

September 2000

## The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace

Franca Baroni

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

---

### Recommended Citation

Franca Baroni, *The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace*, 12 Pace Int'l L. Rev. 233 (2000)

DOI: <https://doi.org/10.58948/2331-3536.1228>

Available at: <https://digitalcommons.pace.edu/pilr/vol12/iss2/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# ARTICLES

## THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND ITS MISSION TO RESTORE PEACE

Franca Baroni†

I. Introduction .....	233
II. Context of the Tribunal's Creation .....	235
III. Peace Through Justice: The Goals and Challenges of the Tribunal .....	237
A. Goals Set in the Resolution 827 and Circumstances Leading to its Adoption .....	237
B. ICTY Functions.....	238
1. Truth Finding .....	238
2. Individualization of Guilt .....	241
3. Deterrence .....	243
C. Alternative Forms of Justice.....	248
D. Tribunal's Challenges.....	250
IV. Conclusion.....	252

### I. INTRODUCTION

On May 25, 1993, the United Nations Security Council ("Security Council" or "Council") unanimously adopted Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia ("ICTY").<sup>1</sup> The Court's mandate is to prosecute persons responsible for serious violations of interna-

---

† Dr. Franca Baroni holds a J.D. Equivalent and a Doctorate in Law from the University of Basle, Switzerland, and a Master in Comparative Law (L.L.M.) from the University of Miami. She is a Member of the New York Bar since 1999.

<sup>1</sup> S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg., U.N. Doc. S/RES/827 (1993) (ICTY Statute Resolution). The author uses the words "ICTY," "Court" and "Tribunal" interchangeably throughout this article.

tional humanitarian law committed in that territory since 1991.<sup>2</sup> The creation of the Yugoslavia Tribunal was most certainly a breakthrough in the enforcement of international humanitarian law and marked the beginning of a new era in international criminal justice. The focus of these remarks is on the usefulness and effectiveness of the ICTY as an instrument to restore peace to a deeply conflicted, blood-drenched arena. After some introductory remarks, I will briefly describe the broad context in which the Court was created and give an overview of its normative impact. Then, most importantly, I will discuss the Court's role in bringing peace to the area. Considering the space constraints and the vastness of the subject, major issues must inevitably be left out of my discussion, and this is especially true with regard to the normative impact of the Court, which alone is a very broad and technical subject.<sup>3</sup>

I would like to begin with a brief definition of international humanitarian law that can be defined as the human rights component of the law of war.<sup>4</sup> It "attempts to place limitations upon the conduct of warfare to prevent unnecessary suffering of civilians and combatants."<sup>5</sup> It applies to international conflicts, and, to a more limited but growing extent, to internal armed conflicts. The principal sources of international humanitarian law are to be found in customary law and various treaties.<sup>6</sup> The major treaties are the Hague Convention (No. IV) Respecting the Law and Customs of War on Land and annexed Regulations of 1907, the four Geneva Conventions of 1949 and its two additional Protocols of 1977.

---

<sup>2</sup> *See id.*

<sup>3</sup> For further discussion, see THEODOR MERON, *WAR CRIMES LAW COMES OF AGE: ESSAYS* (1998); Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57 (1999); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1997); Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996); Walter G. Scharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411 (1996-1997).

<sup>4</sup> THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 249 (1995).

<sup>5</sup> LINDA A. MALONE, *INTERNATIONAL LAW* 154 (1998).

<sup>6</sup> MERON, *supra* note 3, at 262.

## II. CONTEXT OF THE TRIBUNAL'S CREATION

In the last fifty years, international humanitarian law has gradually shifted from an interstate to a more moral, human rights approach. Under the state-centric regime criminal prosecution of violators of humanitarian law was mostly a domestic matter, which resulted in most of the crimes going unpunished. The Nuremberg and Tokyo war crimes tribunals established individual culpability for international crimes.<sup>7</sup> However, those were military courts, which were considered to be institutions of the victorious powers of WWII rather than a model for permanent enforcement of humanitarian law.<sup>8</sup> In contrast, the Yugoslavia Court reflects the recognition that individuals are subjects in their own right and that state sovereignty can no longer serve as a shield.<sup>9</sup> This development has been encouraged by two major factors. First, the growing interdependence of the international community, reflected in an extended coverage of the horrifying events in the media, made the atrocities an issue of international concern calling for a global solution. Second, with the end of the Cold War the Security Council has begun to increasingly resort to Chapter VII of the U.N. Charter as a basis for action in cases of gross violations of human rights, defining mass killings and humanitarian emergencies as threats to international peace and security.<sup>10</sup> Under Chapter VII, the Security Council is empowered to take measures to enforce its decisions either by imposing non-military sanctions or authorizing the use of force. The establishment of the Yugoslavia Court is one example of the many innovative measures that the Security Council has employed in enforcing its decisions after the Cold War,<sup>11</sup> creating for the first time a direct link between accountability and peace.

---

<sup>7</sup> YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 27, 50 (1999).

<sup>8</sup> *Id.* at 39, 61.

<sup>9</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) [hereinafter *Humanitarian Law*].

<sup>10</sup> See generally FRANCA BARONI, VOELKERRECHTLICHE AUSWIRKUNGEN DER FRIEDENSSICHERUNGSPRAXIS DER VEREINTEN NATIONEN NACH DEM ENDE DES KALTEN KRIEGES 242-265 (1995); Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509 (1996).

<sup>11</sup> See generally BARONI, *supra* note 10, at 57, 127-31.

At this point, a brief discussion of a few examples of the normative impact of the Court is appropriate. First, the creation of a judiciary body as a measure to restore peace in itself was exceptional. Also, the Court was held to have the competence to review the Security Council's action under Chapter VII.<sup>12</sup> The Court confirmed the existence of constraints of legality set forth in the U.N. Charter and in general principles of international law such as the right to be tried by a court established by law and the right to a fair trial limiting the Council's authority.<sup>13</sup> This decision is important because it sets a precedent of judicial review of Security Council's action capable of further developments in a context where the increase in Security Council activity under Chapter VII "has raised questions about the purview of the Council's competence and the existence of checks and controls upon its authority."<sup>14</sup> Another example, going beyond the wording of the Geneva Conventions, the Court found that the distinction between international and internal conflicts, which determines the applicability of norms of humanitarian law, is losing its value in relation to human beings.<sup>15</sup> Also, going beyond the black letter of the law, the Court acknowledged that ethnicity rather than nationality determines whether civilians are protected under the Geneva Conventions.<sup>16</sup> Those decisions are very important considering the inter-ethnic nature of modern conflicts. The Statute of the Court<sup>17</sup> includes rape,<sup>18</sup> for the first time explicitly, as a crime against humanity and affirms the humanitarian treaties at the basis of its jurisdiction as customary law. To summarize, the Court has been clarifying some fundamental rules and interpreting critical provisions of international humanitarian law quite expansively suggesting that it is leaning more towards an approach that looks at law in terms of humanity and justice

---

<sup>12</sup> See *Decision of the Appeal Chamber in the Tadic Case, Prosecutor v. Tadic*, Case No. IT-94-AR72, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, reprinted in 35 I.L.M. 32 (1996).

<sup>13</sup> See King, *supra* note 10, at 561.

<sup>14</sup> See *id.* at 511.

<sup>15</sup> See *Humanitarian Law*, *supra* note 9, at 262.

<sup>16</sup> *Id.* at 259.

<sup>17</sup> See *Report of the Secretary-General*, Res. 808, U.N. SCOR, para. 2, U. N. Doc. S/25704 (1993).

<sup>18</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia, in *id.* at Annex, art. 5 [hereinafter ICTY Statute].

rather than states consent and binding power realities. The activism of the Court can be seen either as a dangerous development jeopardizing its future credibility in application of a conflating law or as a necessary move towards an effective protection of basic human dignity. In my opinion, considering the increasing gratuitous violence characterizing post Cold War conflicts, the activist role of the Tribunal is not only welcomed but needed. Finally, the work of the Court triggered an awakened public and academic interest in the field, which in turn created a very positive environment for the adoption of the Rome Treaty in 1998 establishing the permanent International Criminal Court.<sup>19</sup>

### III. PEACE THROUGH JUSTICE: THE GOALS AND CHALLENGES OF THE TRIBUNAL

#### A. *Goals Set in the Resolution 827 and Circumstances Leading to its Adoption*

Can peace be achieved through justice? In Resolution 827 the Security Council determined that the mass killings, systematic rape of women, and the practice of ethnic cleansing were a threat to international peace and security and that, by bringing to justice the individuals responsible for them, it could halt those violations and restore peace.<sup>20</sup> The Security Council created the Court under the pressure of an international outcry. The permanent Members very well knew the severity of the violations long before they took action. However, the distribution of power was not favorable to a forceful intervention protecting the civilians in the area. For example, the acting U.S. Secretary of State at the end of 1992 was Eagleburger who had served as U.S. Ambassador to Yugoslavia and was allegedly known to be a former "drinking buddy" of Milosevic.<sup>21</sup> The many resolutions preceding Resolution 827<sup>22</sup> were nothing more than a moderate

---

<sup>19</sup> See The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

<sup>20</sup> See ICTY Statute Resolution, *supra* note 1.

<sup>21</sup> Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L., 127, 156 (1995-1996).

<sup>22</sup> S.C. Res. 764, U.N. SCOR, 47<sup>th</sup> Sess., 3093<sup>rd</sup> mtg., U.N. Doc. S/RES/764 (1992); S.C. Res. 771, U.N. SCOR, 47<sup>th</sup> Sess., 3106<sup>th</sup> mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 780, U.N. SCOR, 47<sup>th</sup> Sess., 3119<sup>th</sup> mtg., U.N. Doc. S/RES/780

reaction to an external pressure that, in 1993, became so strong that the Council had no other option than to create the Court. Consequently, there was widespread criticism that the only impetus to the establishment of the Court was moral guilt resulting from the double failure to either prevent or stop the massacre.<sup>23</sup> Regardless of the motivations behind its establishment, the Court has very important functions to fulfill.

### B. *ICTY Functions*

The Tribunal has the following functions: first, public and official acknowledgment to the victims; second, individualization of guilt; third, establishment of a historical record; fourth, deterrence; fifth, the de-legitimization of indicted war criminals as political leaders. There has been a lot of skepticism regarding the Court's ability to fulfill these ambitious functions. Of course, one of the worst massacres in the region - Srebrenica in 1995<sup>24</sup> occurred quite some time after its establishment. However, we must not forget that the court's contribution to peace is a long-term process that cannot be measured and valued in the short run. Also, the concept of peace has to be extended beyond the mere absence of crime in the area. Peace includes not only the absence of direct physical violence and war, but also the elimination of structural violence, i.e. the consequences of social, political, cultural, economic, and civil structures and institutions that lower the quality of human life. So, how can the Court create peace?

#### 1. *Truth Finding*

The establishment of the truth is an essential element in the reconciliation process and a precondition for an enduring peace. "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and

---

(1992); S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., 3175<sup>th</sup> mtg., U.N. Doc. S/RES/808 (1993).

<sup>23</sup> Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *FORDHAM INT'L L. J.* 440, 445 (1999).

<sup>24</sup> In July 1995 Serb soldiers massacred thousands of Muslims living in and around the town of Srebrenica in Bosnia-Herzegovina.

religious hatreds and begin the healing process.”<sup>25</sup> To establish the truth is to give dignity and respect to the victims, the survivors and their families who have not only a right to know,<sup>26</sup> but also a right to have their past recognized. This ensures that the gross violations of human rights committed on that territory are not distorted or denied by future leaders.<sup>27</sup> The Court advances the finding of the truth by giving the victims a credible setting in which to report their truth through testimony; and by having their suffering formally recorded and acknowledged through the creation of an official record. For the victims, the opportunity to testify and to have their experiences recorded is central to their healing process. The purpose of letting others know is transformation. To be transformed is a basis for healing and reconciliation.

There are, however, two problems with the Court: First, the perpetrator, and not the victim, is the primary focus of the proceedings. Since prosecutions and trials focus only on the individual liability of perpetrators, the proceedings fall short of telling the whole story of the abuses. This factor is inherent in the form of justice itself. Therefore, solutions are to be found outside the court setting. A Truth Commission that focuses equally on victim and perpetrator could be a valuable complement in this regard. The goal of a Truth Commission is to give a complete picture of the gross violations of human rights that occurred and restore to victims their human and civil dignity by letting them tell their stories.<sup>28</sup> The weight of the victims’ testi-

---

<sup>25</sup> U.N. SCOR, 3217<sup>th</sup> mtg. at 12, U.N. Doc. S/PV.3217 (1993). (View expressed by former United States Ambassador to the United Nations Madeline Albright during the Security Council’s meeting leading to the establishment of the ICTY).

<sup>26</sup> See *Final Report on the Question of the impunity of perpetrators of violations of human rights (civil and political rights) to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights*, Special Rapporteur, Louis Joinet, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997). The report laid down three fundamental rights of victims: the right to know, the right to justice and the right to reparation. See *id.* Under the “right to know” he set out the inalienable right to the truth and the duty to remember. See *id.*

<sup>27</sup> See Lord David Owen, *Reconciliation: Applying Historical Lessons to Modern Conflicts*, 19 FORDHAM INT’L L. J. 324, 335 (1995) (explaining how the distortion of truth was at the root of several wars in the former Yugoslavia).

<sup>28</sup> See Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. OF COMP. & INT’L L. 375 (1996); BEIGBEDER, *supra* note 7, at 117.



mony would not be filtered down by its criminal relevance; rather, the victims' stories would be given full bearing and attention, and would be considered to be at the core of the national reconciliation process. Even within the framework of the Court, the status of victims needs to be improved. Although in the past few years the Tribunal has developed a variety of innovative protective measures to strengthen the status of victims and witnesses in the proceedings,<sup>29</sup> the situation outside the courtroom is more precarious. For too many witnesses, testifying is a risk to their lives. The Tribunal is not based on any territory and lacks an enforcement mechanism of its own. Thus, outside the courtroom, there is little that the Tribunal can do to provide practical protection to witnesses. The Tribunal has established a witness protection program to relocate witnesses to the territory of Member States. These relocations are governed by an agreement between the Tribunal and the State concerned. However, States have been reluctant to sign the proposed agreements. By 1998, none of the Member States had adopted a relocation agreement.<sup>30</sup> It is imperative that Member States grant protection to those victims and witnesses that are unable to return to their homes after testifying in The Hague. States can achieve this objective both through a widespread adoption of relocation agreements, and through the development of social and economic witness integration programs.

Second, it is difficult to establish the meaning and weight of truth. One could say that a court could establish a factual record but not truth, truth being a highly subjective concept. I disagree. It is imperative that the Court provides a forum that encourages the search for a common truth, or in the words of Payam Akhavan, Legal Advisor to the Tribunal, a "shared truth . . . [and] an empathy for human suffering that transcends the

---

<sup>29</sup> See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 43, 83 (1999); Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445 (1998); Y.M.O. Featherstone, *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, 10 LEIDEN J. INT'L L. 179 (1997).

<sup>30</sup> See Gabrielle Kirk McDonald, *International Support for International Criminal Tribunals & an International Criminal Court: The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT'L L. REV. 1413, 1427, 1429 (1998).

bonds of blood and soil.”<sup>31</sup> To establish a “shared truth” is not to impose one historical perspective of the facts but to create some common ground on the basic human fact that people have been massacred, raped, killed and deported from their homes. It is about “reaching a shared truth by considering the struggle of other people in conflict situations.”<sup>32</sup> The acknowledgment of truth in this sense promotes reconciliation and prevents future generations from being doomed to revisit the injustices of the past.<sup>33</sup> One of the most important factors in the violent break-up of the former Yugoslavia was the revival of old hatreds rooted in a flawed history manipulated by the political elite. Therefore, the establishment of basic humanitarian facts by the Tribunal can effectively hinder the recrudescence of unresolved animosities and give new meaning and weight to the common human experience of all parties of the conflict, thus furthering the peace process.

## 2. *Individualization of Guilt*

Another significant contribution of the Court is to create a basis for an interethnic reconciliation that can be achieved through the differentiation between individual responsibilities and collective attribution of guilt.<sup>34</sup> To this end, the underlying causes of the conflict have to be ascertained and publicly recognized. The primordial hatred of Serbs, Croats and Muslims towards each other has often been identified as the root of this conflict.<sup>35</sup> It is, however, easily forgotten that Bosnia, for example, enjoyed long periods of tranquillity as a multiethnic community. Mixed marriages, for instance, were very common.<sup>36</sup> What happened was a tremendous instrumentalization of the

---

<sup>31</sup> Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 713, 771 (1998).

<sup>32</sup> *Id.* at 771.

<sup>33</sup> *Id.* at 773 (citing Michael Ignatieff, *Articles of Faith*, in *Index on Censorship* (Sept./Oct. 1996), reprinted in 294 HARPER'S MAG. 15 (Mar. 1997)).

<sup>34</sup> *Id.* at 742.

<sup>35</sup> *Id.* at 753.

<sup>36</sup> See *Bosnet: Elections Coverage: Reactions to Bosnian Elections*, Sept. 25, 1998, at <http://www.bosnet.org/archive/bosnet.w3archive/9809/msg00076.html>; see International Organization for Migration, at [http://www.iom.int/iom/Publications/books\\_studies\\_surveys/MIP\\_Belgium\\_yugos\\_dp-eng.htm](http://www.iom.int/iom/Publications/books_studies_surveys/MIP_Belgium_yugos_dp-eng.htm). (visited Oct. 21, 2000).

ethnic differences by the political élite in power.<sup>37</sup> The civilian population was, until very recently, manipulated through hate propaganda. The leaders played with core fears deeply rooted in the human psyche for power and control achieved through separation. *Divide et impera* is still very much alive.<sup>38</sup> In various degrees, the international community bought into the belief that primordial hatred was at the root of the atrocities and that there was nothing anyone could really do about it. This conveniently excused us from the responsibilities of intervening. In truth, the systematic gross abuses were not a consequence of primordial hatred, but a design that required a high degree of centralized authority.<sup>39</sup> In this context, it is essential that the Court establishes individual guilt as opposed to collective responsibilities that easily degenerate into resentment and vengeance. The international criminal justice system can credibly support the peace process only if it emphasizes the role of individual leaders in fomenting hatred and inciting acts of brutality, revealing their personal human responsibility. Accordingly, the Statute of the Tribunal provides that "the official position of any accused person, whether as Head of State or Government (), shall not relieve such person of criminal responsibility nor mitigate punishment."<sup>40</sup> Through the individual indictment of the most senior leaders of the former Yugoslavia, Radovan Karadzic, Ratko Mladic and Slobodan Milosevic, the Tribunal has sanctioned political leaders who ordered the massacre, being held individually accountable for their decisions, and invalidated the cover of the abstract, irresponsible state. Moreover, the Court's mandate to prosecute persons responsible for serious violations of humanitarian law, whether public figures or private citizens, limits state authority by setting clear limitations to the once nearly unrestrained immunity of high level state officials. Individuals in power can no longer hide behind the shield of national sovereignty and escape criminal accountability. State authority is thus separated from and restricted by individual authorities. However, the recent public remarks of some leaders suggesting the desirability of granting Milosevic

---

<sup>37</sup> Akhavan, *supra* note 31, at 760.

<sup>38</sup> Latin for divide and conquer.

<sup>39</sup> See Akhavan, *supra* note 31, at 756.

<sup>40</sup> ICTY Statute, *supra* note 18, at art. 7.2.

immunity in return for his resignation shows that the primacy of international justice over state authority is still in doubt. The determination of the Tribunal's officials to bring the high-ranking indictees to justice<sup>41</sup> is an encouraging signal that the gross violations of the most elementary humanitarian laws are not going unpunished, and that the suffering of civilians are not once again disregarded. But it is also clear that the determination in the Hague alone is to no avail if it is not back by the political leaders of the Member States. Through the individualization of responsibilities, the population is purged from its collective guilt that burdens its identity. Through the differentiation between individual and collective responsibilities the citizens of former Yugoslavia can start to process the past and to create a future based upon mutual respect, or at least mutual recognition of the suffered abuses. Without individualization of guilt, there cannot be peace because "in order to prevent a recurrence of mass violence, it is necessary to reveal the way in which élites manipulated ethnic identity to foment violence and consolidate political power."<sup>42</sup> If the Tribunal is going to succeed in its peace-building task, it is essential that the ordinary citizens of the former Yugoslavia are able to see that the roles of individuals in their commission of atrocities are clarified and punished.

### 3. *Deterrence*

Another contribution of the Court to peace is deterrence. Since many atrocities have been committed after its establishment, the Court's very reason for existence has been put into doubt, and its failures and shortcomings highly publicized. Judging the need for the Court by its ineffectiveness in the prevention of war crimes is, in my opinion, inappropriate. Who would seriously criticize criminal courts at the national level simply because crimes are still committed? Criminal law deals with situations where all other political, economic and social structures have failed. It is unrealistic to put these high expectations to succeed on the Court where the rest of society has failed. Only in this context is the Court's work to be assessed.

<sup>41</sup> See Carla del Ponte, *Press Release from the Prosecutor of the ICTY* (Oct. 6, 2000), at <http://www.un.org/icty/pressreal/p532-e.htm>. (visited Oct. 21, 2000).

<sup>42</sup> Akhavan, *supra* note 31, at 765.

Regardless of what happened in Srebrenica and Kosovo, specific and general deterrence through the work of the Court is feasible. 'Specific deterrence' relates to the capacity of the criminal system to deter individuals from the commission of future crimes. In contrast, general deterrence refers to the capability of the system to deter potential criminal behavior in the society at large.<sup>43</sup> To what extent fears of prosecution by the Court could deter individuals in the former Yugoslavia is almost impossible to determine at this point. Although there is evidence in some instances that threatening local political and military leaders with prosecution have helped to improve the condition of prisoners, specific deterrence has certainly not been apparent.<sup>44</sup> The modest deterring effect thus far is related to the fact that hate and fear, as a result of the indoctrination campaign that is continuing to date, are so pervasive, that many do not even consider their own actions to be wrong. Recently, the International Committee of the Red Cross conducted a survey in Bosnia to ascertain whether the population was aware of the content of the Geneva Conventions.<sup>45</sup> The survey indicated that most citizens understood the meaning, but perceived the Bosnian conflict as a total war where the distinction between combatant and civilian barely existed. Ethnicity alone determined the threat that justified a total mobilization against the enemy. The limited specific deterrence has also been related to the small number of prosecutions. In its seven years of existence, the Court has only sentenced fifteen individuals,<sup>46</sup> a small figure compared to the number of war criminals in the area. Professor Wippman accurately observed that "[f]or most offenders . . . the risk of prosecution must appear to be almost equivalent of losing the war crimes prosecution lottery."<sup>47</sup> Combining the motivations behind the violations with the lack of credibility associated with the warnings of punishment, it is evident why

---

<sup>43</sup> See *id.* at 746 (explaining the distinction between specific and general deterrence).

<sup>44</sup> See David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT'L L. J.*, 473, 475 (1999).

<sup>45</sup> See International Committee of the Red Cross, *Country Report on Bosnia-Herzegovina*, available at <http://www.nt.oneworld.org/cfdocs/icrc/pages/reports/pdfs/bosnia.pdf>. (visited Oct. 21, 2000).

<sup>46</sup> See *ICTY Key Figures*, at <http://www.un.org/icty/glance/keyfig-e.htm>. (visited Oct. 21, 2000). There were also two guilty pleas. See *id.*

<sup>47</sup> Wippman, *supra* note 44, at 477.

crimes continue to happen. Therefore, the best way to enhance deterrence is to sharply increase the probability of prosecution through more frequent trials. There are, however, considerable logistical problems that the Court would face with a sharp increase in prosecutions.<sup>48</sup> For this reason, the primary focus should be a consistent and credible effort by the permanent Members of the Security Council to arrest the instigators of hatred. Their prosecution not only deters future crimes, but “reinvents and applies . . . the concepts of responsibility, transparency and accountability as issues central to the idea of limiting government, and correspondingly limits the excesses that are justified under the label of ‘sovereignty.’”<sup>49</sup> Their arrest and prosecution is not only an issue of justice, but one that will have important and long-lasting effects on the region’s ability to form a democratic state, institute market reforms, and accomplish social reconciliation.

Another role of justice is to foster ‘general deterrence,’ to prevent criminal behavior in the society at large. This is the most meaningful potential contribution that the Court can make in the former Yugoslavia. The Court’s role is to create a serious prospect of accountability, and to convey the message that ethnic cleansing, mass killings, systematic rape and other atrocities are wrong, unjustified by any political and social plan, and that they are not tolerated by the world community under any circumstances. This message seems ridiculously obvious. Unfortunately, a culture of impunity has dominated our primitive society for so long a time that, in many countries, including the permanent Members of the Security Council, past human rights abuses are never investigated and the perpetrators are left unpunished.<sup>50</sup> Thus, the Yugoslavia Court is the first essential step towards the creation of a new culture of compliance.<sup>51</sup> As the Legal Advisor to the Court describes, “[F]rom the

---

<sup>48</sup> See Judge Claude Jorda, *Press Release from the President of the ICTY H.E.* . (May 12, 2000), at <http://www.un.org/icty/pressreal/RAP000620e.htm>. (visited Oct. 21, 2000).

<sup>49</sup> Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty International Criminal Law and the Ad-hoc Tribunal for former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 127, 158 (1995).

<sup>50</sup> See BEIGBEDER, *supra* note 7, at 76 (for an extensive discussion about the “forgotten” war crimes).

<sup>51</sup> Akhavan, *supra* note 31, at 742.

criminal justice system emanates a flow of moral propaganda such that punishment of the individual offender is transformed into a means of expressing social disapproval [creating] "unconscious inhibitions against crime, and . . . [establishing] a condition of habitual lawfulness" such that "illegal actions will not present themselves () as real alternatives to conformity ()."<sup>52</sup> With the establishment of the Tribunal, gross violations of humanitarian law are, for the first time, systematically prosecuted, thereby upgrading humanitarian laws from empty words to enforceable behavioral standards. Prosecution and punishment of war criminals, within the framework of a judicial institution established by law, such as the Tribunal is the first, critical step towards the internalization of new values that conform to the basic respect for human dignity. In reeducating the local population about criminally unacceptable behavior, the Tribunal can potentially bring about an eventual decrease in criminal activity that will create an environment in which a peaceful cohabitation of Serbs, Croats and Muslims becomes possible. Yet, some authors seriously question the general deterrent effect of the Court.<sup>53</sup> General deterrence is possible, but it is a long-term proposition. To conclude that, after seven years, the Court has failed in this task is therefore misplaced. I strongly disagree with the opinion raised in the literature that the Red Cross survey, showing that popular knowledge of the Geneva Conventions did not avert human rights violations, is an argument against the Court's contribution to general deterrence.<sup>54</sup> At the time the atrocities were perpetrated, the Court was just about to start its work, and considering the evident lack of political will of the Court's founders to execute arrest warrants, no one seriously expected to be prosecuted and to be truly 'wrong'. Although the slowly growing number of arrests through international forces is encouraging, whether the Court will be able to transmit and contribute to the internalization of new values will, in the long term, depend on the consistency of international support for its work. Court's decisions help anchor the knowledge of what is unacceptable, but police action

---

<sup>52</sup> *Id.* at 746.

<sup>53</sup> Wippman, *supra* note 44, at 486.

<sup>54</sup> *See id.*

and prosecutions are also necessary to substantiate that knowledge.

Finally, central to the deterrent effect of the Court is the assurance that the local population has unfiltered media access to the Court's proceedings. The media have a pivotal role in eradicating structural violence and creating a peaceful society. From the late 1980s throughout the 1990s, the media's influence and power were exemplified by the devastating effect of the political propaganda in the media on the public consciousness of former Yugoslavia. "The media represented the primary tool of manipulation employed by leaders in this effort to arouse inter-ethnic violence . . . . Distortions of truth, if not outright misinformation, compounded by the cumulative effect of systematic indoctrination, generated a nationalist psychosis in which reality was obscured."<sup>55</sup> Accordingly, the Tribunal has been repeatedly presented in the local media as a biased institution of the Western powers.<sup>56</sup> If the Tribunal is at all to fulfill its objectives of promoting security, reconciliation and strengthen the rule of law in the former Yugoslavia, the work of the Court needs to reach directly the ordinary citizens of the region who are the ultimate peace-builders. Otherwise, the Court's role in bringing peace to the area is seriously weakened. In its efforts to ensure that its activities remain transparent and accessible across the whole territory of the former Yugoslavia, the Tribunal launched, in the fall of 1999, an outreach program aimed at strengthening contacts between the Tribunal and the communities in the region.<sup>57</sup> Yet, it is obvious that not only the Tribunal is responsible to make sure that its work is understood. All States, and in particular the permanent Mem-

---

<sup>55</sup> Akhavan, *supra* note 31, at 763.

<sup>56</sup> See Michael Scharf, *Indicted for War Crimes*, WASH. POST, Oct. 3, 1999. The Federal Republic of Yugoslavia and Bosnian Serbs opposed the creation of the Tribunal (see a Letter Dated May 19, 1993 from the Minister of Foreign Affairs of the Federal Republic of Yugoslavia to the U.N. Secretary-General, U.N. Doc. A/48/170-S/25801 (1993)).

<sup>57</sup> The ICTY Outreach Program has established regional offices in Banja Luka, Sarajevo and Zagreb, which primarily operate in local languages. Additional offices are planned in Belgrade and Pristina. For more information about the ICTY Outreach Program see *Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 54<sup>th</sup> Sess., Item 53, Provisional Agenda, U.N. Doc. A/54/187-S/1998/846, para. 146-151.



bers of the Security Council, share responsibility for creating the conditions necessary to facilitate the establishment of the rule of law. The strengthening of the rule of law in the region is mainly a political task for which the respective political will is required. It might be true that financial contributions to the ICTY Outreach Program are essential,<sup>58</sup> but they can also be seen as an easy way out of the responsibility to meaningfully support the Tribunal. For example, it would greatly support the credibility of the Court's work if serious and credible efforts were made to arrest the high level officials. So far, Member States have only shown rhetorical determination.<sup>59</sup> Although NATO forces are well informed about the whereabouts of indicted high-ranking officials,<sup>60</sup> no arrest action has been taken. The recent political changes in the Federal Republic of Yugoslavia will possibly increase the likelihood of their arrest, but it is also very likely that efforts to bring them to justice will continue to be undermined by international and local political agendas. Finally, another means of improving the Tribunal's reputation in the former Yugoslavia is through private initiatives of Non-Governmental Organization and local peace-building groups involved in the creation of democratic structures.

### C. *Alternative Forms of Justice*

Nonetheless, I want to emphasize that there are obvious limits to what a criminal court can achieve. The peace building and reconciliation process is multi-faceted, and criminal justice is but one measure. It is obvious that the most effective measure is to stop the violations in the first place through effective interventions of the world community.<sup>61</sup> Even within the framework of post-atrocities measures, however, alternative

---

<sup>58</sup> After an initial contribution of \$500,000 the United States recently contributed another \$100,000 to the ICTY Outreach Program. See *Press Release of the ICTY* (Oct. 11, 2000), at <http://www.un.org/icty/pressreal/p533-e.htm>. (visited Oct. 21, 2000).

<sup>59</sup> See *Remarks by President Clinton on the Elections in Yugoslavia*, The White House, Office of the Press Secretary (Oct. 6, 2000), at <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/2000/10/10/6.text.2>. (visited Oct. 21, 2000).

<sup>60</sup> See *Bosnia War Crimes Suspect Kills Himself on Arrest*, N.Y. TIMES, Oct. 17, 2000.

<sup>61</sup> See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999).

forms of justice must necessarily be integrated. As mentioned before, criminal justice has some disadvantages. It can provide limited satisfaction to victims.<sup>62</sup> In addition, investigations are time-consuming.<sup>63</sup> Often it is difficult to find sufficient evidence to justify indictment. Evidence is frequently tampered with, or gets otherwise lost, so that many perpetrators escape without penalty or public sanction.<sup>64</sup> Under these circumstances, criminal justice could provide only little satisfaction to victims. For this reason, a Truth and Reconciliation Commission that provides a detailed record of the history of violations, establishing a consensus on abuses suffered by victims on all sides, can be an important complement to the Court's work. A Truth and Reconciliation Commission is not a substitute for the Tribunal, but a necessary additional institution furthering the national reconciliation and healing process. No institution can hold itself solely competent to find and expose the truth.<sup>65</sup> Truth-finding and reconciliation, which eventually lead to peace, require a multi-faceted approach. The importance of creating a common truth about the basic human tragedies suffered by all parties in order to prevent another conflict cannot be overestimated. A Truth Commission would provide a forum for those thousands of victims that will never have an opportunity to share their stories in a court of law. It is about creating an historical record that both points out tragedies and heroic acts of those ordinary citizens who resisted ethnic cleansing and maintained their sense of humanity by demonstrating compassion for others. It is about giving the conflict a human dimension, and understanding how former neighbors and friends were driven to inflict such evil on one another. It could develop practical recommendations on how the recurrence of such atrocities

---

<sup>62</sup> Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL., 485, 491 (1995-1996).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> The former prosecutor of the ICTY, Louise Arbour, vehemently opposed the creation of a Truth and Reconciliation Commission for Bosnia-Herzegovina. The current Judges of the Court signaled their intention to adopt a position on the possible creation of a Truth and Reconciliation Commission in Bosnia. See *Press Release of the ICTY*, Oct. 13, 2000, at <http://www.un.org/icty/pressreal/p535-e.htm>. (visited Oct. 21, 2000).

can be avoided.<sup>66</sup> It is about creating a credible and comprehensive account of the gross abuses committed with the dual purposes of giving the victims a basis to heal and of laying the foundations for a democratic society.

The Tribunal is not addressing these issues as directly as a Truth and Reconciliation Commission would be able to do. Concerns of overlapping mandates between the Tribunal and a Truth and Reconciliation Commission in the former Yugoslavia are unjustified. With the creation of a victim-focused Commission the Tribunal is still solely responsible for prosecuting persons responsible for serious violations of international humanitarian law. The Court's function is primarily to bring to justice the individual perpetrators, whereas the Commission's function would be primarily to make precise and practical recommendations for the future on how violations of humanitarian law can be avoided. Their mandates are therefore distinct.<sup>67</sup>

#### D. *Tribunal's Challenges*

The Court faces some serious problems that are limiting its role in the restoration of peace. The most severe is the lack of state cooperation in the enforcement of the Court's actions.<sup>68</sup> The Tribunal, unlike national courts, does not have an enforcement mechanism of its own and therefore depends entirely on States. Their cooperation and judicial assistance is critical for

---

<sup>66</sup> See Alan L. Heil, Jr., Special Report, WASH. REP. ON MID. E. AFF. (citing Richard J. Goldstone, former prosecutor of the ICTY, cited in a Special Report by Alan L. Heil Jr. in the June 2000 issue of the Washington Report on Middle East Affairs).

<sup>67</sup> In bringing war criminals to justice, the Tribunal is confronted with its limited resources and an ever increasing number of indictees. See *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, presented by the President of the ICTY H.E. Judge Claude Jorda*, May 12, 2000, at <http://www.un.org/icty/pressreal/RAP000620e.htm> (visited Oct. 21, 2000) (in which he proposes several measures to speed up trial proceedings). The number of convictions in The Hague compared to the number of offenders has been extremely low. In addition, little progress has been made in addressing ethnic divisions. These factors and the growing movement of NGO, intellectuals and victims' associations of all ethnic groups in the last few years have created a more favorable environment towards the creation of a joint Bosniak-Croat-Serb Truth and Reconciliation Commission in Bosnia-Herzegovina. For more on the proposed Commission in Bosnia, see Heil, *supra* note 59. See also *The United States Institute of Peace, Bosnia in the Balkans, Advancing the Rule of Law*, at <http://www.usip.org/oc/BIB/bibrolfs.htm> (visited Oct. 21, 2000).

<sup>68</sup> See Scharp, *supra* note 3; McDonald, *supra*, note 30, at 1429.

gathering evidence and producing indictments, as well as for securing custody of indicted persons. Many States have yet to establish the framework that would enable them to provide the support mandated by international law.<sup>69</sup> In particular, the lack of cooperation of Croatia, and to a larger extent the Federal Republic of Yugoslavia and the Republic Srpska, is seriously affecting the Court. This is occurring even though their obligation to comply with requests and orders of the Court is well founded both in the U.N. Charter<sup>70</sup> and in the Statute of the Court.<sup>71</sup> It is still premature to say whether the recent political changes in the Federal Republic of Yugoslavia will improve their cooperation with the Tribunal. Certainly, at this point the priority of the Member States appears more to be to support the Federal Republic of Yugoslavia in its transition to democracy than to pressure its government to cooperate with the Hague and deliver Milosevic to the Tribunal. But even regardless of the recent political developments in the former Yugoslavia, the Member States have generally shown little interest in ensuring that the orders of the Court are enforced. Illustrative is the recent case of an indicted Serb general who quietly traveled to Russia without being arrested. Russian officials downplayed the event as an "internal dysfunction."<sup>72</sup> State's apathy and non-cooperation in the face of the atrocities committed are unacceptable. In the words of former President of the Court, Judge McDonald, "[i]t is a crime not to act, but it is a greater crime to say that you will act and then remain indifferent."<sup>73</sup> If international politics continues to override the requirements of international justice, the credibility of the Tribunal is at stake, and its efforts to strengthen the rule of law and support the reconciliation process are undermined. No additional legal measures are necessary to bring about full compliance of all Member States with the orders of the Court. It is only a matter of political will.

---

<sup>69</sup> See McDonald, *supra* note 30, at 1429.

<sup>70</sup> See U.N. CHARTER art. 25.

<sup>71</sup> See ICTY Statute, *supra* note 18, at art. 29.

<sup>72</sup> Ojdanic Case, *Meeting of Mr. Khodakov, Ambassador of the Russian Federation to the Netherlands, with the President of the ICTY*, Press Release of the ICTY N. 504 of May 25, 2000, at <http://www.un.org/icty/pressreal/p504-e.htm>. (visited Oct. 21, 2000).

<sup>73</sup> McDonald, *supra* note 30, at 1435.

## IV. CONCLUSION

Peace building in the former Yugoslavia is a long-term process that requires a multi-faceted approach. Justice is an essential element of securing an enduring peace in a transitional society. There is no doubt that the establishment of the Yugoslavia Court has been vital. Norms of international humanitarian law have been substantially advanced through its work. It has, for the first time, created a direct link between peace and criminal justice. It has begun the long-term process of inter-ethnic reconciliation. It has begun the long-term process of generating a culture of compliance. It has given rise to an international resurgence of interest in humanitarian law that has played a key role in the adoption of the statute of the permanent International Criminal Tribunal. To enhance its role in obtaining peace, the Court has to prosecute a sufficiently large number of war criminals and, most importantly, the high-level officials responsible for having planned the atrocities. To this end, a credible and comprehensive factual support by all the Member States is a minimum requirement. The Court is a seed that needs to be watered if we want it to blossom. Moreover, the work of the Court will be a testing ground for the efficacy of the permanent International Criminal Court, which will hopefully increase the likelihood that war criminals will be brought to justice, regardless of their nationality.

And what is *our* role in all of this? The misuse of national sovereignty as a shield to prevent accountability and the glorification of differences in ethnic conflicts are just a reflection of what is happening in each human being. Only when we start to humbly embrace the dark sides in us or, to use an expression of Desmond Tutu,<sup>74</sup> when we 'look the beast in the eyes', and begin to focus on our shared fears and values rather than on our differences, will we have made an essential contribution to the formation of a new, enlightened collective consciousness where, eventually, atrocities are no longer an option.

---

<sup>74</sup> James Brittain, *Desmond Tutu Interview Healing a Nation*, reprinted in 25 INDEX ON CENSORSHIP 39 (1996).