslav National Army, the third largest standing army in Europe, for the causes of creating an enlarged Serbian state. The choice for other nations was either to stay in what would be a Serb-dominated Yugoslavia or to fight a war and face one of Europe’s largest armies (Ibid.: 26).

Responding to the pressures coming from Belgrade and following Slovenia’s goal of the decentralization of Yugoslavia, in September 1989 the Communist Party president Milan Kucan started laying the groundwork for elections and Slovenia’s sovereignty. Following their example, the Croatian communists also decided to hold multiparty elections. Milan Kucan became Slovenia’s first president and Franjo Tudjman with his nationalist party of HDZ (Croatian Democratic Union) the first president of Croatia.

Already at the beginning of 1990, fearing Croatia’s independence, the idea of creating a Serbian state, the so called independent Republic of Serbian Krajina in Croatia, was born.

The Krajina Serbs enjoyed the support of Belgrade and of Slobodan Milosevic. By the beginning of 1991 Milosevic was openly declaring that he was no longer pursuing keeping the territorial integrity of Yugoslavia but instead was working for the goal of Greater Serbia. He made clear that Croatia and Slovenia could secede but that he would not allow a part of the Serbian nation, meaning the Serbs living in Croatia, to go with them. His intention was to keep the territory of Croatia's Serb- minority inside Yugoslavia as well as to keep Bosnia under his control.

The goal of all Serbs living in one state was to be achieved by force if necessary. As Silber and Little (1996: 107) write, Serbs were traditionally disproportionately represented in the state security services as well as in the officer corps of the JNA.

To accomplish this aim Milosevic pursued the goal of transforming JNA into the army of Greater Serbia with the purpose of protecting Serbs living outside its borders.

Slovenia and Croatia declared their independence on 25 June 1991 and on 27 June the JNA was deployed to secure state borders, an operation the Slovenes regarded as an aggression and a declaration of war. Slovenia's war lasted for ten days, ending with the decision of the Federal Presidency to withdraw the JNA troops allowing Slovenia to secede from Yugoslavia.

In July of 1991 the JNA was becoming engaged in fighting for the territory of the Serbs in Croatia instead of defending the integrity of Yugoslavia.

For Serbia, Croatia's declaration of independence had to be handled differently from Slovenia's, because of the Serbian population living in Croatia that Milosevic wanted to keep inside the borders of the Serbian state. With some fighting already breaking out in April of 1991, the war in Croatia reached its culminating point in August when the town of Vukovar came under siege. As Vulliamy (1994: 20) writes, the events in Vukovar, where 12.000 people were trapped for six months and the events that took place after its fall were just a foretaste of what was to come in Bosnia.

In November Milosevic agreed to allow international peacekeeping forces to enter Croatia. In January 1992 a ceasefire was established and the deployment of UNPROFOR troops in the areas of the conflict was agreed. During the same month Slovenia and Croatia were officially recognized by the EC². Croatia was left with one third of its territory occupied and with an estimated number of tens of thousands of casualties. At that time it became clear that if Bosnia was to choose the path of Croatia and Slovenia there would be no peaceful secession. Being the most ethnically diverse of the six republics, and with approximately 31 % of the

² For an overview of the most important dates and events from the beginning of the disintegration of Yugoslavia to the end of war in Bosnia see Rogel (1998).

population Serb, it was not surprising that Bosnia became the next victim of the policy of Slobodan Milosevic and the plans for the creation of Greater Serbia³.

3.1. War in Bosnia and Herzegovina and the Policy of non-intervention

“Bosnia’s war unfolded in modern Europe, at the birth of the New World Order, although it often looked like a war from another time.”(Vulliamy 1994: 4)

Just as we thought that the lessons of the Holocaust and World War II had been well learned and carved into memory and as we still remembered the words: “Never again”, the events in Bosnia would be the ones to shake the idea and the thought that such crimes could and would never again occur in Europe, and especially not in plain sight of the entire world. As Power (2003) claims, not only was the international community, especially the U.S., aware but it had made an effort to ignore what was by each day becoming more obvious, the fact that genocide was occurring. To write a short chapter on the events in Bosnia and especially on the reactions of the international community is important in order to explain the context in which the ICTY was established, the possible political reasons for its creation in 1993 while the war was still raging and the constant lack of support it received, especially in the years following its establishment and also in the years following the signing of a peace agreement. It is to suggest that the ICTY was at times useful for the solution of the crisis in the Balkans and at times its goal of pursuing justice an obstacle to the political goals of a fast end to the conflict and the reaching of a peace agreement.

The intention is to show that if the world community was reluctant to make any kind of sacrifice or effective effort to prevent crimes of such scale from occurring, then the common disregard for the work of the ICTY trying to sanction the same, is not surprising.

The first multiparty elections in Bosnia were held on 9 November 1990 and brought the three newly formed political parties of each of the three ethnic groups to power. The Democratic Action Party (SDA), the Serbian Democratic Party (SDS) and the Croatian Democratic Union (HDZ) came to power and Alija Izetbegovic, the leader of SDA, was elected president. A coalition was created between the three parties, one that was not going to last long. The leader of the SDS, Radovan Karadzic soon made clear that the Serbs intended to

³ 27 April 1992 Serbia and Montenegro declared they would remain together, in a state carrying the name of FRY (Federal Republic of Yugoslavia)

remain in Yugoslavia. As Malcolm (1996: 224) writes, already in May 1991, the SDS in Bosnia was demanding the secession of northern and western parts of Bosnia with the goal of joining them with the Croatian 'Krajina' and forming a new republic. They started by declaring 'Serb Autonomous Regions', following the same method previously used in Croatia. At the time, the Bosnian Serbs openly declared their intention to create their own state if they couldn't stay in Yugoslavia, counting on the support of the JNA, which had withdrawn from Slovenia and Croatia and was now moving to Bosnia. Karadzic and the SDS soon started boycotting government institutions, and proceeded by setting up the Serb parliament in October 1991.

By the beginning of 1992 Bosnia had a choice between two options both holding serious consequences. If it decided to remain in Yugoslavia it would become part of Milosevic's Greater Serbia and if it chose independence, it would have to face military force.

The position of Bosnia's Muslims and Croats was clear as they did not want to remain in a Serb-dominated Yugoslavia; on the other hand Bosnian Serbs wanted to stay a part of Yugoslavia at all cost.

The decision came at the beginning of March 1992 when the results of the referendum showed that more than 90 % of voters were in favour of a sovereign and independent Bosnia and Herzegovina. At the beginning of 1992 the Bosnian Serbs proceeded to declare the Serbian Republic of Bosnia and Herzegovina. The war officially started in April 1992 after the EC recognized Bosnia and Herzegovina as an independent state, but the events that followed, beginning in April were previously planned and ordered from Belgrade.

"The Serb-dominated Yugoslav National Army teamed up with local Bosnian Serb forces, contributing an estimated 80.000 uniformed, armed Serb troops and handing almost all of their Bosnia-based arsenal to the newly created Bosnian Serb army". (Power 2003:249)

The arrival of paramilitary forces, which had previously fought in Croatia, in the north-eastern parts of Bosnia marked the beginning of the policy of ethnic cleansing and the creation of ethnically clean areas in the parts of Bosnia that had the biggest strategic importance in connecting the territories of Croatia and Bosnia with a Serb population, to Serbia.

The first cities that found themselves under attack by JNA units and Serb paramilitaries were Bijeljina and Zvornik. By the end of the summer Serb forces managed to seize control of

about two- thirds of the territory with the Bosnian Muslims retaining control of Srebrenica, Zepa and Gorazde which would later be declared “safe areas” by the UN.

In the summer of 1992 the first accounts of the atrocities being committed began to surface. News reports and images captured in the Serb-run detention camps finally brought to light what was happening in Bosnia and caught the attention of the global public. The refugee accounts were mounting up as well as reports of unimaginable savagery taking place before the eyes of the entire world. But the responses of the U.S. and Europe were weak. It would take a great tragedy like Srebrenica for the international community to finally take the necessary measures to stop the further bloodshed.

The early reactions of the United Nations mostly came down to economic and political sanctions against Belgrade that had little effect. The reactions such as verbal condemnations of the violence occurring in Bosnia and the imposing of an arms embargo whose only achievement was denying the victims of their right to self-defence -- an embargo that would continue to apply to Bosnia even after the aggressor was identified and would not be lifted until 1995 -- appeared to damage the victims more than the aggressor.

At the end of 1992 the UN decided to deploy around 6000 peacekeepers with the mission of securing the delivery of humanitarian aid, sending them into a war zone without the authority to use weapons unless under direct attack, turning them into ideal hostages and an obstacle for a military intervention in Bosnia.

As Europe was caught unprepared to deal with the events which followed the disintegration of Yugoslavia, the U.S. simply chose to ignore them, considering them to be Europe’s problem.

According to Power (2003: 264,270) the U.S. was well aware of the situation in Bosnia and of the crimes taking place. The crimes of ethnic cleansing were well monitored and recorded by the U.S. government.

“Thanks to its spy satellites, radio and phone communications, and agents on the ground, the United States had known of the Serb camps since May 1992.”(Power 2003:269)

But when the detention camps were finally revealed by the media in the late summer of 1992, the U.S. could no longer ignore their existence and the violations taking place inside them, but even the pressure of public outrage and growing demand for action from numerous human rights organizations brought no determined action to prevent the violations of international humanitarian law and especially the genocide which would occur in Srebrenica

three years later. As Power (2003: 251) writes: Europe, the United States and the United Nations stood by and watched as some 200.000 Bosnians were killed and more than two million displaced. In order to avoid any involvement in the conflict the political leaders tried to portray it as a civil war, where ancient hatreds were the cause for the killings which were not to be understood as the result of aggression or territorial conquest but as something that was characteristic of the nations and ethnic groups in that territory. The sense of moral equivalency was being created and all sides were characterised as equally guilty of crimes, although Power (2003: 310) cites the CIA conclusion that 90 % of the atrocities which took place during the war were committed by Serb paramilitary and military forces.

On 18 November 1991 the Bosnian Croats established the Croatian Community of Herceg-Bosna which reflected in many ways the Serbian Republic of Bosnia and Herzegovina. In October of 1992 the first fighting broke out between the Bosnian army and the Bosnian Croat forces of HVO (Croat Defence Council) which escalated in the spring of 1993.

At the beginning of 1993 one of the first attempts at a diplomatic solution for the conflict in Bosnia came with the proposal of the Vance-Owen plan, an initiative of the EC and the UN, which was ultimately rejected by the Bosnian Serbs. Other initiatives like the Owen-Stoltenberg plan also failed to bring results. The Muslim-Croat conflict was officially ended by the Washington agreement in March 1994, with the creation of the Muslim-Croat Federation.

The creation of 'safe areas' by the UN in April of 1993 was just one of many measures implemented to avoid more concrete ones like the lifting of the arms embargo or conducting military actions such as air strikes.

The unwillingness of the member nations to deploy the number of troops needed to protect these areas would prove to be a fatal mistake. The cities of Sarajevo, Srebrenica, Zepa, Gorazde, Tuzla and Bihac which were declared 'safe areas', with insufficient UN forces dispatched, surrounded by Serb forces and unprotected, were a disaster waiting to happen. And that is exactly what did on 11 July 1995, in the eastern enclave of Srebrenica. The reluctance of the international community to intervene was usually interrupted by events of unimaginable savagery that had a temporary impact on the policy that put national interests over humanitarian interventions. Unfortunately to react one had to wait for the crimes to take place and not make an effort to prevent them.

One such event was the bombing of the marketplace in Sarajevo by Serb forces in February 1994 which finally made NATO launch air strikes, ones that the Europeans mostly opposed fearing for the lives of the peacekeepers. The eastern enclave of Srebrenica, which was

declared a safe area in 1993 and was surrounded by Serb forces and under siege for three years, was being protected by 370 Dutch peacekeepers. As Power (2003: 396) writes:

“US intelligence analysts had predicted Srebrenica could not survive, but when the attack began, they underestimated Serb intentions”.

Although the UN peacekeepers had the option of calling for air strikes if they came under attack, these calls were either turned down or eventually called off as Serbs took some of the peacekeepers as hostages and threatened to execute them. On 11 July Mladic came into Srebrenica and in the first few hours ordered the men to be separated from women and children. Out of the 40 000 people located in Srebrenica at the time around 15 000, mostly men, headed for the hills, many of them never succeeding to escape as they were gunned down by Serb soldiers. The other 25 000 stayed in Srebrenica seeking protection at the UN base in Potocari.

As women, children and elderly were put onto buses which headed for Tuzla, the boys and men were taken to unknown destinations. The first signs of summary executions appeared shortly after the fall of Srebrenica. The events following its fall were certainly the most tragic of the entire war in Bosnia and also the most disgraceful for the international community as the peacekeeping forces in Srebrenica did almost nothing to prevent the killing of as many as 8000 men.

The biggest massacre in Europe since the Second World War happened with practically no kind of intervention from the international community and without any kind of resistance from the outnumbered peacekeepers. The next “safe area” to fall was Zepa, only a few days after Srebrenica was overtaken by Serb forces and again without any attempts made to defend it. After the fall of Srebrenica and Zepa U.S. policy started to change.

First with the lifting of the arms embargo, and in August of 1995 with a three week long bombing of Serb positions by NATO. In November of 1995 a peace agreement was reached in Dayton ending the three and a half year long war in Bosnia. The three weeks of air strikes accomplished more than three years of sanctions, verbal condemnations and diplomatic efforts had. The Bosnian Serbs agreed to end the attacks on the Bosnian capital, which had endured a siege of more than three years, and agreed to negotiate a peace settlement.

As Karadzic was at the time already indicted by the ICTY he did not attend the negotiations; instead Milosevic negotiated an agreement for the Bosnian Serbs, a man whose role in that

conflict was certainly not unfamiliar to the mediators but who was at the time, for the international community, an indispensable negotiating partner.

The results of the Dayton accord were that Bosnia and Herzegovina would continue to exist within its internationally recognized borders but would consist of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska (Serb Republic). The accord which was reached in November in Dayton was officially signed in December 1995 in Paris.

The provisions of the agreement included the dispatch of 60.000 NATO troops ⁴to secure its implementation, but other provisions concerning the civilian side of the agreement such as the return of refugees, establishment of common institutions and the economic reform ultimately represented a far bigger challenge. The Dayton accord also included provisions concerning cooperation with the ICTY, stating that all authorities in Bosnia and Herzegovina shall cooperate and provide unrestricted access to different organizations, among others, ICTY, and also that any person who is serving a sentence imposed by the Tribunal or has been indicted by this institution cannot stand as candidate or hold any public office in the territory of Bosnia and Herzegovina (Dayton: 1995).

3.2. ICTY and the Political Agendas

The policy of states, primarily the U.S., Great Britain and France towards the ICTY could be characterized as an extension of the policy of the same states towards the conflict in Bosnia. The two are also closely tied as the ICTY was already established in 1993 when the war in Bosnia and Herzegovina was still raging. The support that the ICTY received was tied to the goals which the international community wanted to achieve in the Balkans. The reason why more often than not the support was lacking was because at the time of its establishment and in the first years the ICTY was perceived more as an obstacle for the realization of these political agendas. This kind of policy towards the ICTY continued until approximately 1998 when the position of the Western governments started to change thanks to a few government officials who believed that the prosecution of war criminals was essential for the region's stability and future. Not only at the moment of its establishment but also throughout the majority of its mandate political agendas have had priority over the ICTY's task to sanction war crimes and bring war criminals to justice. Those political agendas were unfortunately created from a realistic point of view which saw the priority in the quickest possible ending

⁴ The NATO forces deployed in Bosnia carried the name IFOR (Implementation Force), with the change of mission the troops were later renamed to SFOR (Stabilization Force).

of the conflict with minimum involvement and risk, which often included dealing with war criminals in order to achieve the same. The same reluctance which was evident when it came to risking the lives of the peacekeeping forces or NATO soldiers in preventing the mass killings taking place in Bosnia, later continued when the issue of arresting indicted war criminals appeared. Unfortunately, although the rhetoric of the international community was based on principles of human rights protection and characterized by harsh condemnations of the atrocities occurring, the practice was certainly not as idealistic.

As quick and painless ending of the conflict was sought, the tasks of the ICTY often didn't match the ones of politics, especially when it came to reaching an agreement between the parties involved. In this period politicians were more interested in having negotiating partners than having indicted war criminals.

The ICTY was seen as endangering the peace process which was at that point more important than the sanctioning of war crimes or justice. Power (2003: 261 ff.) concludes that most of the senior officials of the Bush administration at the time were foreign policy "realists" who didn't think that a humanitarian crisis should have priority over national interests. And as conflicts in the Balkans presented no threat to the U.S., there was no reason for a military intervention. The only argument for intervention was one based on moral grounds, which was not welcomed in the realist approach of handling foreign policy issues. The same approach would later apply when it came to the arrest of indicted war criminals.

With the ending of the war the punishment of human rights violations did not begin to represent a priority, as it was continuously regarded as endangering the peace process and the stability in the area. The ICTY and the realisation of its tasks were put aside till the political goals were accomplished, but the ICTY ultimately found ways to make governments change their policies and accept the pursuit of justice as one of their goals.

4. The Establishment and the Legal Basis of ICTY

With the summary of the events and the consequences of the disintegration of Yugoslavia an insight into the context in which the ICTY was established has been made. In this chapter the reasons for its establishment beyond those of punishing the perpetrators of war crimes will be discussed, the sequence of events that led to its creation will be presented, and followed by a short analysis of certain provisions of its statute. Where the statute is concerned there will be no analysis of the articles concerning the law applied by the ICTY or other provisions concerning, for example, rules of procedure and evidence.

Only a few selected articles dealing with the competence of the tribunal, its temporal and territorial jurisdiction, its concurrent jurisdiction, the co-operation of states with the ICTY and the status of the prosecutor will be discussed.

4.1. The Commission of Experts

“Law became a euphemism for inaction” (Bass 2000:215)

Of course it would be impossible to deny that states are still the main actors and players in the international arena, but as it became evident in this conflict, the non- state actors are growing more important and stronger than ever before. Just how significant and important their role was during the conflict and in regard to the responses of the international community, especially Western democracies, to the Balkan crisis, can also be seen in the impact they had on the establishment of the ICTY and the late, but decisive reaction to the atrocities taking place. It is often mentioned in numerous literature on this issue that the reports and images made by the media in the Serb- run detention camps in Bosnia finally caught the world’s attention. But not only that; as previously mentioned, Power (2003) argues that the international community, in the first place the U.S., had previous knowledge of the situation in Bosnia but decided to ignore it. As the crimes were made public and the horrifying images went around the world, and especially as they reminded people of the crimes of World War II, the pressure to take action built up. For the Western liberal democracies, which rhetorically stood for the protection of human rights, silence was no longer an option. Not only the media but also numerous human rights organizations, like Helsinki Watch, made many appeals to states to take action, even to intervene militarily and ultimately to create the International Criminal Tribunal and try the persons responsible for the crimes which occurred in the Balkans. As Bass (2000: 33) claims, the NGOs can take the credit for the establishment of the ICTY as they were able to influence the liberal states of the Security Council, states for whom non-intervention or ignorance meant embarrassment. But, as many authors argue, the establishment of the ICTY was also seen by Western governments as an easy way out of the situation in which taking military or other more concrete measures would have meant the possible sacrifice of the lives of their soldiers for a tragedy that was ultimately not their own. Bass (2000: 207) suggests that it was an act of tokenism by the world community, which wanted to give the appearance of moral concern as it was not willing to intervene.

One of the most important steps towards the creation of the ICTY was taken on 6 October 1992 with Security Council Resolution 780., deciding to create a Commission of Experts with the task of assessing the information received from member states as well as conducting its own investigations and gathering evidence concerning the violations of international humanitarian law occurring in the Balkans.

“The Commission came into being largely at the urging of U.S. ambassador Madeleine Albright as a political substitute for a meaningful military response to atrocities in the Balkans” (Hagan 2003: 33)

Bassiouni (2001: 46), who was the Commission’s chairman from 1993, writes that in two years of work by the Commission, it conducted thirty- five field investigations, identified over 800 places of detention and estimated 50,000 cases of torture and 200,000 deaths. The Commission also conducted one of the most extensive investigations into systematic rape. But the work of the Commission was not conducted without the same difficulties that the ICTY would experience a few years later, especially concerning lack of funding and lack of support from certain governments. Bassiouni (2001: 47; Sula 1999) explained the lack of resources for the investigations and the opposition of some governments through the political agenda that they had at the time. Russia had openly been against the creation of the Commission. Great Britain and France, which had troops in Bosnia feared that if some leaders were accused of war crimes it would imperil the peace talks. The Commission of Experts faced much opposition from countries which considered a peace agreement and not the punishment of war criminals the best way to deal with the situation in Bosnia.

Hagan (2003: 35) explains that the commission’s mandate was in conflict with the role of the politician-diplomats brokering a peace plan for the Balkans. David Owen, who was at the time trying to broker the Vance-Owen plan, attempted to block the commission’s work from the start, fearing it would upset the balance he was seeking in reaching an agreement. Hagan (2003) understood this conflict to be in the context of the broader conflicts emerging between the politician-diplomats and advocates of humanitarian law enforcement. This was the perfect example of the confrontation of goals of realpolitik and international criminal justice. And it was a great example of how political goals are often given an advantage over justice and how trading impunity for peace agreements becomes a part of the settlement.

In this way the political agendas interfered with the investigation of the violations that were being committed in former Yugoslavia. The lack of support and the opposition the Commission of Experts had received were later present in the same countries’ position

towards the ICTY in the period when political questions such as the peace settlement were still unresolved, but even after Dayton they were considered more important than seeking justice. Bassiouni claims that the support for the Commission's work was lacking because the British, and to some extent the French and Russians, did not want anybody jeopardizing their negotiations by establishing that ethnic cleansing was a policy and by building cases against the leaders who made the decisions (Sula 1999).

In the two year period, the Commission succeeded in achieving its work through states' voluntary contributions and private sources. The result of the Commission's work was close to 80,000 documents and 300 hours of tape, based on which the Commission produced its final report, which with Annexes, exceeded 3,300 pages. In this report the commission concluded that serious violations of humanitarian law had taken place in the former Yugoslavia and that the policy of ethnic cleansing had been carried out by means of murder, torture, rape and other practices. In its report the Commission also discussed the establishment of an international criminal tribunal (Morris & Scharf 1995: 28f.)

As Bassiouni (2001:47) writes, the work of the Commission ultimately laid the basis for the Security Council's decision to establish the ICTY and the Commission's documents would be the first material that the ICTY received at the beginning of its work.

On 22 February 1993, with Resolution 808 the Security Council stated that, having considered the interim report of the Commission of Experts, in which the widespread violations of international humanitarian law through the practice of ethnic cleansing were characterised as alarming and by determining that this situation constituted a threat to international peace and security, they had decided to establish an 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." (Resolution 808 1993)

In this resolution the Security Council also requested the Secretary-General to prepare a report with specific proposals for the implementation of this decision. The Secretary-General's report contained a draft statute for the Tribunal⁵ that the Security Council, acting under Chapter VII of the United Nations Charter, adopted in Resolution 827 on 25 May 1993. In Resolution 827 (1993) the Security Council stated its conviction that the establishment of the Tribunal would achieve the aims of putting an end to crimes taking place, bring to justice persons responsible for them and would contribute to the restoration and maintenance of peace.

⁵ The International Criminal Tribunal for the former Yugoslavia (ICTY) will also be referred to as the International Tribunal or simply the Tribunal.

Resolution 827 (1993) also contained a provision concerning the cooperation of states with the Tribunal, in which it decided that all states shall cooperate fully with the International Tribunal and its organs in accordance with that resolution and the Statute of the International Tribunal.

Since the Security Council already determined that the situation in former Yugoslavia constituted a threat to international peace and security in Resolution 808 (1993), acting under Chapter VII of the United Nations Charter it decided to establish the International Tribunal. The establishment of the Tribunal in the context of the Council's broader efforts to restore international peace and security has had both advantages and disadvantages. The advantages were that the decision was effective immediately and was binding for all states. But on the other hand there were those that questioned the Security Council's authority to establish an International Tribunal under Chapter VII, putting in doubt the independence of such a Tribunal being a subsidiary organ of the Security Council (Morris & Scharf 1995: 42, 47).

But the Secretary- General had already noted in his report that the International Tribunal would perform its functions independently of political considerations. It would be a purely judicial organ, performing its functions independently of the Security Council, but the Council would eventually decide when to abolish it. The International Court of Justice also confirmed the power of the Security Council to create such judicial body (Ibid.).

What eventually proved to be the biggest challenge for the Tribunal was the cooperation of states, not only those in the former Yugoslavia but also some of the members of the Security Council which had the biggest influence on its work. The problem ultimately was not so much the interference of states in the Tribunal's judicial sphere but their denial of financial, military and other support which was essential for it to function properly. Since the Tribunal was dependent on states' assistance in three main areas: financial, military support, primarily in performing the arrests, and the transfer of information and evidence material gathered by the states' intelligence agencies during the conflicts, its success depended a great deal on the political will of states to provide this support. So the influence of politics on the ICTY was more external than internal in nature, resulting not from the fact that the ICTY was a subsidiary organ of the Security Council but purely from the fact that it was in many ways almost completely dependent on the support of states in all areas crucial to its work. One could not so much influence the decisions made inside the Tribunal in the aspects of, for example the issue of conducting investigations or bringing up charges, but the Tribunal's

work could be easily influenced by denying it the means to perform such investigations or to arrest such indicted individuals.

4.2. The Statute of the Tribunal

As mentioned previously in the introduction to this chapter, the articles concerning the law applied by the Tribunal and others concerning for example the rules of procedure and evidence, or election of judges will not be analysed. The goal is to name and discuss only a few selected articles mainly concerning the provisions about the cooperation of states with the Tribunal and the status of the prosecutor. These articles have the greatest importance for the work's subject and relate also to the possible political influences or lack of support for the Tribunal.

Article 1, which concerns the competence of the Tribunal, states that: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present statute." (Statute 2008)

Concerning the subject-matter jurisdiction, it should be stated that the Tribunal shall have the power to prosecute persons for the following offences: Grave breaches of the 1949 Geneva Conventions, Violations of the laws or customs of war, Genocide, and Crimes against humanity.

Article 6 regarding personal jurisdiction, states that:

"The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present statute". (Statute 2008)

Regarding the Tribunal's limited territorial and temporal jurisdiction, Article 8 states that: "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991." (Statute 2008)

The temporal jurisdiction of the International Tribunal was defined only in terms of its starting point since there was no indication of when the serious violations of international

humanitarian law would cease. The ending point was to be eventually determined by the Security Council upon the restoration of peace (Morris& Scharf 1995: 119).

Since only the starting date for temporal jurisdiction was determined, the crimes which occurred in Kosovo in the period of 1998 also fell under the jurisdiction of the International Tribunal.

Article 9 of the statute deals with the concurrent jurisdiction of the International Tribunal and national courts to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, where it is stated that in the case of concurrent jurisdiction between the national courts and the International Tribunal, the International Tribunal shall have primacy over national courts and it may, at any stage of the procedure, formally request national courts to defer to the competence of the International Tribunal (Statute 2008).

Article 11 refers to the organization of the International Tribunal where it is stated that the International Tribunal shall consist of: the Chambers, comprising three Trial Chambers and an Appeals Chamber, The prosecutor and a Registry (Statute 2008).

Article 16 concerning the prosecutor states that: “The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.” (Statute 2008)

One of the most important provisions concerning the prosecutor, especially with regard to political influences, is also mentioned in Article 16 and states that: “The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.” (Statute 2008)

As will be shown further on in this work, this provision has certainly been one of the most important in the work of the ICTY. The high level of independence of the prosecutor in the decision making will prove to be of the greatest significance to the Tribunal’s success.

Article 29 of the statute, concerning Co-operation and judicial assistance, states that: “States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber. (Statute 2008)

Among the mentioned, the possible requests are: the identification and location of persons, the services of documents, the arrest or detention of persons, and others.

This article of the statute, that is, its implementation, certainly represented the main precondition for the effective functioning of the Tribunal. It also signalled that although the Tribunal was independent in its decision making, when it came to the implementation of those decisions it was highly dependent on states' willingness to co-operate and assist it. As Morris and Scharf (1995: 311f.) explain, since the International Tribunal was established by the Security Council's decision acting under Chapter VII, it is binding on all states, and all states are obligated to provide the necessary assistance to the International Tribunal. There are two aspects of the obligation of States to cooperate, one being the obligation to provide any cooperation required to facilitate the investigation or prosecution of alleged perpetrators, the other being the obligation to comply, without undue delay, with formal requests or orders for cooperation or judicial assistance issued by the International Tribunal.

But this also proved to be the difficult part, since many states were unwilling to provide such cooperation or assistance to the International Tribunal. In such cases, the action which can be taken by the International Tribunal is the notification of the Security Council concerning the non-compliance of a state, as the Tribunal itself is not authorized to take any measures. The Security Council then decides whether to impose any kind of sanctions against the state that is not complying with requests or orders from the International Tribunal. Unfortunately, this mechanism also ultimately proved to be ineffective as the responses of the Security Council mostly came down to verbal condemnations.

5. The Establishment of the ICTY and the First Years

The following chapters will deal with the work of the ICTY beginning with the year of its establishment (1993) and ending with the year 2007. The analysis of its work will be divided into two parts, each dealing with a certain period. Chapter five will be based on the period of 1993-1998, covering the first years of the Tribunal's work and focusing mostly on the difficulties that the Tribunal has encountered in fulfilling its mandate. The goal is to demonstrate the lack of support for the Tribunal which was most evident in this period, with attention being mainly focused on the lack of cooperation and support in the areas of finance, arrests and sharing of information. At the end of this chapter there will be a part dealing with

the cases of Karadzic and Mladic, the reasons why their arrests hadn't taken place, especially in the years following Dayton, and the prospect for future developments concerning these cases.

5.1. ICTY and the Struggle for Support

“We all have a stake in the success of this tribunal” (Albright 1994)

While the pressure for the establishment of the International Tribunal came mostly from the public, outraged by press reports from the former Yugoslavia, as well as from numerous human right organizations, in December of 1992 Lawrence Eagleburger, the Bush administration's Secretary of State, called for the establishment of an International Tribunal to deal with the events in the Balkans, naming as war criminals Slobodan Milosevic, Ratko Mladic and Radovan Karadzic among others (Hagan 2003: 40). It was perhaps the first time that an official from the U.S. administration publicly named people responsible for the crimes taking place in the Balkans. With Clinton taking office in 1993 and especially with the appointment of Madeleine Albright as the U.S. ambassador to UN, the support for the establishment of the Tribunal grew stronger.

Although many accused the policy of the U.S. of pushing for a Tribunal instead of applying more effective measures to stop the war crimes occurring in Bosnia at the time, the Tribunal was nevertheless established in May of 1993. At best the Tribunal was envisioned to serve as a deterrent for future crimes, or to possibly create pressure for the political and military leaders to reach an agreement and end the violations of international humanitarian law. The Tribunal would in any case not be given the support needed to do more.

As many predicted in its early years it was an institution without the means to do its work, and one that many at the time considered doomed to failure, when it came to the goals of punishing the high-level perpetrators of war crimes and achieving justice. Where the policy of primarily France and Britain towards the solution of the Balkan crisis was concerned, the establishment of such a Tribunal was characterised as damaging to a possible settlement which would resolve the situation in Bosnia. Their policy was mostly in conflict with the idea of establishing an International Tribunal as it would probably indict men they considered to be indispensable negotiating partners.

They were interested in a quick settlement in Bosnia, and also pointed out the fact that unlike the U.S., they had troops in Bosnia that could face the consequences of the Tribunal's indictments (Bass 2000: 216).

In her speech concerning the War Crimes Tribunal for the former Yugoslavia, Madeleine Albright talked about the importance of the Tribunal, its success and the difficult circumstances in which it would have to do its work.

“We should have no illusions about the obstacles that the tribunal will face. This is not Nuremberg; the accused will not be the surrendered leaders of a broken power. It will be very difficult to gain access to evidence, including mass grave sites, especially in areas under local Serb control. It will be difficult to gain custody over many of the accused.” (Albright 1994)

The realism about the ability of the Tribunal to gain custody over the indicted persons was clearly shown in her speech and the fact that the Tribunal's only option would be to deliver indictments, issue arrest warrants and if anything else, to point to suspected war criminals.

“It will not stop all aggression. It will not end war crimes. It will not – even in the best case – ensure more than a measure of justice in the former Yugoslavia” (Albright 1994)

5.2. Election of the Prosecutor and Financial Difficulties

The first difficulties came with the election of the chief prosecutor. It was a political process in which all kinds of considerations were taken into account, especially ones regarding nationality and religion.

The fact that the prosecutor would be independent in making the indictments and in this way would be able to influence the events in the Balkans and the possible peace settlement, reaching an agreement on the issue of who would become the Tribunal's first prosecutor proved to be a very difficult one. The election of eleven judges⁶ took place at the end of 1993, and they took office in November, but it would take some time until the chief prosecutor finally arrived at the Tribunal. Taking office, the judges started their work by

⁶ The number of judges has been increased, with the numbers currently at: sixteen permanent judges and a maximum at any one time, of twelve ad litem judges; in both cases, no two may be nationals of the same state.

making the rules of procedure and evidence, and at the time nobody was aware that it would take more than a year for the prosecutor to begin his work at the Tribunal.

Upon their arrival at The Hague, the judges, along with Antonio Cassese who was named the Tribunal's president, also faced the reality of the situation in which the Tribunal found itself. The UN hadn't yet approved the Tribunal's budget, they had no offices, no financial means to hire anyone and most important of all, they had no prosecutor (Hazan 2004: 44). At the time it was also not clear who would be given the task of making arrests and if the UNPROFOR stationed in the Balkans would be authorized to carry out that mission. Soon it became clear that the Tribunal had been established but hadn't been given the means necessary to do its work, no financial resources to hire personnel and to perform investigations and no police force to execute the arrest warrants. In October of 1993 the Security Council chose Ramon Escovar Salom, the attorney general of Venezuela, to become the Tribunal's first chief prosecutor. But within three months he announced that he was not going to accept the position. The search for a prosecutor continued. Finally in the summer of 1994 the Security Council chose Richard Goldstone, a South African judge, for the post of prosecutor. It had taken fifteen months since the Tribunal's establishment for the prosecutor to finally take office.

In the Annual Report (1994: 7) that the President of the ICTY submits to the Security Council and the General Assembly it was stated that:

"The work of the Tribunal especially that of the Office of the Prosecutor and the Registry, has also been impeded by the unsatisfactory funding arrangements, which have, in particular, greatly hindered recruitment of staff."

To begin its work the Tribunal was mostly dependent on the voluntary contributions of states, with America deciding to place twenty- two investigators and prosecutors and pay them from Washington; it also made \$3 million in voluntary contributions, joining states like Malaysia (\$2 million) and Pakistan (\$1 million). Britain donated only \$30,500 and gave one staffer and France made no contributions (Bass 2000: 222).

In the Annual Report (1994) of the Tribunal it was stated that the Office of the Prosecutor especially was operating with insufficient staff and that the judges were being paid on an ad hoc basis. The scepticism concerning the work of the Tribunal, especially in light of the difficult circumstances under which the Tribunal was beginning its work, were also expressed as a concern in the Annual Report to the Security Council and the General Assembly:

“Finally, one should also mention the scepticism expressed by those who argue that, in any case, the Tribunal will never be able to bring to justice those in command: plainly, reference is made here to those responsible for planning or ordering large-scale breaches of international humanitarian law occurring in the former Yugoslavia, or for omitting to prevent or punish the perpetrators of such breaches.” (Annual Report 1994: 18)

Soon after he had arrived at The Hague, Goldstone was under a lot of pressure to issue indictments and get the Tribunal working. In November of 1994 and February of 1995 he issued his first indictments against two secondary figures: Dragan Nikolic, the commander of the Susica concentration camp and Dusko Tadic who participated in the crimes committed at the Omarska concentration camp (Hagan 2004: 57). Tadic was already in German custody at the time, having been arrested and indicted by the German authorities with the prosecutor seeking to get him transferred to The Hague.

“It had taken nearly two years from the creation of the tribunal in the spring of 1993, to get the first defendant into custody, and it would be another full year before Tadic would actually go on trial.” (Hagan 2003: 73)

Expecting to indict high-level war criminals, the judges were disappointed with the decision of the prosecutor to start with low-level perpetrators, involved more in the carrying out of the crimes than ordering them. Goldstone issued a number of indictments against low-level officials many of which were later dropped by the second chief prosecutor.

Although many considered Goldstone to be taking too much into account the political pressures and agendas concerning the issue of indictments, the fact that the war in Bosnia was still raging and that a peace settlement hadn't yet been reached, made the position of the chief prosecutor even more difficult. Because the situation was still insecure, it was difficult to perform field investigations and gather evidence in order to build up cases. This was also one of the reasons why some of the higher up war crimes suspects hadn't been indicted. As mentioned in the Annual Report of the Tribunal for the year 1995:

“The work of the Tribunal is still complicated by the fact that warfare continues unabated in the former Yugoslavia. This greatly aggravates the logistic difficulties involved in, for example, the examination and calling of witnesses, the conduct of investigations in the field and the execution of arrest warrants.” (Annual Report 1995: 6)

The indictments against persons like Slobodan Milosevic were also discussed but not seriously considered. It was too early. Milosevic, although regarded by many as most responsible for the events which were taking place, was still the main negotiating partner who would later sign the peace agreement, ending the three and a half year long war in Bosnia. But even at the time Goldstone began making indictments, -- focusing mainly on low-level perpetrators, most of them unavailable to the Tribunal -- and without the conditions to start gathering evidence, nobody was too optimistic about the ability of the Tribunal to ever indict those who bore the greatest responsibility for the atrocities committed. At the time it was perhaps unimaginable that one day Slobodan Milosevic could stand trial for crimes committed in the Balkans. By the beginning of 1995 the judges were becoming outraged by the prosecutor's unwillingness to indict persons higher in the chain of command. They were pushing for an indictment against Karadzic, Mladic, or the paramilitary leaders like Vojislav Seselj or Zeljko Raznatovic –Arkan. At the same time Karadzic was still taking part in negotiations and travelling around Europe (Hazan 2004: 57).

However, Richard Goldstone continued to pursue his strategy which was conceived to indict the low-level perpetrators and then climb up the chains of command, getting the necessary evidence for the indictment of the high-positioned officials in the process. Although he denied this, many considered this strategy to be the result of political considerations which Goldstone had, that made him abstain from indicting any of the political leaders considered responsible at the time for the majority of the atrocities which occurred.

That the Tribunal was a weak institution at the time without any real authority was confirmed by the fact that it had had absolutely no effect on the actions of the Bosnian Serbs taken in the summer of 1995, when one of the biggest massacres in Europe was committed in Srebrenica. The Tribunal didn't have the deterrent effect that many hoped it would. Because of the lack of support it received the Tribunal was a weak institution with no real influence and no strong instruments to realize its mission, and so it didn't make any impression on the war criminals who simply continued with the work as usual. With Srebrenica, Karadzic and Mladic showed just how little they cared about the Tribunal and how little they feared its indictment. Just how helpless the Tribunal was, depending completely on the cooperation of states to execute its orders, will be shown in the following chapters, which also discuss the issues surrounding why Karadzic and Mladic were not prevented from committing crimes even as the Tribunal was operating and already issuing indictments and why they were not arrested for years after the first chief prosecutor decided to charge them for several major crimes in the Bosnian war.

5.3. Intelligence Information

Just how well monitored was the situation in the Balkans and just how much did the West know about what was going on? With the Tribunal beginning its work and trying to gather evidence in order to bring indictments, the first difficulties concerning this issue arose as states which usually supported the Tribunal or at least participated in its establishment showed their reluctance to share the information concerning war crimes in their possession.

Under the provision of the Tribunal's statute concerning the cooperation of states among others, they must comply with any request for assistance, including the transfer of documents or sharing of information concerning crimes committed in the former Yugoslavia. The cooperation of states in the region was considered problematic from the beginning, and there were no high expectations that these countries would provide any significant assistance on this issue to the Tribunal. In addition, as previously mentioned, taking into account the fact that the war in Bosnia was still raging, it was almost impossible for the Tribunal to make field investigations and in that way gather evidence. So the Tribunal turned to countries which had a significant amount of information and whose assistance was not seen as problematic as in the case of countries in the Balkans. But this also proved to be an issue more complicated than many had predicted. According to numerous accounts the U.S. intelligence agencies had gathered a great deal of evidence concerning the atrocities in Bosnia but hadn't taken any steps in making them public or using the data to prevent further crimes. As Power (2003: 407f.) writes, the United States had some five spy satellites operating in space at all times and snapping some 5,000 images per day.

"They could depict foreign troop locations, additional buildings at suspect nuclear weapons sites and even mass graves". (Ibid.)

The U.S. intelligence agencies also used other means such as cameras mounted on U-2 planes, video recorders, microphones and long-distance antennae used by the National Security Agency to pluck radio and telephone traffic, and RC-135 "River Joint" aircraft that can snatch up battlefield communications (Lane & Shanker 1996). But much of this information remained secret, and it was not until 1995, after the Srebrenica massacre occurred, that under the pressure of Madeleine Albright the pictures taken by U-2 spy plane were made public. They were presented to the Security Council in August of 1995, showing evidence of mass graves and the atrocities that were committed by Bosnian Serb forces after the fall of Srebrenica on 11 July 1995. At that time it became clear that the U.S. intelligence agencies had gathered a great deal of evidence on the policy of ethnic cleansing but were keeping the information secret. The questions concerning the reaction of the international

community or its reluctance to intervene militarily were being discussed even more as the circumstances concerning the intelligence data that the U.S. had in its possession were coming to light. Were the intelligence agencies able to predict what was about to happen in Srebrenica and if so, why was nothing done to prevent it? One of the explanations concerning this question was that the agencies were primarily interested in detecting Serb troops or locating Serb air defence systems in order to prevent them taking aim at UN peacekeepers or NATO aircraft. They were only interested in the military aspect of the evidence gathered and were not analysing images with regard to possible crimes (Power 2003: 408). The other explanation was that generally the sharing of information by intelligence agencies is considered too threatening for the protected “sources and methods”.

As Lane and Shanker (1996) write, photographs showing groups of hundreds of prisoners from Srebrenica were also shown to the Security Council by Albright, but were not made public. They would later be given to the ICTY, but the U.S. was still unwilling to provide all of its intelligence on the subject to the Tribunal. As a reason for the slow delivery of data to the ICTY, the American intelligence agencies mostly named the Tribunal’s lack of proper facilities for storing classified material, although many saw the real reason as being the unusual situation in which the agencies found themselves, having to share classified information with an international organization, which was something completely new.

The first to experience the difficulty in obtaining information from the intelligence agencies was the first Chief Prosecutor Richard Goldstone.

“He approached the US intelligence agencies for help immediately, but it took months before he and they were able to agree on a policy of declassification. The US agencies said that in order to protect their sources and methods, only sanitized versions of their reports would be made available, with the names of informants often deleted.”(Ibid.)

However, rumours starting to circulate in the press at the time which have been discussed till today, that the U.S. might have had prior knowledge of the attack which was planned on Srebrenica and that they did nothing to prevent it. Although the claim was repeatedly denied by the U.S. the issue always arises when it comes to the non-arrest of Karadzic and Mladic. One of the possible explanations for the fact that their arrest hadn’t taken place is the possibility that they might reveal certain things which could shed more light on the engagement of the Western governments in the conflict in Bosnia.

After Goldstone made complaints about the issue of intelligence information he was promised more cooperation from the intelligence agencies but despite that the delays and the slow transfer of data to the Tribunal continued to represent a problem for his staff. Apart from the issue of information transfer, the one which represented an even bigger challenge for the Tribunal was the issue of arrests. Taking into account the fact that the Tribunal was under-funded, lacked the necessary evidence to make indictments and received insufficient cooperation from the intelligence agencies, it found itself powerless and in a position of complete dependence on the cooperation of states which were unwilling to provide the same. In raising indictments the Tribunal saw the only way for it to begin its task of achieving justice, especially by indicting political and military leaders to finally start pointing at suspected war criminals. However, this proved to be almost useless as the Western governments refused to apprehend the indicted war crimes suspects, or risk the lives of their soldiers in order to comply with the requests of the Tribunal. Goldstone's indictment of Karadzic and Mladic was an attempt to bring the Tribunal out of its passive role. It was a decision which demonstrated just how little influence the Tribunal had at the time and NATO's policy of avoiding indicted war crimes suspects showed just how unsupportive the Western governments were.

5.4. NATO and the Arrests of Indicted War Crimes Suspects

“Only States can execute arrest warrants, or warrants for search and seizure; only States can make it possible for the Tribunal's investigators to interview witnesses and to collect other evidence; only States can enforce sentences rendered by the Tribunal by holding persons convicted and sentenced at The Hague in their own prisons. As long as States do not fully cooperate with the Tribunal, its action is hampered.” (Annual Report 1995: 41)

The Tribunal's frustration with the non-cooperation of states was predominant in the 1995 report and in the following years there were no major changes regarding this issue. But beside the expected lack of support from the Balkan states, the most disappointing thing remained the continuously passive and non-cooperative approach of the Western governments most involved in that region. After the signing of the peace agreement in Dayton, the Tribunal finally saw its chance, with the war over, to get access to the evidence hidden on the territory, to get to the mass graves before they were disturbed and also eventually to get to the indicted war crimes suspects, who were at the time unavailable to the

court. But the years following Dayton would be almost as frustrating as the previous two. With the deployment of the NATO- led forces to the area, the Tribunal saw its only chance to achieve its tasks using the help of the international military troops stationed there. But unfortunately the policy of the NATO countries proved in many aspects to be unsupportive of the Tribunal's requests. In performing its tasks, NATO would set the priority of guarding the lives of its soldiers and first and foremost dealing with the aspects of the Dayton agreement which were less dangerous than seeking or apprehending war criminals. The policy of NATO, foremost the policy of the U.S., which was contributing one third of the forces, was already set before the accord was signed, determining that the international forces would not have the arrest of war crimes suspects as its primary goal and this was later formulated in the provision of the Dayton Accord dealing with the tasks and obligations of the international forces. This position towards the arrests, determined prior to the Dayton Accord, was based primarily on the fact that the U.S. administration at the time was unwilling to take risks in order to apprehend the suspected war criminals and this policy would continue to apply several years after the deployment of the international forces.

This provision was disappointing for the Tribunal from the start, and especially for the Chief Prosecutor who had difficulties throughout his mandate to gain custody over the indicted war crimes suspects. As the Dayton Accord hadn't made the arrest of war criminals an obligatory task for the NATO forces the states managed to avoid further commitment by leaving the possibility open but not having an obligation. The lack of will to support the Tribunal which was constantly present from its establishment onwards, and shown by the weak financial support as well as the slow and problematic transfer of intelligence information, reached its culminating point with the refusal of the states, primarily the U.S., France and Great Britain, which were among the most significant contributors of military forces, to make a clear commitment to arrest the indicted war crimes suspects and especially the high- level indictees, among them Radovan Karadzic and Ratko Mladic. Although the initial policy of non- arrest eventually changed, the refusal of the international community to arrest two of the persons considered most responsible for the crimes which occurred in Bosnia still remains to this day the biggest example of the Western governments' lack of will to commit themselves fully to the goal of justice and to assist the ICTY in accomplishing its mission which would contribute to a lasting peace in the region.

With the signing of the Dayton peace agreement, the international community made the decision to deploy a 60,000-strong IFOR (Implementation Force) with a one year mandate

beginning in December of 1995. Its main task was to oversee the implementation of the military aspects of the Dayton peace agreement.

The Annex 1A of the Dayton peace agreement concerning the military aspects of the accord contains the tasks and duties of the NATO- led forces, in which it is evident that IFOR shall have the authority but not the obligation to arrest indicted war crimes suspects. Its main task was to guarantee the end of hostilities, separate the armed forces in Bosnia, remove heavy weapons and conduct other similar actions (Dayton 1995a). IFOR ultimately had no difficulty in the implementation of the military aspects of the Dayton peace accord and with its mission accomplished successfully it was the civilian side of the agreement which continued to cause much more concern, with one of the main issues being the apprehension of indicted war crimes suspects. Especially with elections scheduled for September 1996, and with some of the indicted persons still holding public office and planning to participate in the election, this issue became one of the most concerning in the year following the signing of the peace accord. With the U.S. still under the shadow of the tragedy which occurred in Somalia in 1993 when 18 American soldiers died while trying to capture the Somali warlord Aidid, the policy of the U.S. remained the one of avoiding casualties and seeking diplomatic solutions to the question of indicted war crimes suspects.

This created the ironic situation in which those most responsible for war crimes continued to participate in public life, appearing in the media and influencing the political life of Bosnia while the 60,000-strong NATO forces continued to reject any kind of commitment to arrest the indicted war crimes suspects. The reasons named were mostly connected with the fears that such arrests could jeopardize the implementation of the peace agreement, cause unrest, provoke retaliations and most of all that they could result in casualties among the soldiers in the course of making the arrests. Perhaps the person most frustrated with this NATO policy was the Chief Prosecutor of the Tribunal, Richard Goldstone, who had made a number of indictments but had very few suspects in custody. Goldstone, who announced that he would end his mandate in October of 1996, did not remain in office long enough to see NATO make a single arrest. The most concerning of all at the time was, of course, the arrest of Karadzic and Mladic, since Goldstone had raised an indictment against them in July of 1995 and again in November of the same year yet the two continued to exercise their influence in post-Dayton Bosnia. As Human Rights Watch (HRW 1996) concluded, with the United States providing 20,000 American troops to IFOR, a third of the NATO forces deployed, one of the most disappointing aspects of the Clinton administration was the refusal to involve U.S. troops within IFOR in apprehending indicted war crimes suspects. Because France and Great

Britain, both with significant numbers of IFOR soldiers deployed, were not in favour of a clear duty to arrest clause when IFOR's mandate was being formulated either, IFOR continued to define its mandate in the narrowest possible terms, and despite its clear authority to arrest indicted war crimes suspects, it failed to apprehend a single person indicted by the ICTY.

IFOR soon defined its policy of apprehending war criminals, recognizing that it had the mandate to arrest indicted war crimes suspects and that it would make such arrests but only if IFOR encountered the indicted in the course of their regular duties. That meant that IFOR would not seek the indicted persons.

“However, IFOR failed to make arrests on several occasions when indicted war criminals, including both Karadzic and Mladic, were encountered, and it became increasingly clear that IFOR would go out of its way not to arrest indicted persons.” (HRW 1996)

At the beginning of 1996, with more than fifty men indicted and only two in custody, neither of which had been arrested by NATO troops, the reason for the avoidance of suspected war criminals by NATO was to be found in the U.S. policy, clearly represented by many Pentagon officials, who acknowledged the fear of the American military becoming engaged in the arrests of indicted war crimes suspects, even if they could easily be found. This reluctance of the Americans was more than matched by that of their European counterparts (Shenon 1996). Coming under a lot of criticism for not arresting the indicted war crimes suspects, a NATO commander made clear in June of 1996, that the military was willing to take such risks and arrest the indicted, if that was what the Western politicians wanted. With this comment, Admiral Smith was explaining that the orders of NATO troops in Bosnia are set by political leaders not by NATO officers. Under the policy set at the time, NATO forces would detain the men only if they encountered them, but would not go looking for them. Although the military commander of NATO stated that he was willing to take the risks if ordered to, the Clinton administration, haunted by the death of the American soldiers killed in Somalia and in the middle of a presidential campaign, was not willing to take the same risks (Perlez 1996e). Just how absurd the situation became shows the fact that at the time Karadzic was living and working in Pale, a town only a few miles away from NATO headquarters in Sarajevo and Ratko Mladic, was in Han Pijesak, surrounded by American troops, which did their best not to come in contact with the indicted general. An incident which occurred in mid -August showed just how much effort was put into avoiding the

indicted war crimes suspects and in this way the obligation to arrest them. When American troops arrived at general Mladic's headquarters as part of a weapons inspection team, they quickly left the premises upon learning that Mladic was inside, so as not to confront him, and returned at a later time after his departure (HRW 1996).

The other issue that was also causing concern for the Tribunal was the fact that IFOR was just as reluctant to participate in the war crimes investigations, especially the excavation of mass graves. Fearing the mines which were located in many of the fields, IFOR didn't want to take risks and bring its soldiers into danger. When the Tribunal's investigators arrived at Srebrenica, American IFOR commanders refused to clear the sites of land mines.

"IFOR ultimately agreed only to provide 'area security' for the forensic excavators during the day, but when The Hague's investigators left, IFOR did, too." (Bass 2000: 254)

This obviously represented a big problem since there was great fear that the grave sites could be disturbed and evidence destroyed as they were not guarded. Goldstone, disappointed with the non-cooperative policy of IFOR, especially on the issue of arresting indicted war crimes suspects, left the Tribunal in October of 1996, and was replaced by Louise Arbour, a Canadian judge who eventually brought some positive changes concerning the work of the Tribunal and was able to establish more successful cooperation with the military commanders of NATO. IFOR officially ended its mission in December of 1996, but as the situation in Bosnia continued to require an international presence, NATO decided to continue its mission in Bosnia with SFOR (Stabilization Force) whose mission was to stabilize the peace implemented by IFOR. SFOR continued the mission with a reduced military presence, of around 32,000 troops in Bosnia and Herzegovina which was approximately half the size of the Implementation Force. With the security situation in Bosnia improving over time, the intention was to gradually reduce the military presence of SFOR. In the summer of the following year first steps towards changing the policy of NATO in making the arrests were made.

With Clinton's re-election to his second term and his naming of Madeleine Albright, who was known to be one of the biggest advocates of the Tribunal, as his Secretary of State, the approach of the U.S. as well as other states towards the arrests of indicted war crimes suspects began to change. Albright started pushing hard for NATO to conduct arrests, taking the position that peace was not possible with war crimes indictees at large. Upon Tony Blair's Labour Party winning the election and coming into office, the British were also

seeking a more aggressive approach from NATO regarding the indicted persons. Taking into account the fact that apart from Madeleine Albright Blair's Foreign Secretary Robin Cook was perhaps the biggest supporter of the Tribunal and of a new NATO policy towards the arrests one can explain the fact that the British SFOR troops were the first to conduct an arrest raid for two indicted suspects in July of 1997.

While one of the indicted surrendered to the British SFOR troops, the other was killed as he resisted arrest and fired on the British soldiers. The NATO officials then announced that it was NATO's intention to continue pursuing indicted war crimes suspects, whose number based on indictments issued by the Tribunal was well over 70 at the time. Despite this SFOR continued to receive criticism from many human rights organizations as the arrest raid on the two suspects made in July 1997 was not followed by other arrest operations.

"While the arrest of Kovacevic and the attempted arrest of Drljaca seemed to indicate a changed policy concerning the apprehension of persons indicted by the ICTY, no further arrests were made by SFOR." (HRW 1997)

In the same report made by Human Rights Watch it was stated that Clinton reinforced the position that NATO should not seek the indicted war crimes suspects but only arrest them if they encountered them, by stating that U.S. troops in Bosnia and Herzegovina should not be used for police functions such as the apprehension of indictees.

"Throughout the year, the United States stressed the importance of accountability for wartime atrocities, yet failed to order U.S. troops to arrest any indicted persons. In fact, following the arrest initiative by British SFOR troops in Prijedor in July, the U.S. government worked behind the scenes to prevent further arrests." (HRW 1997)

The 'policy of encounter' was becoming more and more ridiculous, taking into account that Bosnia and Herzegovina was a small country and thousands of NATO troops were stationed there while numerous indicted persons were not even attempting to hide, living and working in NATO's proximity; it became impossible to believe that NATO troops were not encountering the indicted war crimes suspects. A map made by Human Rights Watch showing the location of major bases of the NATO-led Stabilization Force and the whereabouts of 41 named war crimes suspects still at large in Bosnia and Herzegovina, demonstrates that SFOR and the indicted persons were in close proximity to one another in at

least 8 locations, and so HRW concluded that NATO troops must have been encountering the indicted war crimes suspects in the course of their regular duties.

“According to the map, the British sector contains 23 indicted war crimes suspects, the French sector 8, including Radovan Karadzic, and the American sector 8, including Ratko Mladic.” (HRW 1997a)

The first arrest made by the American troops took place in January of 1998, so it was eventually the French SFOR which proved to be the most reluctant in making similar arrest raids. It was not until the beginning of 2000 that the French troops finally made their first successful arrest. With the fact that Karadzic was located in the French controlled sector most of the time and considering their reluctance to make arrests it was not surprising that decisive action to apprehend him did not take place. Although at the beginning SFOR focused primarily on arresting low-level indictees, this eventually changed as SFOR made several arrest raids on important military and political figures indicted for war crimes. For example the arrest of General Radislav Krstic, accused of war crimes committed during the fall of Srebrenica in December of 1998, the arrest of Radoslav Brdjanin, a former Bosnian Serb vice president under Radovan Karadzic in the summer of 1999, and the arrest of Momcilo Krajisnik, the wartime president of the Bosnian Serb assembly in 2000, who was the highest ranked politician arrested till that point. This showed foremost that even high-level officials indicted for war crimes could be arrested without causing serious unrest (HRW 1999; HRW 2000).

These successful arrests also proved that it was possible to conduct such raids, even on high-level officials, without putting NATO soldiers at serious risk. Taking into account the fact that until 2001, the Bosnian Serb authorities still hadn't made a single arrest of indicted war crimes suspects, it became clear just how essential the role of NATO was in making such arrest operations, showing that the Tribunal could not rely solely on the local authorities to apprehend war criminals, which was something that represented a part of NATO's initial policy. Although in the year 2001, NATO arrested two war crimes suspects, Dragan Obrenovic and Vidoje Blagojevic, both indicted by the ICTY in connection with crimes committed in Srebrenica in July 1995, there was still no progress made on the issue of Karadzic and Mladic (HRW 2001). It is also important to mention that since the beginning of NATO's arrest raids, several war crimes indictees have surrendered themselves voluntarily to the Tribunal, including several leading wartime political and military figures.

The NATO-led forces continued to make arrests until 2004, when they conducted only several unsuccessful operations to arrest Radovan Karadzic. In the summer of 2004 NATO announced that an E.U.-led peacekeeping force (EUFOR) would replace SFOR before the end of 2004 (HRW 2004). EUFOR officially replaced SFOR in December of 2004, deploying 7,000 troops, with NATO remaining engaged in the country through retention of a military headquarters in Sarajevo and 150 U.S. soldiers, with the task, among others, of assisting in the apprehension of war-crimes suspects.

The initial policy of NATO regarding the arrests of suspected war criminals eventually changed, mostly thanks to certain Western political officials who advocated strongly for the Tribunal and the new Chief Prosecutor who found a way to put pressure on the military officials of NATO. However, the question of Radovan Karadzic and Ratko Mladic was not as easily solved. The non-cooperative policy of NATO regarding the arrests of indicted war crimes suspects only added to all of the other difficulties which the Tribunal was facing in regard to the cooperation of states. The reluctance to make arrests, or take risks in conducting such actions and the rejection of the idea that bringing war criminals to justice was a precondition for peace, significantly undermined the work of the Tribunal. Besides other difficulties, such as lack of funding, or the difficulty in obtaining the intelligence information, the policy primarily taken by the U.S., France and Great Britain towards the Tribunal proved to be considerably unsupportive in the military aspect as well. Although rhetorically the same states portrayed the work of the Tribunal and the cause of justice as one of their primary goals, in practice they often chose not to support the Tribunal with the necessary financial or military means to enable it to successfully achieve its mission. The unwillingness of the international community to truly support the goals of justice, accountability and lasting peace certainly reached its culmination with the cases of Radovan Karadzic and Ratko Mladic, the two indicted men accused of some of the worst atrocities committed during the war, such as the Srebrenica massacre or the sniping campaign against civilians in Sarajevo.

6. Karadzic and Mladic - Indicted but Free

Perhaps the most significant contribution of the first Chief Prosecutor was the indictment against Radovan Karadzic and Ratko Mladic in the summer of 1995. The first indictment to be issued on 25 July came only days after the fall of Srebrenica and on the same day that the Bosnian Serb forces attacked another “safe area” – Zepa. The previous announcement that an investigation concerning the cases of Karadzic and Mladic was taking place had no meaning for the events that followed. Two years after the establishment of the Tribunal its work was making practically no impact on the war in Bosnia and no impact on the war criminals. It was an institution ridiculed by the perpetrators of war crimes, who had absolutely no regard for its existence.

Radovan Karadzic was a founding member and president of the Serbian Democratic Party (SDS), which was the main political party among the Serbs in Bosnia. He was the sole president of Republika Srpska (Serbian Republic) in Bosnia and Herzegovina and was the Supreme Commander of its armed forces from December 1992. Ratko Mladic was appointed commander of the 9th Corps of the Yugoslav People’s Army (JNA) in Knin in the Republic of Croatia, and acted as the Commander of the Bosnian Serb Army from May 1992. Regardless of the indictment both men continued to hold these positions well into 1996.

The initial indictment included charges of genocide, crimes against humanity and crimes perpetrated against the civilian population and against places of worship throughout the territory of Bosnia and Herzegovina. The indictment also included charges relating to the sniping campaign against civilians in Sarajevo and also the hostage-taking of UN peacekeepers (IT-95-5 1995).

At the time when Richard Goldstone issued his first indictment in the summer of 1995, Bosnian Serb soldiers carried out the worst massacre of the Bosnian war.

“Thousands of Bosnian Muslim men- who had given up their arms after the United Nations pledged to protect them – were killed in a series of ambushes and mass executions in and around Srebrenica”. (Rohde 2001)

The numbers of those presumed dead are approaching 8,000 with only some of the bodies exhumed, and as Rohde (2001) suggests: “Many bodies may never be found, thanks to the passage of time and a Serb campaign to hide the evidence by digging up the corpses and reburying them in remote locations”. The reaction of the international community to the fall

of Srebrenica and later Zepa was one of almost complete disregard and passivity. It only outraged the U.S. insofar as to start a short campaign of air strikes and in this way force the Bosnian Serbs into negotiating a peace settlement, but the genocide which occurred in Srebrenica was not outrageous enough for the international community to arrest the two persons considered the most responsible for this and other crimes of the war.

The policy which would continue even after the peace agreement was signed in December of 1995 would be one of ignoring the indicted persons. The biggest accomplishment of the indictment was that it had prevented the two from participating in the peace negotiations. After the indictment was brought it became embarrassing for the international community to deal with them publicly and to have them come to Dayton as negotiating partners. They were eventually represented in Dayton by a man who was known for having the biggest influence on the Bosnian Serb military and political leaders. It was a man already at the time presumed responsible for orchestrating most of the events which occurred after the dissolution of Yugoslavia, as well as being behind the crimes which occurred in Bosnia and Croatia.

Slobodan Milosevic, not yet indicted by the Tribunal at the time, became the most important figure in the peace negotiations, seen as the only man who could bring the Bosnian Serbs to sign a settlement. A man, who would be indicted a few years later, was in 1995 a valuable negotiating partner who left Dayton as a peacemaker. To prevent the ICTY from being completely ignored during the peace talks, Richard Goldstone decided to issue a new indictment against Karadzic and Mladic, on 16 November 1995, a period during which the negotiations were taking place. The indictment was based on the events which occurred in Srebrenica in July of 1995. It included charges of genocide, crimes against humanity and violations of the laws or customs of war. In the indictment the sequence of events that followed after the attack and fall of Srebrenica were listed as well as the main locations where summary executions had taken place.

“Many of the Bosnian Muslims who were captured by or surrendered to Bosnian Serb military personnel were summarily executed by Bosnian Serb military personnel at the locations of their surrender or capture, or at other locations shortly thereafter.”(IT-95-18 1995)

At the time, the peace settlement was most important to the U.S. and other Western countries, as they were seeking the quickest way out and one that involved the least risk. The ICTY had mostly been pushed aside as the provisions of the Dayton accord were being negotiated. Having Milosevic sign the peace accord was seen by many as granting him

immunity for the crimes he was suspected of. The indictment that Goldstone brought against Karadzic and Mladic didn't serve much in regard to their arrest. The only thing that was accomplished was that they had taken no part in the peace negotiations.

Under the Dayton agreement all parties were obligated to cooperate with the Tribunal and indicted persons were barred from holding public office, but the compliance with these provisions and their implementation was presumed problematic from the start. What was more disappointing was the provision concerning IFOR's tasks, regarding their authority to make arrests, an issue discussed previously in the work.

What was uncertain at the time was the fate of the two men indicted for the worst crimes committed during the war. The approach of the international community to this issue reflected its general lack of support for the Tribunal and the work it was set up to do. The lack of support could have been understood as a part of the general approach taken towards the situation in the Balkans and especially towards Bosnia which was based more on short-term solutions, not consideration of the sanctioning of war crimes as an essential and only true solution to the crisis in question. Although many at the time believed that peace without justice was not possible it was exactly what the international community was pursuing. Justice was simply too risky and demanded too much involvement, something that the international community was not willing to make.

Just how strong the influence of Slobodan Milosevic was on the Bosnian Serbs became evident during the Dayton peace negotiations. Radovan Karadzic, who was the President of the Serbian Republic and the supreme commander of its armed forces, and General Ratko Mladic, who orchestrated the events in Srebrenica, were being represented in Dayton by Milosevic. He had also shown himself unwilling to cooperate in regard to their arrest and transfer to The Hague, possibly fearing that they might argue to have been following orders from him (Perlez 1995).

With elections scheduled for the following year, at the time Karadzic was still planning to seek office although, under the provisions of the Dayton Accord, this was forbidden for persons indicted by the ICTY. Karadzic was asked to resign but refused, saying he would stand by the wishes of the self-styled Bosnian Serb parliament, which was expected to vote on his continued leadership (Ibid.).

Although Karadzic eventually gave up running for office in the 1996 elections, he nevertheless remained in Bosnia and not only that, he also continued to make public appearances and to influence the political events in the country. Almost a year after the Chief

Prosecutor issued his first indictment against Karadzic and Mladic they continued to hold their positions and Karadzic actively participated in public life for a significant period of time following the Dayton accord.

At the beginning of 1996 there were still a number of questions which remained open after the signing of the peace agreement, especially regarding the future of the ICTY and the cooperation that it might expect from the signatories of the accord as well as questions concerning the future of the two indicted political and military leaders of the Bosnian Serbs. The biggest hope of the chief prosecutor lay in the possibility that the 60,000 strong NATO-led troops, which were sent to Bosnia to help implement the peace agreement, would assist the Tribunal in making field investigations and arrest the indicted suspects. But the reality of the situation turned out to be extremely disappointing as the U.S. and other countries proved unwilling to put their troops in danger in order to execute ICTY arrest warrants, although they had the obligation under the ICTY statute to provide the necessary cooperation. With more than 50 indicted and with only one prisoner in custody, the ICTY still represented a weak institution that desperately needed assistance if it was to accomplish any of its missions.

“Without help from NATO or another agency, the tribunal is left without the means to arrest anyone and is hampered in carrying out investigations, especially of the graves, which are thought to hold crucial evidence that may be disappearing rapidly.” (Perlez 1996)

The questions discussed at the time were the ones of NATO troops escorting the Tribunal's investigators to the mass graves and establishing a secure environment for their work. At the time, Richard Goldstone became aware of the difficulties in obtaining assistance from the NATO troops as they made clear that the guarding of the mass grave sites depended on the resources of the military and, concerning the question of indicted suspects, it was not NATO's primary goal to seek and arrest them but that it had taken a policy of arresting the indicted persons only in the case that they encountered them (Ibid.). The NATO military officials were pointing to the obligation of the local authorities to arrest the war criminals under Dayton, but this was one of the most problematic issues as this cooperation remained unsatisfactory even years after the agreement was signed. The cooperation of states which signed the peace accord, especially of Serbia and its president Slobodan Milosevic, proved to be the most difficult issue throughout the Tribunal's mandate and particularly in the first years following Dayton. To the chief prosecutor at the time it was clear that the only way to

apprehend the indicted individuals was with the assistance of the NATO-led forces, which were unfortunately unwilling to provide the same for a long time. Another issue that raised questions about the Tribunal's future was the departure of its first chief prosecutor. At the beginning of 1996 the issue was being discussed although it had been known for quite some time that Richard Goldstone would eventually leave to take a position on the South African Constitutional Court. The possible problems that might arise during the search for a new chief prosecutor were also considered since the election of Goldstone had been a long and a difficult process. All in all the future prospects of the Tribunal were not promising.

At the time the Tribunal had indicted 52 persons - 45 Serbs and 7 Croats and had only one person in custody, a low-level perpetrator named Dusko Tadic.

As Perlez (1996a) writes, Croatia was continuously resisting extraditing the seven suspects, demanding that the same kind of pressure be put on Serbia while Belgrade was refusing to cooperate with the Tribunal on several issues and especially ignored the question of arresting Bosnian Serb leaders Ratko Mladic and Radovan Karadzic. Goldstone had openly complained about not receiving the cooperation of the government of Serbia and Montenegro, which they were obliged to provide under the Dayton agreement. In that period there was still no motion on the issue of an indictment against Milosevic. He was the person needed to keep putting pressure on the Bosnian Serbs to comply with the Dayton peace accord and to cooperate with the Tribunal. Serbia was being pressured with economic sanctions which didn't prove effective enough to achieve compliance with the Tribunal's requests most of the time. But even though these kinds of pressures didn't always bring the wanted results they became one of the main instruments in the hands of the chief prosecutors in securing the cooperation of the countries in the region. In May of 1996, with the elections in Bosnia coming up and the date of the prosecutor's departure approaching, Richard Goldstone openly expressed his disappointment in the fact that NATO was refusing to arrest both Radovan Karadzic and Ratko Mladic. Since the indictment in 1995 Radovan Karadzic had remained in office and was constantly present in public and political life. It was Goldstone's suggestion that their arrest was in the interest of peace and not only justice, expressing his fear that with the upcoming election and the fact that Karadzic had not been arrested the peace process in Bosnia could be undermined (Perlez 1996b).

At the time however it became clear that there would be no military actions taken in order to either arrest Karadzic or remove him from public life in Bosnia. The only option that came into question was the use of diplomatic measures to put pressure on the indicted leader to resign from his position. The reasons usually named for avoiding the arrests of indicted

persons were the fear of retaliation against NATO troops and possible unrest. With the states in the Balkans unwilling to extradite suspected war criminals and with NATO refusing to arrest them, the Tribunal found itself in a situation where it was unable to bring the suspects into its custody, and with its continuous financial problems it was in a position of complete dependence on states which were pursuing goals different to the ones of the ICTY.

6.1. Rule 61 and Karadzic's Resignation

Frustrated by the fact that NATO was refusing to arrest Karadzic and Mladic, Goldstone decided to hold a public hearing pursuant to Rule 61 of the Rules of Procedure and Evidence on 16 July 1996. As stated in the Annual Report (1995):

“A solution to the problem of being unable to bring an accused before the Tribunal was found, taking into account the Tribunal's decision not to allow trials *in absentia*, by creating a special procedure - rule 61 proceedings. Rule 61, "Procedure in case of failure to execute a warrant", allows for the confirmation by the full Trial Chamber of an indictment issued against an accused when it has not been possible to arrest him. It provides for a public hearing at which witnesses may be called to give evidence”.

The idea of holding the *absentia* hearing was to put pressure on the international community to arrest the two indicted suspects. At the same time, with elections in Bosnia approaching, the U.S. decided to use all diplomatic means to remove the Bosnian Serb leader Radovan Karadzic from his position as president of the Serbian Democratic Party and the self-styled Bosnian Serb Republic. The person in charge of this task was Richard Holbrooke, the special United States envoy to the Balkans. Holbrooke was putting pressure on Slobodan Milosevic, threatening new economic sanctions if he didn't arrange Karadzic's resignation and possible departure from Bosnia (Perlez 1996c). On 20 July 1996 it was announced that Karadzic had agreed to resign, assuring in this way that he would not participate in the upcoming September elections. On the other hand, Karadzic did not agree to leave Bosnia which meant that he would probably continue to influence the political life of the country. In his position as president of the Bosnian Serb Republic he would be replaced by Biljana Plavsic, indicted by the ICTY in 2000 for the crimes of genocide, crimes against humanity, violations of the laws and customs of war and grave breaches of the Geneva Conventions. As Perlez (1996d) writes, the agreement signed by Karadzic also determined that he would not appear in public or on radio or television. Holbrooke also stated that in his negotiations with Milosevic concerning the arrest of the two indicted men, he had received a negative answer and that it

was unlikely that Milosevic would cooperate on the issue; where General Ratko Mladic was concerned, he was not the priority at the time for Washington, since he had stayed out of public life since the signing of the Dayton accords, although he remained in the country and in his military headquarters in eastern Bosnia.

6.2. All Plans to Arrest Them Fail

In the summer of 1996, with the Dayton agreement still fragile, national elections coming up and the presidential campaign in the U.S. underway, the situation was not considered ideal for making arrests of any sort, especially not of the two suspects whose apprehension was seen as the most dangerous. Although in the two years following Dayton they had been living freely in Bosnia, without even attempting to hide and with Karadzic even holding public office until July 1996, they had still not been arrested. With NATO refusing to understand its mandate in a broader sense, denying it had any role in the apprehension of indicted war crimes suspects and with the U.S. fearing that any such action might endanger the peace process, not to mention the biggest issue of the possible risks for NATO soldiers during such arrests, the chances of arresting the two indicted men while they were in plain sight were often missed. All of this added up to create an ironic situation in which the two men, held as the most responsible for the worst crimes of the Bosnian war and indicted by the ICTY in July of 1995, were living in Bosnia with their whereabouts known to the public and surrounded with 60, 000 NATO troops stationed there. Still no arrests were made.

“Despite NATO’s legal obligation to help arrest war criminals, political leaders have so far given NATO troops instructions to arrest only suspects whom they “encounter”. But even this mandate has proven farcical, as NATO troops go out of their way to avoid any such encounters” (Roth 1997)

In the situation in which the Tribunal found itself at the time, depending completely on states to execute its tasks and with no ability to apply pressure, it seemed as if political goals had prevailed over justice. The cooperation of states, especially the U.S., France and Great Britain, was essential but at the time it was being denied. With the first Chief Prosecutor Richard Goldstone leaving in October 1996, and with only a few men in the custody of the Tribunal, with NATO troops refusing to make arrests and the countries in the Balkans refusing to cooperate and extradite the indicted persons, it seemed as if the Tribunal had reached the limits of what it was able to accomplish. Although things eventually changed

with the arrival of the second Chief Prosecutor, in regards to the cases of Karadzic and Mladic there was no progress made, as this issue hasn't reached its conclusion to this day.

What at the beginning seemed the least of problems later represented a much bigger challenge. Finding the two men in 1996, or well up to 1998 was not an issue. The will to take action to arrest them, was.

“One day in February 1996, for example, Dr. Karadzic drove unchallenged through four NATO checkpoints, two of them manned by Americans.”(Weiner 1998)

In the summer of 1997 Mladic took a vacation, attended his son's wedding in a Belgrade hotel and went to a football match.

“To get to the seaside and to Belgrade, the Serbian capital, General Mladic had to travel from his base at Han Pijesak, in eastern Bosnia, across roads manned by some of the 31,000 NATO soldiers there. But he is protected against any confrontation –or capture—by a fiercely loyal, heavily armed group of bodyguards.” (Perlez 1997)

Karadzic eventually left his base in Pale and was believed to be travelling around Bosnia with an escort of loyal security officers while Mladic was said to be living in Belgrade (Weiner 1998). In the summer of 1997 the British troops performed their first arrest of suspected war criminals. It was the first time that NATO troops decided to take such an action, until then pursuing a policy of leaving the arrests to the local authorities. But the arrests that took place in the following years were mostly connected to low-level war crimes suspects and not the highly ranked officials such as Karadzic and Mladic. They continued to live freely and most of the time their whereabouts were known to the military officials of NATO. Following the first arrest made by the British troops in 1997, according to some accounts NATO was planning other raids to capture high-ranked war crimes suspects on the initiative of the United States, but apparently France declined to take part in the operations considering them too risky (Erlanger 1997). With the British being the first to change their policy of arresting suspected war criminals and with the U.S. also pushing for an operation to arrest Karadzic and Mladic, the French eventually remained the most reluctant to perform any kind of arrest operations. Because of this it was not surprising that Karadzic especially was not arrested since he was mainly located in the French patrolled sector. Just how unwilling the French were, especially when it came to the arrest of one of the two indicted suspects, became clear in the spring of 1998 when accounts of secret meetings between a French officer and Radovan Karadzic were made public. The secret meetings between the French officer Maj. Herve Gourmillon and Dr. Karadzic were said to have deeply troubled

the Americans and other NATO allies and have undercut trust in the French military and also set back any planning for his possible capture. Since Karadzic was located in Pale, which was in the French sector of Bosnia, at the time, the American military officials needed to cooperate with the French in order to make such an arrest. The French acknowledged the meeting stressing that the officer had acted on his own (Erlanger 1998). The Americans later claimed that there had been a big effort to collect intelligence and make plans to arrest Karadzic and Mladic in 1996 and 1997 but that after spending millions of dollars preparing the missions and gathering intelligence, the plans had been cancelled because the American commanders feared a blood bath, the French officers were reluctant to act and fears of the consequences of such an action were too high. The British favoured a mission, but French officers, whose international peacekeepers control the zone where Dr. Karadzic was living, were deeply sceptical. United States officers were reluctant to share intelligence with the French, fearing it would leak (Weiner 1998).

The growing mistrust between the allies and the permanent fear of casualties which could result from the arrest of high-level, well-guarded war crimes suspects were the reasons why the plans to arrest Karadzic and Mladic failed. At the beginning it was an operation considered too risky for the too-fragile peace process and today, almost thirteen years since the indictment against Karadzic and Mladic, it is claimed that their whereabouts are unknown. Throughout the mandates of three different chief prosecutors it remained an issue without conclusion and with the passage of years became almost forgotten. Although the initial policy of NATO changed following the first arrest in 1997 and the cooperation with the ICTY improved and although it became obvious that such arrests didn't represent as big of a challenge for the NATO military as presumed, neither in the aspect of casualties nor in the case of possible unrest, a decisive action to arrest the two indicted men still never took place. It had become impossible to believe that the world's most powerful military alliance could not track the two men down or was incapable of apprehending them.

The unwillingness to risk the lives of NATO soldiers to perform such an action has been one of the more obvious reasons for the fact that this operation hadn't taken place. But as time passed other possible causes have been discussed such as secret agreements between the two men and Western officials that might have been made granting them immunity from prosecution by the ICTY. Often such deals were mentioned in the context that peace was traded for justice and that the two persons considered most responsible for the crimes in Bosnia were granted immunity in order to agree to a peace accord and disappear from public life.

6.3. Why Are They Still at Large?

The rumours that have circulated for quite some time are that Karadzic had struck some sort of deal and that promises were made to him by certain diplomats in order that he move out of the spotlight and leave public office; in return he would be granted freedom. At least that is what members of his family and his supporters have claimed for years. As Vulliamy (2007) writes, Karadzic's brother and daughter claim the alleged deal between him and Holbrooke was made in the spring of 1995 and is the reason why Karadzic hadn't been arrested. His daughter claims that he was offered immunity from The Hague in order to agree to leave office. Karadzic also boasted that he was assured by Richard Hoolbrooke, the U.S. envoy at the time, that he would be left alone if he retired from political life (Toomey 2005). On the other hand, the representatives of the international community in Bosnia claim that it is the wide support that Karadzic received from his family and friends, an entirely well organized network of support from Republika Srpska as well as Serbia, that enabled him, as well as Mladic, to escape justice (Vulliamy 2007). Although in the past few years there have been actions to freeze the assets of the families of the indicted, several raids made to their homes as well as interrogations conducted, none of these has provided much success. Taking into account the fact that both of these men are still considered national heroes in Republika Srpska as well as in Serbia, getting the necessary support to continue escaping justice does not seem to represent a problem. Because of the fact that they enjoy wide popularity in both areas it is also not surprising that the governments are not very cooperative when it comes to the issue of their arrest. Just how much support they received and how little influence the fact that they were indicted for the worst war crimes had, is visible in the fact that:

“Until 2002, however, eight years after being charged alongside Karadzic with genocide and other crimes against humanity, Mladic was still receiving a full military salary from the Serbian government, and until two years ago he was on the payroll of the defence ministry of Republika Srpska”.(Toomey 2005)

Later on he would receive a pension from the government of Serbia and Montenegro which was collected by his son (ibid.). Over the years frustration grew over the issue of their arrest, especially the fact that with each year the possibility of them ever reaching The Hague seemed to be disappearing.

Although many would agree that the post-war period was the best time for their capture, the international forces today claim not to know where the two are located. In recent years NATO held several actions in Bosnia aimed at capturing Radovan Karadzic, who was

believed to be hiding somewhere near the border with Montenegro, but without any results. Several raids were also made on the homes of his family members and at one point his son was taken in for questioning. During one of the raids on the home of Karadzic's wife the NATO forces seized letters which showed that Karadzic corresponded regularly with his wife and even received visits from her. The letters were written between January 1999 and December 2002 (Toomey 2005). This of course raised questions about how it was possible that she could have had meetings with Karadzic while her house was supposedly under NATO surveillance. In the last few years, the prospect of the Balkan countries entering the EU has become the main instrument to put pressure on the countries of the region, especially Serbia, to cooperate with the International Tribunal. The Tribunal's chief prosecutors fought to keep up the pressure as long as the two men, as well as other indicted persons, were still at large. Unfortunately, with the passage of so many years and with the arrival of new issues, especially the preoccupation with terrorism since 2001, it seemed like the two indicted men were being slowly forgotten.

In 2003, the third Chief Prosecutor Carla Del Ponte claimed she roughly knew where the two most wanted men were and pleaded with the international community to arrest them. She claimed that Mladic was in Serbia and Karadzic was moving around eastern Bosnia close to the border with Serbia and Montenegro. She stated that NATO and the authorities in Serbia were certainly in possession of more information and had the obligation to arrest them (Del Ponte 2003). She also stated the importance that their arrest would have in setting an example to other war criminals and that it would also be essential for the successful completion of the Tribunal's work.

On 11 July 2005 European and American officials attended a ceremony marking the 10th anniversary of the genocide in Srebrenica. They expressed their deep regrets for the events that occurred and for the weak response of the international community that had failed to prevent them. The American officials also stated their position that they were committed to the arrest of Radovan Karadzic and Ratko Mladic, the two men held as the most responsible for the crimes that occurred in Srebrenica ten years ago (Rohde 2005).

In a trial held by the Serbian authorities to prosecute people suspected of hiding Mladic, the facts that came up were astonishing.

"Evidence that Mladic lived quietly in an apartment on Yuri Gagarin [street], and in up to a dozen other apartments elsewhere, has emerged from a trial of 11 people accused of providing the former general with a secret support network in and around the Serbian capital from June 2002 to the beginning of this year." (Wood 2006)

Even though the trial revealed a web of former colleagues from the Bosnian Serb Army who had helped the general move from one place to another, it didn't reveal the whereabouts of the general since January 2006. The other disappointing thing, according to Wood (2006), was the fact that no charges were brought against the senior army officers or other government officials implicated by witnesses in the efforts to hide the general. The trial ultimately showed that many government officials were aware of Mladic's whereabouts and were assisting him in hiding although the authorities there persistently claimed that they had no knowledge of his whereabouts. The trial also confirmed the claims of the chief prosecutor of the ICTY that at the time the Yugoslav army was helping to hide the former general and that it had also helped establish a network of support that managed to hide him till 2006. The network was initiated with the support of the Serbian Army high command and, according to one witness, Mladic also hid in the army compound until May 2002 with full approval of Yugoslavia's foremost military body, the Supreme Defence Council (Ibid.).

With the authorities in Serbia denying any knowledge of Mladic's whereabouts at the time, and with the international military forces claiming to be unable to locate the two indicted men, the Tribunal and its chief prosecutor fell short of means to push for any kind of progress on the issue. Ten years after the initial indictment was brought Karadzic and Mladic were still at large and the chances for their arrest seemed slimmer than before.

Unfortunately not even events such as the 10th anniversary of the massacre in Srebrenica provided any kind of impulse for the international community to finally apprehend Radovan Karadzic and Ratko Mladic. The criticism from the third Chief Prosecutor Carla Del Ponte was public and harsh. She had made perfectly clear on many occasions that the NATO forces, and later their successor the EUFOR (European Union Force), had the obligation to arrest the two suspects but were not making a big enough effort to do so. She also criticized the Western governments for not sharing intelligence with the court as well as the cooperation of Serbia and Montenegro which she characterized as insufficient at the time, claiming that the army of Serbia and Montenegro was hampering it (Leopold 2005).

6.3.1. Pressure from the EU

One of the main issues in recent years was the fact that the Tribunal had been given a deadline to finish its work, but without Karadzic and Mladic many considered the work of the ICTY be incomplete. The Tribunal is supposed to finish its work by 2010.

When it came to indicted war crimes suspects the only thing that has brought results in the recent years was not military operations but pressure from the European Union on the countries in the region to cooperate with the Tribunal and extradite the indicted persons in order to proceed with negotiations to eventually join the EU. Unfortunately, this strategy hasn't worked with the two indicted suspects either. Although many hoped that the pressure would eventually bring the government of Serbia to arrest Mladic, who was known to be located in the country, this ultimately brought no results. For example, at one point the EU halted the preliminary talks with Serbia about becoming a member due to its failure to extradite Ratko Mladic to the ICTY. Apart from the EU, the chief prosecutor Carla Del Ponte remained loudest in her criticism of the non-cooperation of Serbia regarding the arrest of Mladic and other remaining fugitives. On numerous occasions she made appeals to the EU to put pressure on Serbia using the talks about possible membership. After almost a year without a single handover of a war crimes suspect, in the summer of 2007 the EU had decided to resume talks with Serbia following the arrest of the indicted war crimes suspect Zdravko Tolimir, considering that its support of the ICTY had improved sufficiently. It was stated that Serbia demonstrated clear commitment to full cooperation with the Tribunal (Kranjc 2007a; 2007b).

At this time the issue of Kosovo and the request for independence by its ethnic Albanian majority emerged.

"The EU's decision to restart negotiations comes as delicate diplomatic moves over independence for the breakaway province of Kosovo reach a critical stage." (Swain 2007)

According to Swain (2007), the fate of the province was due to be decided within days of the EU's decision to continue negotiations with Serbia regarding its accession to the EU, but nobody was willing to admit that there was any link between the two events.

In December 2007, as the second term of the third Chief Prosecutor was coming to an end, Carla Del Ponte made her last appeals for the Tribunal to stay open until the main fugitives are arrested and put on trial. As the Security Council was pressing for the court to close by 2010, many considered that without Karadzic and Mladic standing trial the results and the success of the Tribunal could be seriously damaged. In her last report to the Security Council

Carla Del Ponte accused Serbia of deliberately failing to arrest the two top suspects and she urged the European Union to make the arrest of war crimes indictees, especially Ratko Mladic, a condition for Serbia's accession to the EU.

Del Ponte also stated that the Serbian authorities chose not to arrest Mladic in 2006 although they knew his exact whereabouts and that she believed Western support for the independence of Serbia's Kosovo province was preventing the arrest of Mladic (Worsnip 2007). Many human rights organizations such as Human Rights Watch have also joined the Tribunal's chief prosecutor in making appeals to the EU to persist in its demands for Serbia to extradite war crimes suspects in order to continue its negotiations concerning membership in the EU. Human Rights Watch stated its position that EU member states should refuse to sign the Stabilization and Association Agreement with Serbia until it arrests and surrenders Ratko Mladic to the ICTY (HRW 2007).

"Commissioner Rehn is rewarding Serbia even as it harbors a general accused of genocide. This sends the message that the EU is prepared to let those who commit horrific crimes wait out justice and ignores the victims of horrific atrocities committed in the Heart of Europe." (Ibid.)

As confirmed by the Chief Prosecutor, the pressure coming from the EU was the most important instrument in persuading the states to cooperate with the Tribunal. As HRW (2007) pointed out, although the EU had suspended negotiations with Serbia in May 2006 because of its failure to arrest Mladic, it has now lowered its demands and decided that it is sufficient that the Serbian government declared its commitment to arrest the fugitives, a declaration often made in the past but one that was never followed through with action.

Realizing that the pressures coming from the EU were probably the only way of getting Serbia to cooperate and arrest the indicted suspect, as this is obviously not going to be accomplished by action from the international forces, the lack of interest in the issue and the gradual lowering of demands from the EU has created concern that the question of suspected war criminals at large will simply slip from the political agenda and be forgotten.

"Without firm and consistent EU pressure on Serbia, there is a real danger that Ratko Mladic will never face justice. The EU should not accept anything less than Serbia's full cooperation with The Hague." (HRW 2007a)

With the Tribunal having to slowly bring its work to an end and with Radovan Karadzic and Ratko Mladic still at large, there is a fear that the accomplishments of the Tribunal could be damaged by the fact that these two might not stand trial.

The fact is that with other political issues coming into play, such as Kosovo's independence, the pressure on Serbia to cooperate with the Tribunal is slowly decreasing. With numerous pleas by the Chief Prosecutor for the Tribunal to continue its work until all the indicted persons still at large are brought to justice, it is still uncertain what the future will bring in regard to this issue. Although the newly appointed Chief Prosecutor promised to continue pursuing this goal it remains to be seen if the two men will finally one day reach The Hague.

6.3.2. Karadzic and Mladic Are Not Wanted in The Hague

In September of 2007 Florence Hartmann, who worked as the spokesperson and Balkan adviser to Chief Prosecutor Carla Del Ponte from 2000 until 2006, published a book called *Peace and Punishment: The secret wars of politics and international justice*. It is a book that tries to give an insight into what was happening behind the scenes and far from the public eye in regard to political obstructions of the ICTY. Surprisingly, the book deals not so much with the obstructions from the Balkan governments but the ones of its main sponsors – France, Great Britain and the United States. She presents plenty of evidence to support her claims based mainly on the Tribunal's official documents as well as her personal notes, as she herself was present at many important meetings and events, such as the interactions of the Chief Prosecutor with numerous Western officials. In the book Hartmann openly accuses the three countries of sabotaging the court's work mainly by withholding key evidence and failing to arrest two of its main war crimes indictees, Radovan Karadzic and Ratko Mladic (Perelman 2008). She claims that these countries have had constant knowledge of their whereabouts and that not only had they been able to find and arrest them but they had been deliberately keeping them away from The Hague. The fact that the countries in the Balkans were uncooperative towards the ICTY was not so surprising. Even though under the statute of the Tribunal they had the obligation to cooperate, especially in the matters of arrest and extradition of indicted suspects, they nevertheless often deliberately failed to do so. This kind of approach was expected from the beginning as the Tribunal was constantly aware that the most problematic issue would be to get the countries in the Balkans to make arrests and stop protecting the indicted persons. What was not as expected was for the countries which initiated the establishment of the Tribunal to later obstruct its work or try to limit it, using

their influence in areas such as finance, evidence material and influence in the military aspect to refuse to arrest the indicted war crimes suspects and deliver them to The Hague. The culmination of this lack of will is to be found in the fact that Karadzic and Mladic are still at large. Although the lack of will to assist the Tribunal was at times openly displayed, especially in regard to the peace agreement where some countries clearly showed that they preferred to sacrifice justice in order to achieve a peace accord, most of the time this lack of will was camouflaged with legalistic rhetoric which supported the rule of law and the sanctioning of war crimes, and condemned and judged the crimes and expressed outrage.

Unfortunately, most of the time the rhetoric remained just that, as in reality not many actions were taken for the sake of international justice. Although the three particular countries have always portrayed themselves as being in favour of the International Tribunal, many obvious facts show that they did not always fully support it, something that is confirmed by accounts of individuals such as Hartmann who claim that they were often willing to disregard it when there was a choice between political goals and the goals of justice.

The years during which Karadzic and Mladic were still living in Bosnia and moving freely, simultaneously influencing the political life in the country, years in which their apprehension would have been perhaps the easiest, were those years in which their non-arrest was excused by fears of retaliation, unrests, casualties and constituted a part of the policy set by NATO which determined that the arrest of indicted war criminals was not one of its tasks. With the Dayton agreement less fragile and the public increasingly outraged by the fact that the two were living freely on the territory of the same country and right in NATO's neighbourhood, some actions were finally taken to locate and apprehend them. All of these ultimately proved unsuccessful as it became clear that the countries within NATO itself could not agree on the issue of their arrest, and that the mistrust between the allies was too big.

As years passed by, with Karadzic and Mladic being spotted in public in Bosnia and Serbia and with NATO remaining passive and taking no decisive action to arrest them, the stories of secret agreements became more and more appealing. It became easier to believe that some sort of deal had been made between Western officials and the two men, granting them immunity, than to believe that they could not be located and arrested. That the most powerful military alliance in the world was unable to find the two indicted suspects, while, for example, reporters often succeeded in doing so, was something few people really believed.

While the Americans and the French placed the blame on each other for failed operations, leaking of evidence and secret deals, Hartmann places the blame on all three countries, the U.S., Great Britain and France and finds the explanation lies much deeper than in mere

mistrust between the allies. As she states, the Americans would use the information leaks by the French officer to each time put the blame on the French for the non- arrest of Karadzic while on the other hand members of Karadzic's family continued to claim that Karadzic had signed a deal with American officials that granted him immunity. This rivalry between the French and the Americans served as an alibi for the lack of results (Hartmann 2007: 124). The numerous letters written by Karadzic to his family, which could have led to his arrest, and which were eventually obtained by NATO, were in most cases never handed over to the Tribunal. Hartmann (2007: 128) also claims that Carla Del Ponte tried to get the support of France in 2000 for the arrest of Radovan Karadzic but that Chirac claimed the Americans were blocking his arrest and admitted that he believed some sort of a deal had been made, but that he had no proof. When Del Ponte asked the American general Wesley Clark if this was true, he denied it and accused Chirac of making a deal with Karadzic and Mladic to achieve the release of the French pilots held in captivity by the Serbs in 1995. The constant shifting of blame from one country to another was a permanent excuse for the non- arrest of both men. The French pilots who were released just before the signing of the Dayton agreement were often named as a possible reason why Karadzic and Mladic hadn't been arrested. It was speculated that the French had given them some kind of reassurance that they would not go to The Hague if the pilots were released, something that the French have always denied.

According to Hartmann (2007:140), in 2004, Carla Del Ponte received information that Karadzic had returned to Bosnia. He had left Belgrade and was spending a few days in a house near the Serbian border. This information was immediately given to the SFOR commander in Sarajevo. A few hours later a helicopter flew over the area and in this way warned Karadzic.

Hartmann also states several other examples regarding obstruction of the arrest of the two indicted war crimes suspects.

"In April 2005 a Dutchman contacts the Tribunal in Hague. He claims to have seen Karadzic on April 7th in Foca in the company of a woman on the terrace of a café. Carla Del Ponte asks NATO to verify this information. 'Impossible, because Karadzic was in Belgrade from 6th until 8th of April', the American officials of the NATO responded a few days later, who until then claimed they had lost every track of Karadzic" (Ibid.)

Another incident happened in August of the same year when Carla Del Ponte found out that the surveillance of Karadzic's family, which she had requested of the Bosnian Serb police, had been suspended. She found out that a CIA officer requested the Bosnian Serb agents to suspend the surveillance of Karadzic's family in July, under the pretext that it was an order

from The Hague. The American authorities later expressed their regret to the chief prosecutor for the 'mistake in communication' (Ibid.:141).

Another example of the unwillingness to carry out or the obstruction of the arrest of the two suspected war criminals came in 2006, when Carla Del Ponte realized she had been deceived by the information coming from the CIA agents in Serbia, who were cooperating with the Serbian agents and had the task of verifying information about possible hideouts of Mladic in 2002 and 2003. At the end of 2003 they concluded that Mladic was no longer in Serbia. The information that Carla Del Ponte received from Washington confirmed the findings that Mladic was no longer located there, but was probably somewhere in Macedonia, or in one of the former Soviet republics. But at the beginning of 2006 Del Ponte discovered that Mladic had been present in Serbia in 2002, 2003, that he had never left Serbia except during short visits he made to Bosnia and that Mladic had been indeed located in some of those places that the CIA agents were in charge of verifying (Ibid.:142).

With her mandate coming to an end and frustrated with the fact that not even the 10th anniversary of Srebrenica's massacre made any significant impact on the issue of the two indicted suspects, she made her last appeals to the international community to continue putting pressure on Serbia in particular, to arrest and extradite war crimes indictees and also to keep searching for the two men. Ultimately none of this produced many results. The doors of NATO and the EU seemed opened to Serbia even without it handing over the suspected war criminals to the Tribunal and the international community appeared satisfied with empty promises without demanding concrete actions.

Perhaps the best message about the cooperation of the Western countries with the Tribunal on the issue of Karadzic and Mladic was sent by Del Ponte in one of her speeches to the Security Council. She clearly expressed her position on the non- arrest of Karadzic and Mladic and the reasons for it:

"For 10 years, the international community has been playing cat and mouse with Karadzic and Mladic. For much of this time, the cats chose to wear blindfolds, to claw at each other and to allow the mice to run from one hole to another. It is time now for the cats to stop suffering the ridicule of the mice." (Leopold 2005)

As it became clear that the Tribunal could eventually close its doors without Karadzic and Mladic standing trial, the chief prosecutor pleaded with the Security Council to keep the ICTY open until the two men are arrested and put on trial. Despite this the international community is seeking ways to close the Tribunal without the two men in its custody and alternatives are being sought for the possible trial of the two wanted indictees, in case they

are apprehended after the Tribunal finishes its work in 2010. The Americans are trying to persuade the ICTY to agree to an option of the logistics of the ICC to be used for the trial of Karadzic and Mladic after the closure of the Tribunal (Hartmann 2007: 151). With Russia consistently refusing to keep the Tribunal open until the two are arrested and tried and considering the fact that once the Tribunal is closed its arrest warrants cease to be valid, the question remains if the two would be tried after the closure of the Tribunal, and if so, what judicial body would be responsible for their prosecution? Even though some may have suggested that the victims could or should find satisfaction in the fact that the two will remain fugitives, living marked as war criminals, this couldn't be further from the truth. One thing is certain, without the verdicts and the evidence delivered by the Tribunal, there will always be denials. Without facts being established and documented and the truth revealed in the process, there can be no satisfaction for the victims or prospect for true reconciliation. As long as the ones most responsible for the atrocities and the sufferings of the war are still at large and as long as they are not brought to justice, there will always be various 'truths' about who these men were, about the nature and the events of the conflict and about the aggressors and the victims. There will remain various histories, completely different stories, different claims and different truths.

For one side these men will remain national heroes, men who have earned respect and admiration, for others they will remain the planners and the executors of the worst crimes and worst violations. And as long as a neutral institution such as the ICTY doesn't officially establish the facts and bring its sentence, there cannot be truth, or reconciliation, or durable peace.

6.3.3. Back to Srebrenica

The story which holds the reasons for the non- arrest of Karadzic and Mladic begins in 1995, with Srebrenica and the Dayton Peace agreement.

“The constant refusal of the great powers to arrest Karadzic and Mladic or to ensure their extradition to the ICTY has proven during the twelve years to be related with their lack of will to stop the massacre in Srebrenica. And in this awful fact should the answer for the riddle of Karadzic and Mladic be sought.” (Hartmann 2007: 154)

Hartmann (2007: 154) claims that Washington, London and Paris had failed to take all necessary measures to stop the genocide which was about to be committed in Srebrenica in 1995. During the entire offensive against Srebrenica from 6th until 11th of July 1995, the great powers claimed that the Serb forces, despite their advance, had no intention of taking over Srebrenica, and without any action they allowed Mladic to enter the town and later to separate the men from the rest of the population. Although at the time, the French president Jacques Chirac tried to convince his allies to intervene and to regain control of the enclave by force his suggestion was refused by Bill Clinton, who was unwilling to intervene and France eventually backed away from its initiative.

Thus the questions remain of just how predictable the Srebrenica massacre was, and just how possible it is to believe that the international community, constantly monitoring the area, had no prior knowledge of Mladic's intention to take over the town, something he had attempted to do before, and whether it was so difficult to presume what was about to happen, as Mladic had threatened he would take revenge on the same enclave numerous times in the past. As it became clear what was about to happen when the Serb forces entered the town and started separating the men, why was there no determined action made to protect the population of the town?

Even more disturbing was the fact that only days after the fall Srebrenica, Mladic was allowed to take over another 'safe area'- Zepa, without any decisive action from the international community either. Hartmann suggests that the reason why Karadzic and Mladic are not in The Hague is because their presence there could possibly reveal mistakes made by the international community in the past, mistakes they never want to become public.

In 1995 the three enclaves of Srebrenica, Zepa and Gorazde, still under the control of the Bosnian government and with a Muslim population, were pieces of territory that did not fit into the Serb plans and in this way represented an impediment to the signing of the Dayton Accord, making the clean split of the territory that the Serbs were seeking during the peace negotiations difficult.

"In the spring of that year, negotiations between Milosevic and Western officials over the shape of Bosnia were reaching a turning point. While there was general agreement to divide the country into two autonomous entities, the outlines of the map were still in dispute. The main point of contention was three Muslim enclaves –Srebrenica, Zepa and Gorazde—nestled in the midst of Bosnian Serb territory." (Perelman 2008)

In November 2005, on the 10th anniversary of the Dayton peace agreement, Richard Holbrooke said openly on Bosnian television that he had been instructed to sacrifice the three

enclaves to reach an agreement. He would later deny his claims, although they exist on tape (Start 2007).

This coincided with the fact that Srebrenica and Zepa were both taken over by the Bosnian Serb army under General Ratko Mladic without any attempts from the international community to prevent it and were given to the Serbs to build part of their territory in the peace negotiations, although the crimes that had been committed there were already known at the time. Hartmann (2007: 159) claims that, since Belgrade and the Westerners have never handed over to the ICTY all of the documents in their possession about the preparatory stage of the offensive against Srebrenica, they have concealed in this way the predictability of the Srebrenica massacre. Karadzic and Mladic were not taken before the court so that they would not revive the memory of the shameful choice of the great Western democracies to sacrifice the population of Srebrenica.

In numerous interviews made after her book which caused many reactions even before it was made available in many countries – was published, Hartmann confirmed her claims stating once again that they were all based on evidence collected by her, official documents of the Tribunal, official transcripts of certain conversations between the Chief Prosecutor and high-level Western officials and also on her personal notes since she had been present at many meetings held in regard to these issues.

What Hartmann openly claims is that the three countries, the U.S., Great Britain and France, together pursued a deliberate policy not to arrest the two war crimes indictees. It was not simply lack of will, nor was there a lack of information. She claims that throughout the period of twelve years the evidence shows that they were not looking for Karadzic and Mladic.

She explains this with the international community's desperate wish to get a peace agreement in 1995 after more than three years of war, and the price of this agreement being unfortunately too high. The reason why Karadzic and Mladic are not wanted in The Hague is the fear that they might put the blame on the international community by saying they had been given a green or orange light to take over the Srebrenica enclave. The territory which Milosevic wanted in order to have a compact territory to sign for at the peace talks was sacrificed to the Serb side despite the fact that it was under international (UN) protection. In this way Srebrenica was sacrificed in order to get a peace agreement and the price was 8000 lives (Aulich 2007)

According to Hartmann, the green light to occupy Srebrenica and later Zepa did not of course assume a massacre or any other crime, but the Serb forces used the opportunity to unleash

genocide. The West did not or could not have prevented that, but they did not even punish them as these areas were given to the Serbs by the peace agreement and Karadzic and Mladic have not been brought to The Hague to this day (Start 2007).

Hartmann also states that the Western powers have previously been shown to be uncomfortable with the evidence regarding Srebrenica, and that they were carefully picking out the evidence to be handed over to the Tribunal, foremost influencing in this way the ability of the Tribunal to prove the predictability of the killings (Aulich 2007). She pointed out that the international community did not agree to the crimes, but they nevertheless closed their eyes at the military operation against Srebrenica, which they had had the obligation to protect since it was declared a 'safe area' by the UN. She claims that:

“Western powers had advance notice of the offensive, they knew that the Serb forces were equipped for the take over of the enclave. They had to prepare a response in case of such a scenario, they did not. They had to take measures to protect the population after the fall of Srebrenica, they did not. They had to act when they found out that the killings had started they did not.” (Aulich 2007)

Since the U.S. had very good intelligence capacity in the region in 1995, they intercepted conversations between the Serbian and Bosnian Serb leadership in the spring and summer of 1995, but the U.S. refused to give these materials to the Tribunal. Mladic was at the time in contact with the Belgrade leadership to prepare the attack on Srebrenica and by only intercepting these conversations the U.S. had enough notice of what was about to happen (Ibid.).

If there was really an intentional obstruction of the effort to arrest Radovan Karadzic and Ratko Mladic by the three states, is something that Hartmann has tried to prove, but something that most would probably have difficulty believing. Although it may sound like a conspiracy theory, Hartmann has certainly done her best to prove the opposite, giving evidence that only an insider could provide, but even so, the accusations are so harsh that all other explanations become easier to believe. Whatever the reasons might be, lack of will is something that cannot be disputed. Whether the reasons were fears of casualties, unrest, failures in information-gathering or assessment, not coming across the indicted, or numerous others, the only conclusion that can be drawn from the story of Karadzic and Mladic is that there was not enough political will to put the goals of justice and lasting peace before the short- term political solutions that demanded the least sacrifice and least risk. The lack of will

to assist the Tribunal in its task of prosecuting the suspected war criminals, and in this way establishing the truth about the war and the crimes committed and the lack of interest in the future of the region, which in many ways depends on the findings of this Tribunal, has reached its highest level with the lack of clear and strong commitment to bring the two to justice. The fact that Karadzic and Mladic remain free threatens to undermine all of the other accomplishments of the Tribunal, which in the end proved to be numerous despite the lack of support in all areas. The fact that the truth about the crimes they are suspected of and the role they played in their execution has not been legally confirmed creates the opportunity for the same crimes to be denied and for the war criminals to be turned into national heroes. The lack of will that was most evident in the first years following Dayton, when all kinds of diplomatic and political solutions were sought in dealing with the issue of Karadzic and Mladic instead of making decisive actions and turning the two over to the Tribunal; later the same lack of will would only be disguised with excuses of the inability to encounter, find, or arrest the two indicted war crimes suspects. The lack of will to arrest would only be transformed into the lack of will to search. Besides other examples of the weak support of states for the Tribunal, especially of states which were its main initiators, the cases of Karadzic and Mladic represented the one issue where the lack of support was most evident and most persistent. It is an issue that not only threatens to undermine the successes of the Tribunal but also to jeopardize the future of the region and the relations between its people. Without the two facing the charges against them, standing trial and taking responsibility for their actions, the story of the Bosnian war cannot reach its conclusion, regardless of any peace agreement, because it is the establishment of truth, the bringing of war crimes to light and the punishment of war criminals that can eventually provide the desperately needed reconciliation, durable peace and coexistence.

7. Kosovo War and the Rise of the Tribunal

The events which took place in the fall of 1998, and throughout 1999, had an enormous impact on the work of the Tribunal and the situation in the Balkans, and especially on the policy of the international community towards human rights violations and their prevention. Those events represented a continuation of the policy of Slobodan Milosevic that was conducted in the early 1990s in Croatia and Bosnia and Herzegovina. It also represented a turning point in the relationship of the international community with the man who was once transformed into a peacemaker and was now again starting a campaign of violence and

human rights violations in order to achieve his political goals. The story of Kosovo and the issues and problems regarding its status within Serbia began long before the events in Croatia and Bosnia could even have been foreseen. In the 1974 Yugoslav constitution, the autonomous province of Kosovo was granted a status almost equal to that of Yugoslavia's six republics, which moved Kosovo further away from Serbia's influence. Since Kosovo's population was already almost 90 percent Albanian by the 1980s, and the Serbs represented a minority, at the time, the Kosovo Albanians had already started resisting the growing Serbian control over Kosovo. Soon the first demands for autonomy would surface as the Kosovo Albanians started demanding the status of a separate republic for Kosovo.

The 1980s were defined by numerous protests and demonstrations that usually ended with strong reactions from the Serbian police, numerous arrests and, in some cases, with deaths. At the same time, the 1980s were marked by the rise of the Serb nationalism, which was at the time exploited and used most successfully by Slobodan Milosevic. He took advantage of the burning question of Kosovo to improve his position in the political structures of Serbia and to gain more influence.

"By exploiting the issue of Kosovo Milosevic quickly turned himself into a 'national' leader, a role which enabled him to quell all opposition to his takeover of the Communist Party machine." (Malcolm 1998: 342)

In the late 1980s first attempts to take away the autonomy of Kosovo were made. The Serbian assembly was preparing amendments to the constitution that would restrict its powers, and give Serbia more control over the province. The amendments were adopted in 1989 causing even more protests and violent clashes with the Serbian police.

In the 1990s strong initiatives were made by the Kosovo Albanians to declare Kosovo an independent republic. This only increased the human rights abuses from the Serb authorities, such as the dismissal of the majority of Albanians who had any kind of state employment who had taken part in any of the protests, with increased police violence, arrests and summary imprisonments becoming routine (Ibid.: 349). However, all of this was only the beginning of the more serious human rights violations which were to occur in 1998. Although the Kosovo Albanians hoped that the end of the war in Bosnia could also bring some kind of solution to the crisis that Kosovo was enduring, the international community hadn't paid any significant attention to Kosovo and the human rights abuses that were taking place there. At the same time, Milosevic left Dayton as a peacemaker and not as the person who was responsible for most of the violence and ethnic conflicts that followed the dissolution of Yugoslavia. Milosevic's connection to and influence on the events in Croatia

and later Bosnia were at the time ignored by the Western governments which regarded him as the only man who could help end the war and put pressure on the Bosnian Serbs to sign a peace agreement. Only three years later the rhetoric of the international community would change dramatically, suddenly pointing publicly at Milosevic and his responsibility for the wars in the Balkans. With a part of the Albanians seeking a more aggressive approach to resolve the status of Kosovo, in 1997 an organization called the 'Kosovo Liberation Army' publicly announced that it was taking a new and more aggressive approach to solving the question of Kosovo. This was the perfect pretext that was needed and used by Slobodan Milosevic in order for Serbia to engage its forces in Kosovo.

The actions of the Kosovo Liberation Army would later be used as an excuse to conduct ethnic cleansing of the Kosovo Albanians, which was executed mostly by the Yugoslav army and the Serb police as well as by paramilitary groups. The Human Rights Report (HRW 1997b) concerning the situation in Serbia at the time stated that:

"The most severe abuse occurred in the southwest region of Kosovo, inhabited by 1.8 million ethnic Albanians, who comprise 90 percent of the local population. Serb authorities continued to use political trials, police violence, and torture to repress ethnic Albanians, sometimes resulting in death."

In 1998 these abuses in the Kosovo province continued and deteriorated. The government of FRY (Federal Republic of Yugoslavia) led by President Slobodan Milosevic conducted several police and army actions in Kosovo, committing serious violations of international humanitarian law. Using the KLA's actions as a pretext, the special police forces and the Yugoslav army attacked several villages, leaving dozens of people dead, among them women and children (HRW 1998). The offensive by the government forces would intensify in the summer of 1998 with some of the worst atrocities occurring during September of the same year.

"Government forces attacked civilians, systematically destroyed towns, and forced thousands of people to flee their homes. The police were seen looting homes, destroying already abandoned villages, burning crops, and killing farm animals." (Ibid.)

This time the international community was determined to prevent a new war before it developed into a serious threat to the region's stability. As Power (2003: 446) explains, the situation in Kosovo was treated differently than the one in Bosnia, because it was regarded as more dangerous, with the potential to unleash violence throughout the rest of Balkans. In October 1998, the international community took its first steps in dealing with the Kosovo

situation. Richard Holbrooke, the main architect of the Dayton peace agreement, tried to negotiate a deal with Milosevic, threatening him with possible air strikes. A reduction of the Serb forces in Kosovo and a deployment of OSCE monitors were eventually agreed, but by the beginning of 1999 it was clear that Milosevic was not holding on to his part of the agreement. It was an event which took place in January 1999 in the village of Racak, where the Serb forces killed 45 people that clearly showed the policy of ethnic cleansing was continuing and ultimately made the international community take more decisive actions to stop the violence in Kosovo.

With the Rambouillet -negotiations failing to produce any results in February of 1999, the NATO finally decided to take military action to stop the violations occurring in Kosovo. On 24 March 1999, NATO started its bombing campaign against Serbia.

“It was the first time in history that the United States or its European allies had intervened to head off a potential genocide.” (Power 2003: 448)

It was the intention of the U.S. administration to fight the war exclusively from the air, and in this way to avoid the deployment of ground troops and reduce the number of casualties to a minimum. Although the international community expected the air strikes to produce quick results, forcing Milosevic to withdraw from Kosovo, the outcome was completely the opposite, as the human rights violations worsened with the beginning of the NATO bombing. The reason why the position of the international community towards Milosevic had suddenly changed lay in the fact that it was realised that the issue of Milosevic and his policies would not go away. Even with his role in the conflicts in Croatia and Bosnia being put aside and ignored since the Dayton accord, he was now starting a new campaign of violence which threatened to bring instability to the entire region. At the beginning of 1999, Slobodan Milosevic was described by President Clinton as the person who started the wars in Bosnia and Croatia and was named a ‘serial ethnic cleanser’ by a senior British official (Bonner 1999). This was obviously something that the international community till that point had chosen to ignore, considering the fact that Milosevic was its main negotiating partner in the Dayton peace talks. It was becoming clear that this was exactly the reason why Milosevic had up to that point still not been indicted by the ICTY. With the Kosovo situation continuing and the international community again seeking diplomatic solutions to the issue, there was a genuine concern that Milosevic could once again avoid legal accountability, with the signing of a new peace agreement that would end the war in Kosovo and in this way grant Milosevic immunity. With some American officials confirming that there was enough information in possession of the U.S. to establish Milosevic’s responsibility for previous war

crimes, especially in Bosnia, it became clear that the efforts to help build a case against him had not been taken because of the fact that Milosevic was considered an indispensable negotiating partner and a person needed to implement the Dayton peace accord. Since the Clinton administration had made Milosevic its main partner in achieving peace in Bosnia, helping to build a case against him by providing intelligence information to the Tribunal was not at the top of U.S. priorities (Ibid.). With Milosevic continuing the policy of ethnic cleansing, this time in Kosovo, a change of policy occurred, mainly in the way the U.S. had dealt with the Yugoslav president until that point. But with the new changed policy of the U.S. and the bombing campaign against Serbia underway, the Serb forces would intensify the ethnic cleansing in Kosovo. The Human Rights Report (HRW 1999a) stated that:

“The most egregious abuses took place in Kosovo during the NATO bombing period from March to June when Serbian and Yugoslav forces conducted a brutal "ethnic cleansing" campaign in which thousands of ethnic Albanians were killed. But these forces also committed many serious abuses in Kosovo before the NATO bombing of Yugoslavia began in March, including summary executions and indiscriminate attacks on civilians.”

The NATO bombing campaign lasted seventy- eight days and finally ended with Milosevic surrendering in June of 1999. Milosevic ultimately agreed to the withdrawal of all Serbian forces from Kosovo and the deployment of NATO troops to the area. Although the air strikes achieved their goal and finally brought the Kosovo war to a conclusion there was still much criticism of NATO's bombing campaign that often caused the death of civilians.

The results of the ethnic cleansing in Kosovo were that over a million Albanians were forced out of the province and an estimated 10,000 killed. The period following Milosevic's surrender was marked by recovery of numerous mass graves as well as evidence which pointed to the fact that operations were conducted in order to conceal the results of ethnic cleansing such as the removal of corpses from the execution sites in Kosovo and their reburial in Serbia. Concerning the work of the Tribunal, the Kosovo situation certainly produced the most significant indictment raised till that point. On 27 May 1999 Louise Arbour, the second chief prosecutor of the ICTY, indicted Slobodan Milosevic for crimes against humanity committed in Kosovo. She also indicted four other high political and military officials suspected of being involved in the same crimes. Although at the time there was no mention of any charges concerning the crimes committed in Croatia and Bosnia, this option was left opened. The raising of the indictment during the NATO bombing campaign, and, more importantly, during the negotiations with Milosevic concerning his surrender were made precisely out of fear that Milosevic could once again avoid his responsibility for the

crimes in Kosovo with the signing of a peace agreement. In this way Arbour wanted to ensure that the indictment was raised before any kind of settlement could be made. It would be the most significant decision and contribution of the second Chief Prosecutor to the work of the Tribunal, who in many ways ensured that this institution grew beyond anyone's expectations. It was a completely different approach to dealing with the Western political and military officials from the one taken by the first Chief Prosecutor that enabled Louise Arbour to achieve more significant results during her mandate.

7.1. The Second Chief Prosecutor Brings Changes

During 1996, the first chief prosecutor Richard Goldstone struggled to get the Tribunal working, but the under-funded ICTY lacked any significant results three years after its establishment. With NATO refusing to play the police force of the Tribunal in conducting arrests, with the Western governments sceptical about turning over intelligence information to the Tribunal, Goldstone was not successful in changing the relationship of the ICTY and the states that were legally obligated to cooperate and assist it but were in practice denying it the means to do its work. With the indictment against Radovan Karadzic and Ratko Mladic raised in the summer of 1995, and then again in November of the same year, with the absentia hearing on the evidence against Karadzic and Mladic in 1996, and the issuing of an international arrest warrant for the two war crimes suspects, Richard Goldstone had done all he could have for the Tribunal and announced his departure in October 1996 to take up a position on South Africa's Constitutional Court. By the time Goldstone was ready to leave the Tribunal, over seventy indictments had been made and only a few men were in custody. Even though the indictment against Karadzic and Mladic was raised in July 1995, for the next few years and during Goldstone's entire mandate they not only remained in Bosnia, but held their political and military positions and continued to move freely and exercise influence in Bosnia, with thousands of NATO troops surrounding them and refusing to arrest them. The case and trial of Dusko Tadic, who was at the time the only suspect available to the Tribunal, due to his arrest and extradition by the German authorities, was underway then but received much criticism since Tadic was a low- level war crimes suspect who hadn't held any high position in the command structure and didn't bring the Tribunal the desperately needed positive publicity. But for Goldstone, Tadic was the only option at the time, since the international community was reluctant to make arrests, especially of high- level suspects such as Karadzic and Mladic, which were portrayed as too dangerous both for NATO troops

and for the peace process in Bosnia. When Louise Arbour succeeded Richard Goldstone to become the second Chief Prosecutor, the Tribunal's reputation was already seriously endangered by the fact that until that point it hadn't succeeded in bringing indicted war criminals into its custody and there were no trials of high-level military or political officials. The Tribunal carried the image of a powerless institution that had no means to achieve its tasks and was probably going to fail in its pursuit of justice.

Upon Arbour taking over the office of prosecutor and taking a completely different approach to bringing indictments as well as changing the prosecutor's position towards the Western military and political officials, the institution would grow significantly in the three years of her mandate. The first move that Arbour made was to dismiss a number of the indictments brought by the first Chief Prosecutor, concluding that there was insufficient evidence to conduct successful trials for some of the cases. However, at the time the most obvious of all the problems that the Tribunal was facing was the question of NATO's cooperation and the arrest of indicted war criminals. Without suspects in custody the Tribunal was not going to move forward. One of the issues which was being seriously considered by the time of her arrival was the possibility of trials in absentia, since the Tribunal was unable to get the indicted into custody. This would have, most probably, completely shattered the Tribunal's reputation since it would have definitely confirmed that the institution had powers only on paper and that in reality it was going to remain symbolic, without any results to show. Since for Arbour the possibility of trials in absentia was out of the question, she finally found the solution to the problem of arrests and NATO's reluctance.

The first step that had to be taken was to change the approach of the Prosecutor in dealing with the media, and secondly, to change the way indictments are issued. The innovative idea of the second Chief Prosecutor was for the Tribunal to start issuing secret indictments.

"The secret, or 'sealed', indictments were attractive because they promised an element of surprise that reduced the risks of injuries and deaths during arrests." (Hagan 2003:100)

She would also take a much tougher approach towards Western governments, by not paying too much attention to political considerations, by standing firmly on the side of law, rejecting all excuses for inaction and demanding the cooperation that they were legally obliged to deliver. She was not willing to allow the Tribunal to be pushed aside and excluded from the political agenda. Differing from the one of Goldstone, her approach took much less

consideration of politics and was concentrated more on the legally established rules that needed to be followed. Arbour had developed a new strategy to put pressure on both the political and military leaders to make the arrests happen, and this was certainly one of the biggest and most important contributions that she made to the success of the Tribunal. By issuing secret indictments the NATO commandos had the advantage of surprise, since the indicted war criminals were not even aware that they were suspects. The other important approach that Arbour took was to threaten to go public if the Western governments refused to carry out arrests.

In this case she would use the media in order to put pressure on the governments, which could face embarrassment once the secret indictments were revealed to the public (Hazan 2004: 95).

Although Arbour faced much criticism from the NATO governments, which were against the policy of sealed indictments, which were in a way pressuring them to begin arresting suspected war criminals, she was determined to keep her policy and had no intention of backing away from her requests. Surprisingly the first arrest of a war crimes suspect who was under a sealed indictment did not take place in Bosnia, nor was it conducted by NATO forces. The first person to be arrested was Slavko Dokmanovic, a former Mayor of Vukovar, who was apprehended by the UN authority in eastern Slavonia, in Croatia, in June 1997. This arrest, which was conducted without any incidents, set an example for the future arrests made by NATO that would take place in 1997. With the election of Tony Blair as prime minister, Britain's policy towards arrests changed significantly. In July 1997, the British troops conducted the first arrest operation in Bosnia, apprehending one war crimes suspect and killing another who shot at the British soldiers. Both were under a sealed indictment. This arrest operation would be followed by several others as well as by voluntary surrenders. In December of 1997 the Dutch SFOR troops arrested two Bosnian Croats accused of atrocities committed in Ahmici in 1993 and at the beginning of 1998 the American SFOR troops performed their first arrest raid, apprehending Goran Jelisic. The arrests also aimed higher with NATO troops apprehending some high-level war crimes suspects such as General Radislav Krstic, indicted for his participation in the Srebrenica genocide, and Momcilo Krajisnik, former president of the Bosnian Serb assembly. These arrests first and foremost proved that there was no great danger involved in the raids, neither for the NATO troops nor for the situation in the country. It was ultimately Arbour's initiative that finally provided NATO with a way of conducting the arrests safely and made it difficult for it to keep using excuses of danger and risks for inaction. By 1999 the ICTY would have over thirty indictees

in custody, with another thirty-two at large (HRW 1999). The other issue that Arbour, like her predecessor, needed to face during her mandate, was the constant disregard for the Tribunal by some of the countries which were its main initiators and had a significant military presence in Bosnia. Regarding the support for the Tribunal, France demonstrated itself the least supportive, especially when it came to the issue of arrests. The fact that the French troops were the most reluctant to apprehend indicted war criminals, making their first successful raid in 2000, and with issues such as secret meetings between French military officials and indicted war criminals emerging, showed that France was not really dedicated to the cause of ICTY. Only French officers were refusing to testify before the Tribunal and the French were also giving no intelligence to the ICTY (Hagan 2004: 99). With Tony Blair as the new prime minister, the British policy towards the Tribunal improved significantly, but the French continuously refused to provide any assistance to the ICTY. One of the reasons for their unsupportive approach was the fact that the French had had troops in Bosnia prior to the Dayton peace accord and unlike the U.S. suffered casualties during the peacekeeping operations which made them even more reluctant to take the risks involved in conducting arrest raids. The uncooperative position of the French government towards the Tribunal culminated with the statement of the French defence minister Alain Richard in December of 1997, declaring that the Tribunal was carrying out a 'spectacle of justice' and that the French officers would not under any circumstances testify before the Tribunal (Ibid.:100). It was an incident that made Arbour act and publicly express her resentment towards the French policy of complete disregard for the ICTY. She travelled to Paris and made several statements to the press concerning the minister's comments. Her response was that the majority of indicted war criminals were located in the French sector and were feeling safe there (Hagan 2003: 111). She also criticised the French regarding the issue of testifying before the Tribunal, something that the British as well as U.S. officials had already done but the French constantly refused. The criticism did ultimately achieve its goal as the French officers were soon after authorized to testify before the Tribunal and French troops finally started making arrests. However, one thing Arbour did not succeed in was to achieve the arrest of Karadzic and Mladic, although Karadzic was known to have been spending most of the time in the French controlled sector. In any case, it was certain that without Arbour's new policy the international community would have most probably remained passive in regard to the arrests of indicted war crimes suspects. She applied the pressure necessary to make the governments finally act and in this way made it possible for the Tribunal to start conducting trials of, not only low- level perpetrators, but also of those who had held higher positions in the chain of

command and were thus more responsible for the atrocities committed. Another turning point during her mandate would occur in 1998 and early 1999, as the military offensives in Kosovo, conducted by Yugoslav authorities, intensified and as numerous human rights violations occurred. Once again Arbour proved resistant to political considerations as she made the most significant decision of her mandate and certainly one of the most important ones in the work of the Tribunal.

7.2. The Indictment against Slobodan Milosevic

By the end of 1998, with the situation in Kosovo worsening and the international community trying to get an agreement with Milosevic, securing a cease- fire and withdrawal of Serbian forces from Kosovo, Arbour feared that these negotiations could once again bring amnesty for Milosevic. At the end of 1998 Arbour had requested access to Kosovo to conduct on-site investigations, but she would only be granted a visa to go to Belgrade and talk to Serbian officials, something that Arbour had no intention of doing. She was interested in entering Kosovo with a team of investigators in order to gather evidence of human rights violations that were still taking place there. In January 1999, after the massacre in Racak, she appeared at the border determined to enter Kosovo and conduct an investigation. The entry was denied to Arbour as she had no visa. At the same time ICTY investigators in Albania and Macedonia interviewed refugees and collected evidence of crimes in Kosovo. With two Security Council resolutions from 31 March and 23 September of 1998, it was confirmed that the ICTY had jurisdiction over Kosovo and that the authorities in Belgrade had the obligation to cooperate with the Tribunal (Hartmann 2007: 11). Although Arbour did not succeed in entering Kosovo in January, appearing at the border between Macedonia and Kosovo did send a clear signal that she was not willing to back down and was determined to enter Kosovo and conduct an investigation at any cost. As the deal between Milosevic and Holbrooke was not followed through, the NATO forces finally decided to act and started the bombing campaign against Serbia in March of 1999. But the campaign of air strikes would only increase the human rights violations in Kosovo, with some of the worst crimes occurring in the period between March and June of 1999. Suddenly there was a shift in the policy of Western governments towards Milosevic. They appeared more willing to assist the Tribunal in its investigations of crimes in Kosovo, and Milosevic, the man they once negotiated with and relied on when it came to the peace implementation, was now being named an ethnic cleanser.

“As refugees streamed out of Kosovo, NATO officials accused Yugoslavia of genocide and compared Milosevic not just to Hitler, but also Stalin and Pol Pot.” (Bass 2000: 272)

Most importantly, Arbour would seize the moment to make her biggest decision yet. She had feared that Milosevic could be offered a trade, in which a cease- fire and the deployment of international troops could be exchanged for immunity from prosecution, but she was in no case willing to allow this to happen, warning constantly that the Tribunal would not accept any kind of a deal that foresees immunity. At the end of May Arbour had already prepared an indictment against Slobodan Milosevic. She refused to consult with any of the Western governments fearing that they might put pressure on the Tribunal to postpone the indictment. She did not inform anyone of her decision, except a handful of close co-workers. Being warned constantly by Russian as well as American officials that any kind of indictment would endanger the chances for peace, Arbour decided to proceed with the signing of the indictment without consulting any of the Western officials (Hartmann 2007: 14). The indictment included not only Slobodan Milosevic but also four other high- level military and political officials, among them, Serbia’s President Milan Milutinovic, Yugoslav Army Chief of the General Staff Dragoljub Ojdanic, Serbia’s Minister of Internal Affairs Vlatko Stojiljkovic and Yugoslavia’s Deputy Prime Minister Nikola Sainovic.

On 24 March 1999, the indictment was signed by an ICTY judge, and Arbour made the indictment public three days later. The indictment against Milosevic came as a shock to most Western officials, who regarded it as highly inconvenient because of its timing, just as Milosevic was being put under pressure with air strikes to agree to a ceasefire. The indictment was seen as endangering the prospects for a peace settlement. Despite the indictment Slobodan Milosevic was ultimately forced to surrender in June 1999, to agree to the withdrawal of Serb forces from Kosovo and to the deployment of NATO troops to the area. NATO troops which entered Kosovo in June were accompanied by teams of investigators from the ICTY with the mission of collecting evidence of atrocities committed in Kosovo that would later help complement the indictment against Milosevic.

However, even with the indictment raised, there was still no possibility for Milosevic’s arrest and transfer to The Hague. NATO did not have the authority to apprehend Milosevic in Serbia and so he remained out of the Tribunal’s reach. Nevertheless, the decision to indict a sitting head of state, for crimes against humanity, for the first time, was no less an important and historic event. Only weeks after making the Milosevic indictment public, Louise Arbour

announced that she was leaving the Tribunal in order to take a seat on Canada's Supreme Court. In this way Arbour left the implementation of her biggest and most significant decision to her successor.

Although it was still necessary to keep putting pressure on the Western governments to arrest Karadzic and Mladic, who were still at large, to complement the indictment against Milosevic and, more importantly, to accomplish his arrest and transfer to the Tribunal, Arbour had made the necessary preconditions for these events to happen. She secured the necessary policy changes from the international community regarding its general support and cooperation with the Tribunal, especially regarding its assistance in making the arrests of indicted war criminals.

She used the media to successfully bring to light the disregard of the Tribunal by some of the Western countries that were supposed to be assisting it, and succeeded in putting pressure on such governments to change their policy of non-cooperation and comply with the requests of the Tribunal through her criticism.

With some of the changes she made regarding Tribunal's work, particularly on the issue of indictments, the ICTY was transformed into an institution with influence on the international political scene. By making clear that the goals of justice had priority over political settlements, she made perhaps the most significant contribution to the Tribunal's success, the indictment against Slobodan Milosevic, which became the biggest proof of the Tribunal's evolution from a completely dependent and powerless institution, that stood in the shadow of states' interests and policies, to one of significant influence that demonstrated its independence in decision making, even when these were in conflict with the political agendas at the time. The Milosevic indictment proved that the Tribunal had grown stronger and was beginning to exercise influence on the events taking place around it. The preconditions for making such an indictment were that at that moment the goals of politics and international justice coincided to some extent.

As the Western countries realized that Milosevic had become a problem who could no longer be pushed aside and needed to be dealt with, the ICTY was regarded as one of the means with which to resolve the issue. By providing the necessary intelligence that had been denied to the Tribunal many times in the past and by assisting its investigators in performing investigations in Kosovo, Western countries supported the ICTY as its work became a valuable factor in resolving the Kosovo crisis. The ICTY and its prosecutor were prepared to seize the moment and push the Tribunal forward in its quest for justice. The struggle of the ICTY, however, needed to continue as it was clear that the bringing of an indictment, no

matter how groundbreaking, was not enough. As had been learned from the examples of Karadzic and Mladic, despite the indictment bringing the indictees to the courtroom often fails. So the difficult part of assuring that Slobodan Milosevic faced justice was left for the third Chief Prosecutor and again it would take a great deal of effort for the interests of politics and justice to coincide.

The next step was to complete the indictment against Milosevic, supplement it with new charges, including the extremely difficult task of charging Milosevic with crimes committed in Croatia and Bosnia and securing that he was held responsible for the same and ultimately to achieve Milosevic's arrest and extradition to The Hague, which would prove to be the most challenging part. Tasks which were waiting for the third Chief Prosecutor of the Tribunal, Carla Del Ponte, would not be easily accomplished as she continued to face the same problems of non-cooperation as her predecessors, as well as political agendas that continued to interfere with the work of the Tribunal.

7.3. Carla Del Ponte and the NATO Investigation

Carla Del Ponte took over the position of the chief prosecutor of the ICTY on 15 September 1999 and started dealing with the political pressures involved in trying to apply the rule of law equally to all with one very sensitive issue inherited from her predecessor. It was an issue that showed that the ICTY was beginning to act in a new manner based on an almost complete independence in decision making. During the NATO bombing campaign between March and June 1999, there was a lot of criticism, especially from human rights organizations, concerning the bombing of non-military objectives, which sometimes resulted in the death of civilians. Since NATO had taken on a policy of 'zero casualties', in its attempts to avoid any of the NATO airplanes being shot down, flying at high altitude, they were often unable to precisely determine their targets. The issue of possible violations of international law committed by the NATO forces was brought up and seriously discussed by the ICTY. Already during Arbour's mandate there were demands, coming mostly from Belgrade, for the ICTY to open an investigation, concerning possible violations of international law committed by NATO. Arbour then made clear to the countries of the Atlantic Alliance that the ICTY had jurisdiction over them and their actions in Kosovo. This produced a shock as it had never been thought possible that the Tribunal could even consider

an investigation into possible violations of the Geneva Conventions committed by NATO forces (Hazan 2004: 129ff.). As soon as it was made public the issue also demonstrated the sharp limits of international justice. Nevertheless it became a way for the ICTY to show that it had complete liberty to make investigations and possible charges, and that its decisions could not even be determined by the countries that sponsored it. In practice, it became evident that the issue would be almost impossible to pursue, as NATO countries immediately made clear that they would not tolerate such accusations or any similar charges. With Arbour showing that she was prepared to open an inquiry if necessary, she wanted to demonstrate that the ICTY was able to act independently and that it was impartial in its decision making. Eventually Arbour made no requests for an investigation, leaving this issue to her successor. Carla Del Ponte, a former Swiss attorney general, famous for her struggle against organized crime, took over the position of the Chief Prosecutor, with the question of a possible investigation concerning NATO's bombing campaign being one of the first issues she needed to deal with. The accusations regarding the possible criminal responsibility of NATO, which were drawn from its targeting of civilian objectives during the bombing campaign, became a highly sensitive issue, considering the fact that the countries involved in the bombing were the main sponsors of the ICTY, whose cooperation and assistance were in every aspect essential to its work.

Although she appeared willing to conduct such an investigation if the evidence showed that there was a need for one, Del Ponte ultimately announced that there was no basis for an investigation into NATO's bombing campaign, concluding that although mistakes were made, there was no deliberate targeting of civilians or any other non- military objectives during the campaign (Ibid.: 133). It remains unknown if perhaps pressure was put on Del Ponte to abandon the investigation, aware that the ICTY would continue to depend on the financial and military assistance of the countries involved. In any case it was clear that the Western countries, which rhetorically stood for the principles of the rule of law, were not so supportive of the same in a situation where these could apply equally to them.

All in all, even the notion or the insinuation that NATO could find itself under investigation by the ICTY showed just how far the Tribunal had come. In this way the Chief Prosecutor demonstrated that countries could not influence its decision making process, especially in regard to investigations and the making of indictments.

Although the reality of the situation surrounding the Tribunal was clearly one of ICTY depending on the cooperation of states when it came to the implementation of its decisions,

nevertheless this was a step forward in ICTY's quest to remain impartial and to apply the rule of law equally to all.

8. Milosevic's Arrest and Transfer to The Hague

In the year 2000, following the events in Kosovo and the NATO bombing campaign, Serbia began to experience major political changes.

In the September 2000 federal election in Yugoslavia, Slobodan Milosevic was defeated by the opposition candidate Vojislav Kostunica. Although he refused to accept the election results and tried to ensure another round of elections, the mass protests that followed eventually forced Milosevic to concede defeat. At the time Carla Del Ponte was already trying to find a way to finally secure the arrest and transfer of Slobodan Milosevic to The Hague. After taking up the position, President Kostunica soon made clear that cooperation with the ICTY was not one of his priorities and he sent a clear signal that he was not willing to extradite Milosevic to The Hague. The December 2000 Serbian parliamentary elections brought victory for the Democratic Opposition of Serbia (DOS), which won 64 percent of the vote and it would be the new Serbian Prime Minister Zoran Djindjic, who would play a major role in the arrest and extradition of Slobodan Milosevic. Welcoming the change of government in Serbia and the fall of Slobodan Milosevic, the EU immediately ensured the country financial support, and in a few months it lifted all the sanctions imposed on FRY since 1998. The issue of concern for the Tribunal was that the EU was avoiding putting pressure on Serbia to arrest and extradite Slobodan Milosevic, as a condition for receiving financial support.

"While E.U. bodies called on the new authorities in Belgrade to cooperate with the International Criminal Tribunal for the former Yugoslavia, they failed to condition financial assistance on the country's cooperation." (HRW 2001a)

The EU did not appear to be very interested in pressuring Serbia on the issue of indicted war criminals. Because of the sensitive political situation in the country, the EU wanted to assist Serbia and its new government in every way and did not consider it to be the best time to make conditions over the extradition of indictees.

On the other hand, Carla Del Ponte was not willing to let the moment pass, and she decided to put her all efforts into ensuring that Serbia was forced to hand over Slobodan Milosevic, as well as other indictees residing in Serbia. According to Hartmann (2007: 28), in January 2001 Carla Del Ponte encountered the newly elected Prime Minister Zoran Djindjic, who,

unlike the Yugoslav president Kostunica, wanted Milosevic to take responsibility for the crimes he had committed and who was generally more supportive of the ICTY. He wanted to establish more effective cooperation with the Tribunal and help bring the indicted war criminals to justice. This was essential, considering the fact that out of thirty- seven indictees at large at the time twenty of them had found refuge in Serbia. But although he was no longer serving as president, Slobodan Milosevic kept his power and influence in the state and both Djindjic and Del Ponte were aware that arresting Milosevic would not be an easy task. The people of Serbia also wanted to see Milosevic take responsibility for crimes committed, although these were often reduced to illegal actions within the state, mostly the damage done to the state economy and other issues like corruption; they were still not willing to face the crimes that Milosevic had ordered and orchestrated, which had taken place outside Yugoslavia. Unlike the European countries, the U.S. proved to be much more persistent in their demands for Serbia to cooperate with the ICTY and more willing to make cooperation a precondition for receiving financial aid. Money did ultimately play the decisive role in the extradition of Slobodan Milosevic to The Hague, but more importantly it was the willingness of the U.S. to keep pressuring Serbia and demanding Milosevic's arrest and extradition.

The Prime Minister of Serbia also put all of his efforts into arresting Milosevic and ending his interference in the country's politics in order to ensure that Serbia continued on its newly elected pro- western and democratic path.

On 1 April 2001, after spending hours negotiating and demanding assurances that he would not be transferred to The Hague, Milosevic was arrested. The accusations Milosevic was facing were corruption, abuse of power and embezzlement, without any mention of war crimes. Although Milosevic was arrested, Kostunica kept refusing the suggestion of turning Milosevic over to The Hague. At the same time Del Ponte did not give up the goal of having Milosevic transferred and was in no case willing to allow Milosevic to be prosecuted by Serb authorities.

She once again demanded support both from the U.S. as well as European countries to make the last effort necessary and press Serbia into transferring Milosevic to The Hague.

The donors' conference scheduled for the end of June, which was supposed to bring Serbia over a billion dollars in financial aid, was the perfect opportunity to achieve this goal. One of Del Ponte's main partners in the efforts to bring Milosevic to The Hague was Colin Powell, the U.S. Secretary of State. He would help Del Ponte to finally get custody of Milosevic using the donors' conference scheduled for June 2001. The EU was to officially host the donors' conference but Powell refused to participate until there was evidence that Milosevic

would be transferred to the ICTY and the conference was rescheduled several times as the Yugoslav government struggled to get Milosevic transferred (Hagan 2003: 208).

In the period following Milosevic's arrest, Carla Del Ponte visited some of the Western capitals trying to convince European countries that the arrest of Slobodan Milosevic itself was not enough and that it couldn't be permitted that he stand trial in Serbia. On her visit to Paris in May 2001, the French minister of defence at the time expressed his opinion to Del Ponte that he thought Milosevic should be tried in Serbia (Hartmann 2007: 33).

Europe was still refusing to put pressure on Belgrade to ensure that Milosevic was tried before an international tribunal, fearing this could jeopardize the situation in the country. The next stop for Del Ponte was Washington, which had already previously made Milosevic's arrest a condition for the release of financial aid and was this time willing to make his transfer a condition for their participation in the donors' conference scheduled for June. In May, on her visit to Washington, she received assurances from the Secretary of State, Colin Powell that the U.S. would not back down on their demands for Milosevic's extradition to The Hague using financial aid as the means to put pressure on Serbia (Ibid.: 34).

Aware that the money that was needed to rebuild the country would not be available until Milosevic was in The Hague, the Serbian prime minister finally took all the necessary steps to ensure his extradition.

Since the law in Yugoslavia prohibited the extradition of nationals, the Yugoslav president Kostunica insisted that it was first of all necessary to adopt a law concerning cooperation with the Tribunal, in order to extradite Milosevic to The Hague. The government finally adopted a decree of cooperation with the Tribunal in June 2001, in this way assuring the legal basis for the extradition of Slobodan Milosevic. As soon as the constitutionality of the decree was brought into question by the Constitutional Court, Djindjic decided it was time to act.

"To avoid the emerging political and legal gridlock, the government of Serbia transferred Milosevic to The Hague on June 28, invoking the Statute of the Tribunal and the Constitution of Serbia as the legal basis."(HRW 2001a)

Accompanied by one of the Tribunal's investigators, Milosevic was first transferred from Belgrade to a military base in Tuzla, in Bosnia, and then, with the assistance of the British Royal Air Force he was transferred to the Netherlands and taken to prison in Scheveningen, where the ICTY's detention unit is located. What had once been considered impossible had now been achieved. A former head of state had been extradited to an international tribunal to

be tried for crimes against humanity, after years during which it seemed that impunity had prevailed and that he had been given immunity by the peace accords he had signed. But this transfer was not achieved by the eagerness of states to ensure that justice was served, or by their will to end impunity for war crimes, but by the enormous efforts made by the Chief Prosecutor of the Tribunal, who had been able to unify the goals of politics and justice and achieve what nobody had thought possible. This was certainly the most significant achievement of the Tribunal, which will now remain known for its success in bringing a former head of state to trial, to answer for the most serious violations of international humanitarian law. People whose positions had historically offered them protection from having to take responsibility for their crimes, were now considered within the reach of international justice. This was the enormous achievement of the Tribunal and its Chief Prosecutors, who were able to transform the seemingly powerless institution, into one of great influence, which had overcome some of the biggest obstacles that exist in international law enforcement. Had Milosevic not been indicted and stood trial, the Tribunal might have been remembered as an institution that was only able to bring low-level perpetrators to justice, while the ones who had held high military and political positions and were thus most responsible for the planning and execution of the crimes, remained out of its reach. Although with Milosevic's transfer to The Hague an enormous step had been taken, it was still necessary to supplement his indictment and provide evidence for all of the crimes that Milosevic was suspected of. Connecting Milosevic to the crimes committed in Croatia and Bosnia would prove to be a difficult task and the trial itself, more complicated and longer than anyone could have anticipated, had an unexpected ending which gave the impression that the Tribunal ultimately failed in its historic attempt to bring a former head of state, considered responsible for so much destruction and so many crimes, to justice.

8.1. Indictment and Trial of Slobodan Milosevic

The moment that most had thought they would never witness had finally come. A former head of state, considered responsible for so many acts of destruction and numerous wars, who for years had dealt with Western politicians and diplomats and appeared to be out of reach of international justice was finally in The Hague to answer to accusations of war crimes, crimes against humanity and, ultimately, genocide. Although Milosevic was initially only charged with crimes against humanity committed in Kosovo, the third Chief Prosecutor Carla Del Ponte was determined to prove his involvement in the conflicts in Croatia as well

as in Bosnia and Herzegovina and prove that he had masterminded and stood behind both of these conflicts as well as planned and helped execute the crimes that were committed during them. However, Milosevic's appearance in court was not one of a defeated man, but of someone who continued to perceive himself as a head of state, with his own views of international justice and of the Tribunal he declared false from the start. In his first appearance before the judges on 3 July 2001, Slobodan Milosevic stated his opinion of the court and the indictment, which would not change much throughout the trial. To the question from the presiding judge Richard May if he wished to be given a council, Milosevic responded:

"I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ." (Milosevic 2001: 2ff.)

To the question from the judge if he wanted to have the indictment read, Milosevic responded: "That's your problem" (Ibid.).

When asked if he wanted to enter a plea, Milosevic started with the speech that later became the main part of his defence:

"This trial's aim is to produce false justification for the war crimes of NATO committed in Yugoslavia." (Ibid.)

Concluding that the accused had failed to enter a plea, according to the Rules, the Trial Chamber proceeded by entering a plea of not guilty on his behalf. Milosevic's rhetoric from then on would not change much. The courtroom became a stage where Milosevic continued to claim that the Tribunal had no authority to prosecute him and where he held countless political speeches. Following his transfer to The Hague, the next step for Del Ponte was to supplement his indictment and charge him for his involvement in the crimes in Croatia and Bosnia. To prove Milosevic's connection with the Serb leaders in both of these countries and to show that Milosevic was the one giving the orders, was an extremely difficult task, especially considering the lack of cooperation that the chief prosecutor was encountering in obtaining such evidence material as well as objections coming from within her office, regarding the charges in the Bosnian indictment in particular. According to Hartmann (2007), the issue of the Bosnian indictment, ultimately proved to be one of the most disputed inside the Office of the Prosecutor. The charge of genocide in particular represented an enormous

challenge. In October 2000, Carla Del Ponte had set up a team to work on the indictment against Milosevic concerning Croatia and Bosnia, with the task of having the investigation finished before summer. 1 October 2001 was set as a deadline to have the indictment prepared (Hartmann 2007: 49f.).

As the ICTY had free access to the territory of Kosovo and exhumations were underway, building a case based on crimes committed in Kosovo did not represent a problem, but Del Ponte faced much opposition from inside the Office of the Prosecutor and some of her colleagues in regards to building a case against Milosevic for crimes committed in Croatia and Bosnia. Hartmann (2007: 52, 63) who tries to give an insight into the events that were taking place inside the Tribunal and around the chief prosecutor, particularly points out the positions of Graham Blewitt, the deputy prosecutor, who did not believe in Milosevic's involvement in the crimes committed by Serbs in Bosnia and didn't believe that indicting Milosevic for these crimes was possible. She points out his negligence towards gathering evidence for the Milosevic case, as he was convinced that Milosevic would never be delivered to The Hague. She also mentions Geoffrey Nice, head of the prosecution team in the Milosevic case, who, according to her account, persistently demanded the severest charges against him to be left out of the indictment. Proving Milosevic's real influence on the Serb forces in Croatia as well as in Bosnia and gathering the evidence was a difficult task which ultimately revealed divisions inside the prosecutor's office between those who didn't see these charges as a priority and those who considered them essential. Making the indictment against Milosevic for crimes in Croatia proved to be much easier than in the case of Bosnia, since it did not contain the charge of genocide, which was in any case more difficult to prove. On 8 October 2001, Slobodan Milosevic was officially indicted for crimes against humanity committed in Croatia.

In the indictment it is stated that Milosevic is accused of "participating in a joint criminal enterprise".

"The purpose of this joint criminal enterprise was the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes" (IT -02- 54; 2001).

One of the ways in which Milosevic participated in the joint criminal enterprise was that he: “provided financial, material and logistical support for the regular and irregular military forces necessary for the take-over of these areas and the subsequent forcible removal of the Croat and other non-Serb population.” (Ibid.)

Milosevic was to be held accountable for the: “extermination or murder of hundreds of Croat and other non-Serb civilians”, “imprisonment and confinement of thousands”, “the deportation or forcible transfer of at least 170,000 Croat and other non-Serb civilians” and a number of other crimes committed in the period between 1 August 1991 and June 1992 (Ibid.).

At the end of September 2001, the team in charge of making the Milosevic indictment concerning Bosnia had prepared a document proving his central role in the policy of ethnic cleansing conducted in Bosnia, but the example of the indictment that was presented to Del Ponte contained neither the massacre in Srebrenica nor the siege of Sarajevo, with the explanation that there was just not enough evidence to charge Milosevic with these two central events of the war (Hartmann 2007: 57).

Since Del Ponte was not willing to accept an indictment that did not contain charges relating to these two events, she postponed the signing of the indictment to November 2001.

Although Del Ponte finally succeeded in her intentions, and the indictment containing both the events of Srebrenica and the siege of Sarajevo, was finally signed at the end of November 2001, the issue would come up again during the trial.

The Bosnian indictment against Milosevic stated that he participated in a joint criminal enterprise, with, among others, Radovan Karadzic, Ratko Mladic, Biljana Plavsic and Momcilo Krajisnik, and he was charged with committing the crimes of genocide, complicity in genocide, crimes against humanity and others.

“From on or about 1 March 1992 until 31 December 1995, Slobodan Milosevic, acting alone or in concert with other members of the joint criminal enterprise, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation and execution of the destruction, in whole or in part, of the Bosnian Muslim and Bosnian Croat national, ethnical, racial or religious groups, as such, in territories within Bosnia and Herzegovina.” (IT-02-54; 2001a)

The trial officially started on 12 February 2002, with the Prosecution presenting its evidence concerning the Kosovo case and Milosevic deciding to represent himself. It was this right that he used most successfully, not so much to answer to the charges brought against him, but rather to make political speeches, referring to a conspiracy against him and the entire Serbian

people, or exposing NATO's war crimes committed during the bombing campaign. He continued to claim that the Tribunal he called 'false', had absolutely no jurisdiction to prosecute him and that the goal of the trial was to cover up the war crimes committed by the international forces in Yugoslavia. In her opening statement on 12 February 2002, Carla Del Ponte described in advance the nature of the case and the trial in which a former head of state stood as the accused:

"The case against the accused will be complex. It will be broad in its scope, reflecting the nature of the charges, and yet it will be detailed, as criminal cases must be, where specific features of the evidence are required to be explored in depth. This case will certainly test the criminal justice process itself and will challenge the very capacity of a modern criminal court to address crimes which must extend so far in time and place." (Del Ponte 2002: 5)

The Milosevic trial began with an inverse chronology of the wars, starting with the charges concerning the Kosovo indictment first. Milosevic conducted his defence by shifting the blame for the crimes committed there to the United States and NATO, especially in regard to its bombing campaign. He did not deny that the crimes occurred in Kosovo, but tried to put the blame for them on the KLA and the international forces:

"Grave crimes were committed there against humanity, the crime of genocide and other war crimes. And also there is evidence of that, of direct cooperation in the commission of these crimes between the occupying troops - that's what they turned into - from being the Protection Force of the UN, they, on the one hand, and on the other hand the KLA that continued to loot, plunder, kill everybody and everything that was not Albanian in Kosovo including part of the Albanians themselves." (Milosevic 2002: 356)

Milosevic used the trial to portray himself and the Serbian people as victims of the lies spread by the Western governments and of their strategic goals. He blamed the NATO countries for the crimes committed in Yugoslavia and described his own actions and the ones of the Serb forces, as acts of self-defence from the Western aggressor and the terrorists in Kosovo.

"Nobody will be able to conceal or justify the monstrous crimes committed by NATO in the Yugoslav part of the European continent at the threshold of the new millennium in spite of ten years of media demonisation of Serbia, the Serb people, the intensified production of a factory of lies in a media war in which the global networks were misused." (Milosevic 2002: 413).

“I personally am honoured to have defended my country from NATO aggression in an honourable and chivalrous way.”(Ibid: 419)

The courtroom became a stage where Milosevic portrayed himself as a man who was against war, who knew nothing about the crimes and who was simply, together with the Serbian people, the victim of Western policy. Although the first part of the trial concerning Kosovo was already finished by September 2002, the second part of the proceedings, concerning the Croatian and Bosnian indictments, would take much longer, with charges, especially the one of genocide, demanding more time. With hundreds of witnesses brought in to testify about Milosevic’s responsibility and to try to show that the chain of command ultimately led to him, the prosecution only concluded the presentation of its evidence in the cases of Croatia and Bosnia at the beginning of 2004. The lack of time ultimately proved to be the biggest obstacle in making all of the charges against him. With the judges trying to save time, they often seemed to be making decisions benefiting the accused more than the victims. The best example of this was the decisions of the judges for the testimony of witnesses to be introduced in written form, but with Milosevic retaining the right to cross-examine the same witnesses, mostly by intimidating and discrediting them.

Del Ponte expressed her concerns that the time limit imposed by the judges simply didn’t leave enough time for the Prosecution to present the evidence in their possession in order to prove Milosevic’s responsibility, especially regarding some of the more serious charges, such as the one of genocide (Hazan 2004 :174).

She did not hide her disappointment in the judges’ decisions, putting herself constantly on the side of the victims and fighting to bring to light all of the crimes Milosevic was responsible for, no matter how much time it demanded. She was generally against dropping any of the charges, especially the severe ones, in order to save time.

Hartmann (2007: 61ff.) describes the constant fight of Carla Del Ponte to keep the two essential charges of the massacre in Srebrenica and the attacks on Sarajevo in the Milosevic indictment concerning Bosnia.

With the judges demanding the indictment be shortened, because of time constraints, Del Ponte constantly faced proposals inside her office for these two events to be left out of the indictment in order to save time and achieve a quicker verdict. She also had to face the officials inside the Tribunal who did not believe, or denied, the involvement of Milosevic in these events, claiming that the Bosnian Serb military and political leaders were the most responsible. However, Del Ponte was determined to show Milosevic’s role in the crimes committed in Bosnia and to demonstrate that he was the person who orchestrated them,

including the genocide committed in Srebrenica, despite even facing opposition from inside her office.

Hartmann (2007: 70) also points out the constant lack of cooperation from Western governments in regard to the transfer of information gathered by their intelligence agencies.

Although Del Ponte requested Washington to give the Tribunal the recordings of conversations between the Bosnian Serb leadership and Belgrade, made in the spring of 1995, her requests were ignored. Hartmann sees the reason for denying the Tribunal such information, which could allegedly easily prove Milosevic's involvement in crimes in Bosnia, as the fact that the Western governments feared revealing that they had prior knowledge of the events that occurred in Srebrenica, and were trying to avoid taking responsibility for not preventing them.

The enclave they were legally obligated to protect according to the Security Council resolution which declared Srebrenica a 'safe area' (as well as under the Genocide Convention under which all state signatories are obligated to prevent this crime), ultimately fell and although it was known that the U.S. in particular monitored the situation in Bosnia closely and had numerous sources of information, the killings were still not prevented despite a significant number of obvious warning signs.

Another reason why Hartmann (2007: 45f.) claims the intelligence information concerning Milosevic was not handed over to the ICTY, is that Milosevic was needed to sign the peace agreement which would end the three and a half years of war in Bosnia and therefore his involvement in the same conflict needed to be kept secret.

However, despite numerous objections and pressures, as well as lack of cooperation, Del Ponte finally succeeded in her intention to keep all of the charges against Milosevic, including the most severe one of genocide, with Srebrenica and Sarajevo remaining part of the indictment.

After the Prosecution concluded the presentation of the evidence in the cases of Croatia and Bosnia in February 2004, under the Rule 98 *bis*, of the Rules of Procedure and Evidence, the Defence had the right to file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment, if it believed that the Prosecution didn't present sufficient evidence to prove the charges. This is exactly what the Defence did. On 16 June 2004, the Trial Chamber made the decision to keep each count in the three indictments, including the charge of genocide.

“The effect of the Trial Chamber’s determinations is that it has found sufficient evidence to support each count challenged in the three Indictments, but there is no or insufficient evidence to support certain allegations relevant to some of the charges in the Indictments.” (Trial Chamber 2004)

Despite the insistence of the Prosecutor that Milosevic be provided with a defence attorney, he would continue to lead his own defence, using the opportunity to intimidate witnesses, spread propaganda and hold speeches, in this way using the valuable time that was ultimately being saved at the expense of the Prosecutor. Milosevic’s health problems during the trial became an additional obstacle in conducting the process and threatened to endanger all of the accomplishments made. In such a complicated trial, with a former head of state as the accused and dealing with events that occurred during a period of ten years and within three different wars, mistakes were bound to be made.

Although the Trial Chamber reached the decision to keep all of the counts in the indictments and even though the Tribunal ultimately obtained some of the necessary evidence to prove Milosevic’s involvement in the crimes committed in Bosnia, on 11 March 2006 Slobodan Milosevic died, ending in this way the proceedings against him and depriving the victims of a verdict.

8.2. The Mistakes Made and the Lessons Learned from the Milosevic Trial

At the beginning of the Milosevic trial, in her opening statement on 12 February 2002, Carla Del Ponte stated that:

“With the trial of this particular accused, we reach a turning point of this institution. The proceeding upon which the Chamber embarks today is clearly the most important trial to be conducted in the Tribunal to date. Indeed, it may prove to be the most significant trial that this institution will ever undertake.”

“I recognise that this trial will make history, and we would do well to approach our task in the light of history.” (Del Ponte 2002: 8)

Although the trial of Slobodan Milosevic was ended by his death in March 2006, without the judges reaching a verdict, the accomplishments of the Tribunal in this case, including the creation of the indictment, providing the evidence to support the charges against him, conducting the trial and putting hundreds of witnesses on the stand to testify as to his responsibility, were still significant and with them the Tribunal had made an enormous contribution to international criminal justice and revealing the truth about events in the Balkans. As it became clear that the trial would not easily reach its conclusion, after years spent with the Prosecution trying to prove the charges against the former head of state, the first critics openly stated their doubts about the accomplishments and the significance of the trial itself. A lengthy and an expensive process that appeared endless didn't seem to provide a good example and much hope for similar future proceedings. Judging the entire success of the Tribunal on this particular trial, it seemed to most as though Milosevic once again succeeded in cheating justice by obtaining the leading role in the courtroom, turning the situation to his benefit and the trial into his personal show. After four years, the trial seemed to be losing its importance in contributing to the enforcement of international criminal justice and the ending of impunity. While the duration of the trial was one of the main points of criticism, the Prosecution, or the Chief Prosecutor saw the process itself as being perhaps more important than simply reaching a verdict, especially the significance of charging Milosevic with some of the severest crimes, such as genocide, and proving the extent of his criminal responsibility. The differences between those who favoured dropping some of the counts in the indictment which were harder to prove, and those who found exactly those counts and their confirmation to be essential had to become apparent. It was impossible to predict at the time the trial started which approach was better and what the best way to proceed was. On the other hand, the Tribunal and its judges also chose to lead the proceedings in such a way as to provide the accused with the maximum of rights in order to conduct a fair trial, one that could not later be discredited in any way. This certainly led to a situation where Milosevic was at times given perhaps too much time and space to conduct his defence, mostly using the precious time to turn the courtroom into a political stage, with the judges granting him too much freedom in the courtroom.

Mistakes were certainly made, but it is a fact that can easily be justified if one takes into account the exceptional circumstances surrounding the trial. Trying to respond to the criticism, one should not forget the difficulties that the Tribunal encountered in conducting such a high-profile trial, with a former head of state as the accused as well as the significance of the trial and the proceedings themselves, which made their own impact, even though a

verdict was not reached. After four years of the trial and only weeks before the Defence could finish presenting its case, Slobodan Milosevic died; the trial received the kind of conclusion that threatened to make the entire effort worthless. After years of presenting the evidence and trying to prove the numerous counts of the indictment, the verdict which could have set the record straight, was now impossible to reach. This left the victims as well as the Tribunal officials who had worked for years to get Milosevic convicted, feeling extremely disappointed. In the press conference following Milosevic's death, the Tribunal's chief prosecutor expressed her regrets regarding the fact that, with the trial so close to its conclusion, it was terminated in this way.

"I deeply regret the death of Slobodan Milosevic. It deprives the victims of the justice they need and deserve.... During the prosecution case, 295 witnesses testified and 5000 exhibits were presented to the court. This represents a wealth of evidence that is on the record.... There were in total 466 hearing days. 4 hours per day. Only 40 hours were left in the Defense case, and the trial was likely to be completed by the end of the spring. It is a great pity for justice that the trial will not be completed and no verdict will be rendered." (Del Ponte 2006)

The question of the legacy of the Milosevic trial remained as well as the assessment of the Tribunal's work in regard to this trial. It was considered by many the most important event in its entire mandate, one which would determine either its success or its failure. In trying to assess the significance and the contribution that the trial of Slobodan Milosevic has made one must first acknowledge the difficulties involved in conducting such a trial.

One of the first difficulties that must be mentioned is that for the first time a former head of state was being prosecuted by an international tribunal and therefore there had been no previous proceedings similar enough to provide guidelines for the conduct of such a trial. This contributed to the fact that, even among the Prosecution team, there were divisions regarding the creation of the indictment and the conduct of the trial. Different views about what the priorities and the goals of the prosecution were also determined the course of the trial. Was the goal to reveal as many of the crimes in which the accused had taken part as possible and try to bring to light the immense number of cases in which he had committed a certain crime, or was the goal to pursue only those charges which were the easiest to prove even when they were not among the most severe, in order to reach a verdict as quickly as possible, and in this way avoid the possibility of the accused being acquitted, or as in the case of Milosevic, not living long enough to witness a verdict? Was the goal to give priority only

to the most serious charges and perhaps exclude numerous others in order to shorten the proceedings? There are certainly no easy answers to any of these questions and at the time the trial of Slobodan Milosevic was being conducted there were also no precedents to provide the best possible solution regarding some of these issues. The chief prosecutor Carla Del Ponte worked mainly with the intention to expose all of the crimes Milosevic was responsible for. She was determined to prove the numerous counts in the indictment but most of all to provide enough evidence to prove his involvement and to ensure a conviction on the severest charges such as the one of genocide. She had given priority to revealing the truth about the events in the Balkans and the crimes which occurred during the three wars and she made the exposure of Milosevic's full responsibility and the large scope of his criminal activity her goal. Would the option of charging Milosevic only for certain crimes which were easier to prove and leaving out others, in order to get a quicker conviction, while concealing part of his responsibility, have been a better solution? It depends on one's priorities.

Comparing the Milosevic trial to the trials against leading Nazis after World War II, Quayle (2005) explains why the trial before the ICTY took much longer than the 12 months which were necessary to finish the cases in Nuremberg. One of the reasons was the fact that in those cases the written orders and reports represented most of the evidence making the trial 'paper-based'. Milosevic, on the other hand left little written proof of his criminal plans. Because of this, the Prosecution struggled to prove the serious charges brought against him, relying mostly on testimonies, which demanded more time. The other, very important fact was that Milosevic's activity stretched over a period of ten years, and three different wars, conducted in completely different circumstances and with different crimes committed in each. Even if taking only this issue into account, one could not have expected either a simple indictment, or a simple trial. By adding to all this the complicated nature of the wars in the Balkans and the opaque role Slobodan Milosevic played in them, making sure he could not be easily connected to the activities of the Serbian leadership in Croatia and Bosnia, the trial itself could not have been conducted in a simple way. Beside these issues, the one that should also be pointed out is that according to the rules of the Tribunal, the defendant had the right to conduct his own defence. This was also one of the circumstances that made the trial significantly harder to conduct. Taking into account Milosevic's ability to manipulate the events in the courtroom, as well as to influence the people who participated in the trial, he too often managed to waste precious time to spread propaganda, intimidate witnesses, portray himself as a man of peace and too often make the trial look as if he, rather than the judges was conducting it. He wanted his last victory by ridiculing the court, showing off his power

and the power of his words and by once again turning the situation to his own benefit. His goal was to show that he was not defeated and could not be easily scared by the institution that finally managed to lower him to the position of accused. The issue of self-representation was also one of the main sources of criticism pointed at the Tribunal. Considering the fact that Milosevic was in ill-health and sometimes unable to conduct his defence, the court often had to change its schedule, making numerous pauses, which slowed the trial down significantly. The other source of criticism was the fact that the judges often seemed too preoccupied with respecting Milosevic's rights as a defendant, giving him more freedom in conducting his defence than an ordinary defence council might have had.

“When Milosevic's trial begun in 2002, Richard May, the original presiding judge appeared to be overly cautious to demonstrate that all due care was taken to ensure the high profile defendant's rights were respected” (Karavasili 2007)

This led to the fact that “Milosevic was allowed to occupy hours of the court's time, to personally attack witnesses and to make comments and statements that would have led any ordinary defense counsel to be held for contempt of court.” (Ibid.)

Although the issue invited much criticism as Milosevic continuously misused the freedom given to him by the judges, it also represented one of things that gave the trial enormous credibility when it came to the question of the fairness of the proceedings. The rights granted to Milosevic as the defendant, the freedoms he received in conducting his defence and the general treatment towards the accused, with high regard for his rights, made it difficult for people to label the proceedings ‘unfair’ or a ‘show trial’. Despite the amount of criticism the judges received, because they often seemed to be granting Milosevic too much freedom, proceedings conducted in this way leave no doubt about the impartiality and the credibility of the Tribunal and the fairness of the trial. Conducting the trial in a way which granted the accused, regardless of who he was and what crimes he was indicted of, every possible right in order to ensure a fair trial, only contributed to the overall positive assessment of the Tribunal's work. In this way the Tribunal proved itself truly impartial, with high regard to the principles of due process and respect for the rights of the accused.

One of several issues which made the creation of the indictment as well as the conduct of the Milosevic trial more difficult was the lack of cooperation from both the states in the Balkans as well as Western governments. This lack of will to cooperate fully and assist the Tribunal in performing its work was present throughout the Tribunal's mandate, as shown in some of

the previous chapters. In the case of Slobodan Milosevic the situation was no different, as the Tribunal once again struggled to obtain the evidence essential for the Milosevic indictment, facing opposition from both Serbia and the Western countries.

“The Serbian government in Belgrade, and the Bosnian Serb officials in Bosnia itself, sought time and time again to block the prosecutors’ access to witnesses and evidence in Serbia.” (Kaye 2006)

Apart from the usual opposition in Serbia to hand over the evidence to the Tribunal, evidence which, would in this case, prove the involvement of its forces in the war in Bosnia, according to Hartmann (2007), the Western governments were also reluctant to provide the information gathered by their intelligence agencies in the Balkans, which contained the necessary evidence for the Milosevic case, as well as for others. For whatever reason, either the usual reluctance of the governments and their intelligence agencies to share such information with an outside source, or the Western governments’ fear of being implicated in certain events of the war, this surely made the entire work of the Tribunal more difficult. The difficulties which usually accompanied the transfer of intelligence information ultimately proved to be part of the Slobodan Milosevic case as well.

Taking into account all of the difficulties mentioned, especially the fact that the trial of Slobodan Milosevic was the first of its kind to be conducted, one could say that mistakes were bound to be made. There was neither a precedent to follow, nor a formula for a successful trial to apply and if the trial had not ended in such an unexpected way, leaving a bitter taste of unachieved justice, the process itself might have gotten a much better appraisal than it eventually did. Ultimately, even the mistakes made during the process are among the lessons to be learned from this trial in order to improve the future ones. These mistakes will surely not set back, but rather improve the implementation of international criminal justice, especially when it comes to high- profile cases such as the one of Slobodan Milosevic. So what are the lessons learned and the accomplishments of the Milosevic trial?

The first that comes to mind is certainly the raising of the indictment itself, which marked a turning point in the development of international criminal justice. Even though at the time nobody honestly believed that Milosevic would ever face trial, it was considered a major breakthrough in the implementation of international criminal justice. High-level political figures who often plan and give orders for some of the worst crimes, are almost always granted immunity from prosecution because of their high positions, power and influence.

First the indictment and then the Milosevic trial proved that even the highest political officials could no longer feel untouchable and out of justice's reach.

The Milosevic trial certainly sent the most important message that even presidents can stand trial and be held responsible for the crimes they commit and that state borders no longer shield anyone charged of committing the most serious violations of international humanitarian law.

"As the first former president brought before an international criminal tribunal, the trial of Milosevic marked the end of the era when being a head of state meant immunity from prosecution" (HRW 2006)

As Crossette (2001) writes, this had raised concerns with those who fear national sovereignty has been jeopardized by these new developments in international criminal justice, while human rights lawyers have praised it as the beginning of "an age of justice without borders". The deterrence effect of this trial is also one of its major accomplishments. In the future high-level political and military leaders will think twice before ordering or committing a crime, as they have now become aware that their position does not automatically grant them immunity. The fear of being indicted or judged by an international tribunal could help prevent future crimes.

Another, very important legacy of the Milosevic trial is the fact that it leaves an enormous amount of evidence material which will serve a few different purposes. First of all, the evidence presented to the court during the trial shall serve as a historical record of the events in the Balkans. It will make understanding of the wars easier, and their causes and ultimately the truth about them more visible. Important evidence material, which finally ended up at the Tribunal, helped unveil the truth about the conflicts in the Balkans, so the information introduced during the trial has an importance of its own, regardless of the fact that a verdict was ultimately not made. For example, a video which emerged in 2005, showing a Serbian unit executing six Bosnian Muslims around the time of the Srebrenica massacre, forced Serbs to confront their involvement in the Srebrenica massacre and also to consider their government's broader responsibility for the Balkan wars (Kaye 2006). In many ways the trial disclosed Belgrade's involvement and responsibility for the crimes which occurred in Bosnia and Croatia, leaving important evidence which helped establish the truth about what happened. This evidence can also be useful in other cases conducted before the Tribunal.

“So over the four year trial a painstaking reconstruction has taken place, using witnesses, insiders, affidavits, letters, and transcripts of phone taps and radio intercepts. Some of that evidence may be admitted in other trials.” (Simons 2006)

The introduction of the evidence in the Milosevic trial forced people to face some of the facts they had previously denied for the first time. According to the Human Rights Watch report (HRW 2006), the Milosevic trial was the first ICTY case in which evidence relating to all three conflicts, was introduced and, according to the same report, it is likely to remain the only trial that comprehensively examines Belgrade’s role in Bosnia and Croatia. The Milosevic trial finally made public the full extent of the support of Serbia for the Serb combatants in Croatia and Bosnia, as well as the mechanisms by which this support was accomplished.

The next issue in the assessment of the legacy of the Milosevic trial is the question of procedural lessons. Being the first trial of a former head of state and involving such a complicated indictment, the Tribunal faced many difficulties in conducting the trial and determining the best possible way to handle the proceedings. Nevertheless, the trial itself, as well as the mistakes made in it, will become an example for future cases of this scope. The procedural lessons are certainly among the most important legacies of the Milosevic trial.

Last but not least, although there was no verdict, the trial of Slobodan Milosevic, brought some sort of justice for the victims. The fact that Milosevic’s responsibility for the crimes was exposed during the trial and that the evidence about the crimes was presented, might have provided some sort of satisfaction for the people who considered themselves to be victims of Milosevic’s criminal policies. The trial also gave many victims a voice, a chance to tell their stories, to unveil the truth and to ask for justice to be done. Even though in the end Milosevic was not convicted, the fact that he was brought before the court to stand trial for the crimes he was considered responsible of and that the evidence of his crimes being made public, certainly provided some sort of justice for his victims.

“There will now be no court verdict in the trial against Milosevic, but history’s verdict - in large measure because of this trial – will be harsh.” (Kaye 2006)

9. Tribunal's Achievements

At the time of writing the news that one of the four remaining indicted war crimes suspects at large had been apprehended was made public. Stojan Zupljanin, charged with crimes committed in the area of north -western Bosnia, was initially indicted in 1999 and after eight years on the run, he was arrested on 11 June 2008 in Serbia. He has been charged with crimes against humanity and violations of the laws or customs of war.

“Župljanin, the most senior police officer in the so-called Autonomous Region of Krajina (ARK) in northwestern Bosnia and Herzegovina during the 1992-1995 conflict and later an advisor to fugitive Radovan Karadžić, stands accused of involvement in a campaign to eliminate and permanently remove Bosnian Muslims and Bosnian Croats from the area between April and December 1992. The prosecution holds him responsible for murder, persecution, torture and deportation of non-Serb civilians, as well as for wanton destruction of towns, villages and religious institutions in numerous municipalities.” (ICTY 2008)

The arrest of Zupljanin leaves only three indicted war crimes suspects at large, among them the most wanted Radovan Karadzic and Ratko Mladic, who have been on the run for the past thirteen years, since being indicted by the Tribunal in 1995, and Goran Hadzic, indicted in June 2004, and charged with crimes against humanity and violations of the laws or customs of war. Hadzic is charged with participating in a joint criminal enterprise as a co-perpetrator. The purpose of the joint criminal enterprise was the permanent forcible removal of a majority of the Croat and other non-Serb population from approximately one-third of the territory of the Republic of Croatia in order to make it part of a new Serb-dominated state (IT-04-75 2008).

Although the two most wanted, Karadzic and Mladic, are among the three persons still at large, the number is astonishingly small. In a matter of years the Tribunal has transformed itself from an institution that was unable to get any of the indicted persons into custody, into one which now only seeks three indicted war crimes suspects. The changes have been visible in all aspects of the Tribunal's work. Having to cope with the lack of financial means, lack of staff, problems in obtaining intelligence information and, most importantly, getting the indicted persons into its custody, the Tribunal has grown into a powerful institution, making incredible progress in all areas. But the constant struggle in the relationship between the Tribunal and its sponsoring countries remains the core issue of its entire mandate, permanently determining the Tribunal's work. Although the relationship has improved

significantly over time, for the most part because of the initiatives of the Chief Prosecutors who successfully managed to find new ways to obtain the cooperation needed, support permanently depends on the political agendas and current political issues. The cooperation was always closely tied to the political situation both in the Balkans as well as in the Western countries and cooperation was mostly provided when either the pressure from the Tribunal, the media and the NGOs became too large or when the political goals and those of justice accidentally coincided. In any case, the success of the Tribunal today is evident, especially considering its humble beginnings, mostly in the number of indictments the Tribunal has brought, the number of judgements rendered, the severity of the crimes prosecuted and the high- level war criminals who found place in the Tribunal's courtrooms.

9.1. Budget

As shown in one of the previous chapters, the primary issue that the Tribunal had to face was lack of funding. Just how serious the countries which established it were about its mandate and work was shown by their initial disregard for its financing. With insufficient money to even contract the personnel needed, and provide for basic accommodation of the Tribunal, not to mention conduct the necessary investigations and evidence- gathering, the Tribunal's judges and prosecutor feared that the Tribunal was established but would remain functional only on paper, as it received such small amounts of money insufficient to cover even the basic costs that such a Tribunal has. This was certainly the first and biggest proof of just how much interest the countries and their political leaders at the time had for the execution of the Tribunal's mandate, confirming in a way the main arguments coming from the media and human rights organizations at the time, that it was an institution created as a substitute for more decisive action to resolve the situation in the Balkans, and one that was never meant to work. The Tribunal was pushed aside while the war in Bosnia was still raging, and did not receive much support until the peace agreement was signed and the Tribunal started to change its relationship with its sponsoring countries itself, making itself heard, putting more pressure through the media and ultimately using its legal basis and the mandate entrusted to it by the Security Council to ensure that it finally received the cooperation that the countries were legally obligated to provide, but were all too often evading. One of the core problems of the Tribunal at the beginning was the lack of funding and the lack of staff.

Today, the Tribunal has over a thousand employees with more than eighty different nationalities represented. Its budget has grown enormously in the past years as shown in the table below:

Table 1: Regular Budget of the ICTY

1993	1994	1995	1996	1997
\$276,000	\$10,800,000	\$25,300,000	\$35,430,622	\$48,587,000
1998	1999	2000	2001	2002-2003
\$64,775,300	\$94,103,800	\$95,942,600	\$96,443,900	\$223,169,800
2004-2005	2006-2007	2008-2009		
\$271,854,600	\$276,474,100	\$310,952,100		

Source: ICTY website: <http://www.un.org/icty/glance-e/index.htm>

From depending completely on voluntary contributions from states and various organizations and struggling to get the basic means necessary to start its work, the Tribunal has come to have its budget reach the incredibly high sum of over three hundred million dollars. Money was essential in achieving the Tribunal's goals, and although it produced certain criticisms of being too expensive, the final results of its work were certainly worth the money invested, not only the significance of its work in determining the truth but also in establishing lasting peace in former Yugoslavia, not to mention the enormous accomplishments achieved in the area of international law.

9.2. Important Cases and Judgements

The ICTY has indicted one hundred and sixty- one (161) persons for serious violations of international humanitarian law committed in the former Yugoslavia. It has until this point concluded one hundred and thirteen proceedings (113), and has forty- eight ongoing (48). Among the ongoing proceedings, 27 persons are currently on trial, 10 of them are before the Appeals Chamber, 7 at a pre-trial stage, 1 is awaiting judgement and 3 are still at large. Among the concluded proceedings 9 have been acquitted, 55 sentenced, 13 have been referred to national jurisdiction, and 36 have had their indictments withdrawn or are deceased (ICTY 2008a).

Some of the cases in which a sentence had been rendered, which have had a significant impact or importance and have stood out from other cases, will be mentioned here. Although some of the verdicts reached by the Tribunal were received negatively in the countries of the former Yugoslavia, sometimes causing outrage among the victims, who considered them too mild or inappropriate in some way, nevertheless, a number of verdicts, especially in the cases of high-level indictees, have made an enormous contribution to the establishment of the truth about the wars in the Balkans and have helped reveal the horrific crimes that occurred. Especially in the cases where the accused were charged with some of the most atrocious crimes committed during the wars, the sentence did not only carry a punishment for the accused, but also confirmed the facts about the crimes, pointed at their character, confirmed the suffering of the victims, condemned the crimes and helped establish a historic record. With the Tribunal able to impose the maximum sentence of life imprisonment, some of its verdicts often seemed too mild in comparison to the crimes with which the person was charged. On the other hand, the Tribunal has often imposed high sentences, though rarely the sentence of life imprisonment.

Two very significant convictions took place in 2001. In the first conviction on genocide charges before the ICTY, the Bosnian Serb Army General Radislav Krstic was sentenced to forty-six years in prison, a sentence later reduced by the Trial Chamber to thirty-five years. Krstic was initially indicted in November 1998 for genocide, crimes against humanity and violations of the laws or customs of war, based on his role in the events in and around the Bosnian Muslim enclave of Srebrenica between 11 July 1995 and 1 November 1995. At his initial appearance, Krstic pleaded not guilty to each of the counts (IT-98-33 2008). The trial took place between March 2000 and June 2001, with the Trial Chamber rendering its judgement in August 2001, finding Krstic to be guilty of genocide, among other crimes, and sentencing him to forty-six years in prison. The Appeals Chamber later concluded that:

“However, there was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Radislav Krstić, therefore, was pronounced not guilty of genocide as a principal perpetrator, but guilty as aider and abettor to genocide.” (IT-98-33 2008)

The Appeals Chamber rendered its judgement in April 2004, reducing his sentence to thirty-five years in prison. The significance of the judgement lay in the fact that with it the ICTY had officially found that genocide had occurred in Srebrenica.

Although Krstic's sentence was reduced on appeal to aiding and abetting genocide, the judgement ultimately legally confirmed that Bosnian Serb forces had committed genocide in Srebrenica.

Another important trial which was taking place at approximately the same time as the Krstic's concerned the Foca case with three indicted: Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. It was a case regarding the rape, enslavement and torture of Muslim women in the area of Foca in south-eastern Bosnia, which took place in the period between early 1992 and mid 1993. The trial began in March 2000 and ended in November of the same year. Although the indicted were low-level perpetrators, the case itself had enormous significance as it handled the sensitive issue of rape in wartime, one which often gets neglected in comparison to other war crimes. In the case of Foca, one of the most disturbing things was that the victims were sometimes as young as twelve or fifteen. The girls and women were held in various detention centres for a significant period of time where they were repeatedly raped. The case provided evidence that the rapes were widespread and systematic, and that they constituted part of a larger program of ethnic cleansing conducted throughout Bosnia. A crime which is not often pursued or whose perpetrators are often granted immunity had now been elevated to a completely different level. With the sentences in the case of the three indicted, rape was recognized as a crime against humanity, which was used as an instrument of terror. Another important part of the case was that it paid special attention to sexual slavery, thus broadening the definition of slavery itself. In court the prosecutors repeatedly used the term "sex slaves" to describe the plight of the victims, and it was the first time that an international tribunal prosecuted and condemned sexual slavery (Simons 2001, 2001a).

"The court said that the two convicted of slavery had kept their captives, some as young as 12, for up to eight months, abusing them sexually, forcing them to do domestic work for their captors, and renting and selling them to other soldiers." (Simons 2001a)

In February 2001, Dragoljub Kunarac was convicted of torture, rape and enslavement and was sentenced to 28 years imprisonment. Radomir Kovac was convicted of enslavement, rape and outrages upon personal dignity, and he was sentenced to 20 years imprisonment. Zoran Vukovic was convicted of torture and rape, and was sentenced to 12 years imprisonment (Trial Chamber 2001).

All three sentences were affirmed by the Appeals Chamber in June 2002.

The case surely set new standards when it comes to the prosecution of wartime crimes of sexual violence, and gave these violations a higher level of seriousness as crimes.

The siege of Sarajevo, which lasted for three and a half years, was certainly one of the most infamous events of the war in Bosnia, and it left an enormous number of casualties. In 1999 Stanislav Galic, who was the commander of the Sarajevo Romanija Corps of the Bosnian Serb Army, was publicly charged for crimes committed during the siege of Sarajevo. The indictment stated that:

“For forty-four months, the Sarajevo Romanija Corps implemented a military strategy which used shelling and sniping to kill, maim, wound and terrorise the civilian inhabitants of Sarajevo. The shelling and sniping killed and wounded thousands of civilians of both sexes and all ages, including children and the elderly. The attacks on Sarajevo civilians were often unrelated to military actions and were designed to keep the inhabitants in a constant state of terror.” (IT-98-29 1999)

Stanislav Galic was charged of conducting a campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population, as well as inflicting terror upon civilians, in the period between September 1992 and August 1994. This campaign resulted in thousands of civilians being killed or injured. Galic’s trial lasted from December 2001 until May 2003, and the Trial Chamber rendered its judgement in December 2003, sentencing him to 20 years imprisonment. However, in an Appeals Chamber judgement, reached in November 2006, Galic’s sentence was increased to life imprisonment. Another accused with charges relating to the Sarajevo siege was Dragomir Milosevic. Dragomir Milosevic first served as Chief of Staff of the Sarajevo Romanija Corps under its Commander General Stanislav Galic. From August 1994 he succeeded General Galic as Commander of the Sarajevo Romanija Corps, a position he held until approximately November 1995. In his indictment it is stated that:

“Dragomir Milosevic conducted a campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population which had the primary purpose of spreading terror among the civilian population.” (IT-98-29/1 2006)

In December 2007, Dragomir Milosevic was sentenced to 33 years imprisonment for his role in the siege of Sarajevo. The trial of Dragomir Milosevic also resolved one of the controversies of the Bosnian war, finding the Serbs responsible for the Sarajevo market massacre of August 1995, which left around 40 dead and dozens of wounded.

For years Serbian propaganda claimed that the massacre was staged by Bosnian Muslims in order to win international sympathy and stigmatise the Serbs. The court ruled that Bosnian Serbs and Dragomir Milosevic were responsible for carrying out the atrocity (Traynor 2007). In the case of Dusko Tadic, the judgement of the Appeals Chamber made in July 1999 has had enormous significance in determining the nature of the conflict in Bosnia. Although the Trial Chamber originally concluded the conflict could not be considered international Judge Gabrielle Kirk McDonald expressed a separate and dissenting opinion on the issue, and the prosecutor had made an appeal regarding the issue:

“In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina ("BH") on the one hand, and the FRY on the other. Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.” (Appeals Chamber 1999)

The Prosecutor requested the Appeals Chamber explicitly state the nature of the conflict between the Bosnian Serb army and Bosnia and Herzegovina, as it pointed out the issue that Bosnian Serb forces “could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY.” (Ibid.)

The decision of the Appeals Chamber certainly was one of the most significant in revealing the role of FRY in the conflict in Bosnia, and the political and military control it exercised over Bosnian Serb authorities. The final conclusion of the Appeals Chamber was that:

“The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the *Republika Srpska*⁷ were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict.” (Ibid.)

In the case of the indicted Dario Kordic and Mario Cerkez, the involvement of Croatia in the events which occurred in Bosnia during the period of 1992 and 1993 was handled. The two accused are Bosnian Croats who played major roles in the conflict which took place in central Bosnia between Bosnian Muslims and Bosnian Croats. Dario Kordic had been an important political figure at the time, who acted as president of the Croatian Democratic Union of Bosnia and Herzegovina⁸ as well as Vice- President of the Croatian Community of

⁷ Republika Srpska - The Serbian Republic of Bosnia and Herzegovina established in 1992

⁸ Croatian Democratic Union of Bosnia and Herzegovina (HDZ- BiH) was the principal political party of the Bosnian Croats

Herceg- Bosna⁹. Mario Cerkez had been a commander of a Brigade of the Croatian Defence Council¹⁰. The Trial Chamber stated in its judgement:

“The Chamber finds that the conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina was internationalised by the intervention of Croatia in that conflict through its troops.” (Trial Chamber 2001a)

The Trial Chamber also found that Croatia exercised overall control over the Croatian Defence Council, and that the Croatian community of Herceg -Bosna was founded with the intention that it should secede from Bosnia and Herzegovina in order to be unified with Croatia (Ibid.). The Trial Chamber ultimately concluded that:

“The Trial Chamber finds, on overwhelming evidence, that there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb.” (Ibid.)

These findings were later confirmed by the Appeals Chamber.

Other cases have also established similar important facts about the war which were legally confirmed by the Tribunal through its judgements. Such judgements are essential in establishing the truth, helping people in the Balkans come to terms with the events which occurred during the war and ultimately contribute to the reconciliation between the nations of the Balkans.

Although a number of controversial decisions were also made, which caused negative reactions within the Balkan countries, in general the Tribunal’s rulings have had an enormous influence on the establishment of truth about the wars and the war crimes committed. As it was impossible for the Tribunal to bring all of those responsible for war crimes to justice, it has primarily concentrated itself on prosecuting those individuals who held high political and military positions, and who were considered to be most responsible for the atrocities committed. But one of the issues which, from the victims’ point of view, deserved most criticism was the sentencing of the Tribunal. In two surveys regarding the work of the ICTY, conducted in Sarajevo in 2000 and 2003, with people of different nationalities, the general

⁹ In November 1991 Bosnian Croats created a new community or entity called the ‘Croatian Community of Herceg-Bosna’ (HZ H-B) within Bosnia and Herzegovina. In 1993 it would be renamed to Croatian Republic of Herceg- Bosna

¹⁰ The Croatian Defence Council (HVO) was the main defence authority of the Croatian Community of Herceg -Bosna

view and perception of the Tribunal, was questioned. Part of the criticism directed at the Tribunal had to do with, for example, the perceived leniency of the decisions and its disapproval of the use of plea bargaining (Ivkovic & Hagan 2006).

The majority of the people questioned regarded the procedures of the ICTY as fair but considered the sentences too lenient. In general, no one can deny the overall positive contribution of the Tribunal regarding the punishment of war criminals and the establishment of a historical record. Keeping in mind especially the reality of international criminal justice and the fact that often even the most responsible war criminals are never prosecuted, one cannot ignore the significance of the trials conducted and the judgements made by the ICTY. One could not have expected each decision to be received positively, or to be regarded as adequate, especially among those most affected by the Tribunal's work. The ICTY was bound to receive criticism as well as disapproval from some of the parties involved in the conflicts, but this does not in any way undermine the significance of its work and its results, as the Tribunal has proven itself impartial and with high regard for the principles of due process, procedural fairness and the rights of the accused. Keeping all of this in mind one can certainly make an overall positive assessment of its accomplishments.

9.3. The Completion Strategy and the Departure of Carla Del Ponte

At the time when Carla Del Ponte took over the Office of the Prosecutor at the end of 1999, there were over thirty publicly indicted war crimes suspects at large. By the time she left office this number had decreased to only four indicted war crimes suspects. One of her major successes was certainly the apprehension and transfer of Slobodan Milosevic to ICTY custody, and the trial which followed. Although his death in 2006 left many people disappointed and deprived of justice, the trial itself, the evidence gathered and presented as well as the acknowledgements made, make the trial of Slobodan Milosevic one of the Tribunal's biggest accomplishments and one of its major contributions to international criminal justice. Through the constant efforts, of its chief prosecutors in particular, the ICTY has gradually developed into an important institution making historic indictments, trials, setting numerous legal precedents, determining the facts and the truth about the conflicts in the Balkans and making enormous progress in the area of international criminal justice. The ICTY ultimately made giant steps forward in ending impunity and bringing war criminals to

justice, especially when it comes to persons holding the highest political and military positions.

The ICTY and its work will also represent a role model for similar institutions, and also provide examples of the best possible way to conduct high profile trials, and to make the procedures as efficient as possible.

With Resolution 1503 in 2003 and with Resolution 1534 in 2004, the Security Council endorsed the completion strategy of the ICTY. It called for the Tribunal to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010. The Security Council also urged the Tribunal to concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes and to transfer cases involving those who may not bear this level of responsibility to competent national jurisdictions. In implementing the completion strategy the ICTY began referring some of its cases to national judiciaries in former Yugoslavia. The Tribunal transferred some of the lower level accused, already indicted by the ICTY and located in the Tribunal's custody, to national jurisdictions and also referred case files to national prosecutors, in cases where the Tribunal's Prosecution collected evidence but the investigation was not completed and the indictment was not issued due to the deadlines of the completion strategy.

The Tribunal has up to this point transferred a total of 8 cases involving 13 persons indicted by the ICTY to courts in the former Yugoslavia, mainly to Bosnia and Herzegovina (ICTY 2008b). The completion strategy has had a positive impact on the development of national judicial systems in former Yugoslavia. In Bosnia and Herzegovina a specialized chamber for trying war crimes cases was created within the State Court of Bosnia and Herzegovina. The establishment of this War Crimes Chamber was essential as the majority of cases referred by the ICTY concern crimes committed in Bosnia and Herzegovina. The War Crimes Chamber became operational in March 2005, and in September the ICTY transferred its first case to the War Crimes Chamber. The prosecution on national level is extremely important as the ICTY has only been able to prosecute a limited number of perpetrators.

At the end of 2007, Carla Del Ponte stepped down as the Chief Prosecutor of the Tribunal, and was replaced by Belgian Serge Brammertz, who officially took over the post in January 2008. Del Ponte ultimately left her post disappointed in the fact that Karadzic and Mladic had not been arrested, fearing that political issues were taking priority over their arrest and that this could undermine other achievements of the Tribunal. Before leaving the post she made her last appeals to the international community to keep putting pressure on Belgrade to arrest

the two indicted men and to the Security Council not to close the Tribunal before they are brought to justice.

In some of the interviews she made before the end of her mandate, Del Ponte acknowledged the fact that politics had interfered with the work of the Tribunal on a number of occasions, and confirmed that the states often failed to provide the information she requested (Spiegel 2007). She expressed her opinion that the international community, including NATO and EUFOR were not doing enough to locate Karadzic and Mladic (Glasse 2006). About the cooperation of states in general and the interference of politics in the work of the Tribunal she stated that:

“When politics is interfering in the judicial, you always have a problem solving this issue of the arrest of fugitives, searching for documents, access to witnesses. And the international community, European Union, or even the United States are supporting us but always with political thinking.” (Ibid.)

Carla Del Ponte ultimately felt both satisfied with the many accomplishments the Tribunal has made as well as disappointed with the fact that Karadzic and Mladic had not been arrested. For Del Ponte the establishment of what happened is one of the greatest achievements of the Tribunal. She points out that the ICTY had prosecuted a head of state, prime ministers, chiefs of army staffs, police generals and high level officials. The Tribunal has provided justice to thousands of victims and given them a voice. Generally it contributed to the development of international law and the creation of other courts such as the ones for Rwanda, Sierra Leone and Cambodia (Swissinfo 2007)

Although Del Ponte admitted being disappointed the trial of Slobodan Milosevic didn't reach its conclusion and that Karadzic and Mladic had not been arrested, she still acknowledged the numerous accomplishments the Tribunal has made, naming some of the significant judgements, like the one which proved that genocide was committed in Srebrenica or that rape was used as an instrument of terror. Bringing justice to the victims, establishing the truth about what happened and judging some of the most responsible war criminals are among the essential accomplishments of the Tribunal. The non-arrest of Karadzic and Mladic ultimately cannot be considered a failure of the ICTY, as it had almost no influence over the issue and the responsibility lay completely on the states which were unwilling to make the efforts necessary to arrest the two indictees. Whether the reasons are hidden political agendas or unwillingness to take risks, the fact that the two are not in ICTY custody can only be contributed to states and their policies which advantage their political interests over international justice, prosecution of war criminals and, ultimately, their legal obligations.

10. Conclusion

At the time when I considered the ICTY as a possible subject of my work I held the position mostly present with individuals who are in some way affected by its work. Those individuals are mostly ones involved in the conflicts which occurred in the Balkans or who were somehow affected by their consequences. This position is usually characterized by criticism directed at the Tribunal and a generally negative attitude towards its results. Needless to say, my approach and general view of the ICTY has changed, as one can conclude by simply reading my title. Learning more about the work of the ICTY and about the difficulties it faced throughout its mandate in particular, not to mention the significance of the decisions it has made, one comes to regard its work positively and sees the importance its results have had for the future of not only the region in question but of international criminal justice in general. Having witnessed the type of crimes which occurred on the territory of the former Yugoslavia, perhaps one views no procedure fair enough and no sentence harsh enough to deal with their perpetrators. On the other hand, when one takes into account the realities facing international criminal justice and its history which lacks positive examples of justice being done and war criminals being held accountable for their actions one also comes to appreciate any kind of justice even if it is a partial one. When we look at the realities of international politics we come to realize that justice, war crimes sanctioning and accountability more than often lose priority over other issues, and most likely will continue to play a subordinate role in the near future as well. Considering just some of these facts, the mere establishment of the ICTY itself seems like an achievement which is not to be taken for granted. The scepticism towards the ability of the ICTY to produce significant results was more than justified considering the reasons for its establishment and the initial disregard for its work. However, the ability of the Tribunal to take advantage of its strong legal basis and to exercise pressure on states to comply with their duties and obligations using the help of numerous NGOs and the media had also been underestimated. It was never envisioned that the Tribunal would prosecute all of the violations which occurred, and to punish all of their perpetrators, nor would this have been possible. A small portion of justice was sought through the prosecution of the most responsible individuals who took part in the atrocities committed, and more importantly, to make decisions which would be crucial in the establishment of a historical record. But even this small portion of justice was from the beginning brought into question when states showed insufficient political will to cooperate with the Tribunal and assist it in the realization of its tasks.

Both the states in the Balkans as well as certain Western governments made the execution of its mandate difficult by trying to protect their interests in one way or another. The interesting thing is that the non-cooperative attitude of the Balkan states was anticipated and from the beginning accepted as almost inevitable, but the same thing coming from states which were its main initiators and, at least rhetorically, supporters, was not. This lack of political will and the common disregard for the Tribunal was especially analysed in some of the first chapters demonstrating the numerous difficulties which the ICTY faced and had to overcome in order to succeed in its pursuit of justice. Breaking out of the role of a mere political instrument and an institution which suffered from the constant prevalence of political agendas over its own, the Tribunal ultimately made states take notice of its existence as it found new and inventive ways to accomplish its goals. These positive changes in the conduct of its work, which in the end made it successful, can only be contributed to individuals working in the Tribunal and fighting strongly for the accomplishment of its mission, especially the Chief Prosecutors. Putting aside the fact that it is impossible for all parties involved to be satisfied with the Tribunal's work and decisions one can safely conclude and say that the accomplishments of the Tribunal have been numerous, their significance enormous and their role historical, and just how important may yet be fully acknowledged in some cases. The number of people indicted and prosecuted by the Tribunal may not seem large considering the number of conflicts and war crimes which fell under its jurisdiction, but if we look at the rankings of the accused, their military and political positions and thus their responsibility for the violations which occurred it becomes evident that ICTY did eventually succeed in its intention to prosecute those individuals most responsible and simultaneously among those who usually manage to escape justice or are granted amnesty. The ICTY managed to hold them responsible and even brought a former head of state into its custody and charged him with the most serious violations of international humanitarian law. Considering the criticism that its predecessor received, one can hardly accuse the ICTY of being "victor's justice" or "show justice" as it continuously proved itself fair and with high regard for due process throughout its mandate. It has ensured in all cases that the rights of the accused were respected and that they were provided with all the necessary conditions to respond to the charges brought against them and to conduct their defence. The success of Tribunal is reflected in another important aspect of its decisions and that is their role in determining the nature of the conflicts in question. With a few selected cases mentioned in one of the closing chapters of the work, it was demonstrated that the Tribunal contributed enormously to the establishment

of truth and a historic record about the events which occurred on the territory of the former Yugoslavia.

This could be characterized as the biggest contribution and accomplishment of the Tribunal since this was perhaps the only way to set the record straight and certainly the most credible, preventing the possibility of crimes being denied or falsely portrayed and forcing societies to deal with the crimes committed and their true nature. In the long-term the Tribunal can only help the reconciliation process and enable the nations in the region to come to terms with their past more easily. Besides the significance of its accomplishments for the region in question, the prosecution of war criminals who committed horrific crimes provided at least a small portion of justice for the victims. It is also important to mention that the ICTY has had an enormous influence on the development of international law and has helped pave the way for the creation of other courts which are to prosecute similar violations. Taking into account all of these arguments it becomes easier to give a positive assessment of its work and conclude that the ICTY was ultimately successful despite the lack of political will.

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12. Summary

As a response to the mounting pressure from the public and numerous human rights organizations for the international community to in some way intervene in the conflict in the Balkans and stop the massive human rights violations taking place there, the International Criminal Tribunal for the former Yugoslavia was established in May of 1993. That the establishment of the Tribunal primarily represented an alternative to a more decisive reaction to the atrocities taking place was later confirmed by the stunningly small amount of support that the Tribunal received in all areas essential to its mandate. By pointing out the difficulties which the Tribunal had to face, primarily in the areas of financial and military assistance and the transfer of evidence material, it becomes evident that the Tribunal was envisioned as an institution which could contribute to the political goals pursued by the international community at the time but would not be allowed to jeopardize the political agendas which too often differed from the goals of war crimes sanctioning. With the cases of Radovan Karadzic and Ratko Mladic this position towards the Tribunal and its work became perhaps most obvious, as their non-arrest represented the culmination of the lack of will of primarily the three states most involved in the Balkans -- the U.S., Great Britain and France -- to assist the Tribunal in the completion of its mandate.

On the other hand, as the Tribunal was equipped with a strong legal basis, the individuals working for the Tribunal, especially its Chief Prosecutors managed to pressure states into cooperating with and assisting the Tribunal. With certain innovations introduced in its work and using the pressure which can be created through the media, the ICTY ultimately succeeded in changing the policy of the international community towards its work and secured at least partial cooperation. The ICTY produced significant results, bringing senior political and military officials to respond to the charges brought against them and handing down several extremely important decisions which determined the character of the crimes committed as well as the nature of the conflicts in general. The indictment, arrest and trial of Slobodan Milosevic were certainly among the biggest accomplishments made by the ICTY and a clear demonstration of just how historical its work and decisions were. Bearing all of these facts in mind it can be concluded that the ICTY was ultimately successful despite the lack of political will, and that it has made enormous contributions not only to the sanctioning of war crimes committed in the former Yugoslavia but also to the international criminal justice in general.

13. Zusammenfassung

Der Internationale Strafgerichtshof für das ehemalige Jugoslawien (ICTY) wurde im Mai 1993 als Reaktion auf die zunehmenden Forderungen der Öffentlichkeit, insbesondere von Menschenrechtsorganisationen, zur Intervention gegen die schwerwiegenden Menschenrechtsverletzungen im Balkankonflikt, begründet. Das erstaunlich niedrige Ausmaß an Unterstützung in allen Bereichen seiner Mandatsausübung bestätigt, dass die Schaffung des Tribunals eher eine Alternative gegenüber einem noch entschiedeneren Auftreten gegen die stattfindenden Gräueltaten darstellt. Durch die Darstellung der Hindernisse, mit denen das Tribunal konfrontiert wurde, hauptsächlich im Hinblick auf die mangelnde finanzielle und militärische Unterstützung, wird evident, dass der ICTY als eine Institution konzipiert wurde, die zur Erreichung der politischen Ziele der internationalen Gemeinschaft beitragen sollte, ohne aber die politische Tagesordnung zu gefährden, wenn Sanktionen gegen Kriegsverbrechen mit dieser in Konflikt kamen. Am deutlichsten tritt diese Haltung gegenüber dem Tribunal im Zusammenhang mit den Fällen Radovan Karadzic und Ratko Mladic zutage. Das lange Ausbleiben ihrer Verhaftung stellt ein Resultat des fehlenden Willens aller drei der am heftigsten involvierten Staaten – den USA, dem Vereinigten Königreich sowie Frankreich – dar. Auf der anderen Seite wurde das Tribunal mit einer starken rechtlichen Basis ausgestattet. Die Mitglieder des Tribunals, insbesondere sein Hauptankläger, waren dadurch in der Lage, Druck auf Länder auszuüben und deren Kooperation zu erreichen. Durch einige Innovationen und nicht zuletzt durch die geschickte Ausnutzung des vorhandenen medialen Drucks, hat der ICTY letztendlich erreicht, den Standpunkt der internationalen Gemeinschaft gegenüber seiner Aufgabe in Richtung einer zumindest teilweisen Kooperation zu verändern. Die Bedeutsamkeit des ICTY zeigt sich vor allem darin, dass sich ranghohe Militärs und Politiker gegenüber den gegen sie vorgebrachten Anklagen verantworten mussten sowie darin, dass wichtige Entscheidungen getroffen wurden, die den speziellen Charakter der stattgefundenen Kriegsverbrechen sowie der Kampfhandlungen im Allgemeinen identifiziert haben. Einer der wichtigsten Erfolge, der die historische Tragweite der rechtlichen Arbeit und Entscheidungen belegt, bestand in der Anklage, Verhaftung und dem Prozess gegen Slobodan Milosevic. In Anbetracht all dieser Fakten darf der Schluss gezogen werden, dass der ICTY letztendlich, trotz mangelndem politischen Willen, erfolgreich war, und insofern einen enormen Beitrag sowohl zur Sanktionierung von Kriegsverbrechen im ehemaligen Jugoslawien, als auch zur Weiterentwicklung der internationalen Strafgerichtsbarkeit insgesamt, geleistet hat.

Curriculum Vitae

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Berufserfahrung:

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Sprachkenntnisse:

Bosnisch – Muttersprache

Englisch – fließend

Deutsch – fließend

Französisch – gute Kenntnisse

Spanisch – gute Kenntnisse