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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

◆ John B. Allcock, Editor ◆

New Questions for Old

The Prospectus of the Scholars' Initiative (SI) summarizes the concerns of Group 10 in three questions. "To what extent is the ICTY [International Criminal Tribunal for the Former Yugoslavia] a political body? To what extent is it impartial? To what extent is it anti-Serb?" In the course of our research we have moved away from the attempt to answer them either in simple negative or affirmative terms and have arrived at the conclusion that it is more useful to investigate *the sense in which it might be said* that the Tribunal is political and *the gap between intention and effect* with respect to its impartiality. Perhaps more significantly, we believe that it is important to challenge the framing of partiality or impartiality in terms of the specific position of many Serbs.

The project sets out to challenge accounts of the Yugoslav experience embedded in the lay understanding of history, particularly in the region itself. These accounts often need to be challenged, not because the presumed "facts" upon which they are based are false but because the very intellectual framework within which they belong is distorted.

To What Extent Is the ICTY a Political Body?

The question contains the rhetorical implication that the ICTY should somehow not be a political body and that to reveal its political character is to expose its fundamental illegitimacy. This language is encountered frequently in press and public discussion of the Tribunal within the region, but no social scientist would ever entertain it seriously. *All* courts are political bodies: they are essentially embedded within the state. The fact that the ICTY is an *international* tribunal cannot

be expected to elevate it above the world of politics into some Platonic realm of ideal justice. The properly social-scientific answer to the original question is an explanation of *the specific manner in which international justice takes on a political aspect*.¹

To What Extent Is the ICTY Impartial?

Because courts are embedded within a political matrix they are *never* completely impartial—although their effectiveness and legitimacy rest upon the *belief* in their impartiality. A striking feature of the work of the ICTY, however, is the gap that has grown up between the international perception of its legitimacy (based substantially upon a belief in its impartiality) and local doubts on this score. Understanding of the importance of the Tribunal as an experiment in international justice is best advanced by rephrasing the original question in order to explore the origins and significance of that gap in perception.

Is the Tribunal Anti-Serb?

This certainly has been a widespread perception within Serbia. To tackle this question without further qualification would not be very helpful. The result would be to frame the SI irrecoverably as either pro- or anti-Serb. In fact, when one investigates the reception of the ICTY within the region, it is remarkable that different ethnic groups—and not only the Serbs—have come to perceive The Hague as at best indifferent to their own interests, if not hostile to them. Investigation of the reasons why that should be the case tells us interesting things about the Tribunal and about the differing characteristics of political cultures and processes within the post-Yugoslav states.

A central aim of the SI has been to provide “an attempt by scholars to bridge the gap that separates their knowledge of the tragic events of the period 1986–2000 from the proprietary interpretations that nationalist politicians and media have impressed upon mass culture.”² Our account is offered in the belief that the best way to undermine these “proprietary myths” is to challenge their central questions rather than to attempt to answer them. To do so without challenge would be only to confirm their legitimacy. While avoiding the Scylla of extreme nationalism, however, it is equally important to avoid the Charybdis of implicit Orientalism.³ While endeavoring to lay to rest some of the evidently mythological images of the ICTY that have become current in the Balkans, we are equally ready to point out that this experiment in international justice is open to critical scrutiny. Neither the process of demythologization nor that of independent critique will be completed on this occasion—but we hope that they both will have been given a significant impetus.

Our report did not set out to be—and cannot be—an encyclopedic work of reference on either the ICTY or the Yugoslav wars. Suggestions that it ought to have encompassed a comprehensive survey of the press of the region, a detailed analysis of court transcripts, an examination of the role of expert witnesses, a critique of the rules of evidence and procedure adopted by the Tribunal, or that it should engage with the problematic relationship between justice and reconciliation, all fall well outside the possibilities of a project that has been mounted here without the benefit of large research grants or permanent personnel.⁴

The Problem of Bias

The research goal that was originally given to Group 10 was to investigate the allegations of bias that had been laid against the ICTY. The task seemed, at first sight, to be fairly straightforward, but as members of the team began to explore the problem this originally defined exercise appeared to be pointless. Participants in the meeting that took place in Sarajevo in July 2002 were aware of no evidence of deliberate partiality on the part of the Tribunal, although allegations of bias were rife within the Yugoslav region. The question was how to reconcile these disparate, and apparently directly contradictory, observations.

At that time there was little scholarly investigation of the ICTY in any discipline.⁵ There was extensive discussion within the legal community at the time regarding the implications of the creation of the ICTY for law and jurisprudence.⁶ Within the legal literature critical discussion of the ICTY centered upon a number of procedural and conceptual issues, but the question of whether or not it was substantially biased in its practice was not addressed.

At the time when we conceived our project, we were aware of no significant attempt in English-, French-, or German-language literatures to expose bias in the working of the ICTY. The prevailing tone of discussion was to welcome its creation as a significant advance in the development of international humanitarian law, and the work of Aryeh Neier (president of the Open Society Institute and a figure who had been especially active in agitating for the creation of the Tribunal) was particularly important in setting the tone of discussion.⁷ It is perhaps significant that the first chief prosecutor of the ICTY, Justice Richard Goldstone, in his own writing about the Tribunal did not regard it as necessary to defend it against accusations of bias.⁸

In 2002, the social-scientific literature devoted to the Yugoslav wars had little to say at all about the interest of any aspect of the ICTY.⁹ Given the undoubted familiarity of the generality of specialists with conditions in the “Yugoslav space,” it is reasonable to assume that, had the issue of the bias of the ICTY been one that was deemed worthy of attention, there would have been rather more evidence of this in the scholarly literature.

This lack of interest in the issue of bias on the part of foreign scholars of different disciplines contrasted sharply, however, with widespread popular perceptions of The Hague within the former Yugoslavia, where the citizenry (the purported constituents of the Tribunal) remained either ignorant or largely skeptical.

Following the Sarajevo conference, members of the group contributed a variety of types of input to the report, ranging from “desk research” synthesizing aspects of the literature; detailed scholarship addressing specific aspects of the Tribunal’s work; a survey of the public opinion research available in the Yugoslav region; interviews with a small number of key actors; reflection on their own experience as participants in one aspect or another of the work of the ICTY and as researchers in the region; and a small, specially commissioned focus-group investigation to explore attitudes to its work.¹⁰

The present summary of our work substantially condenses and reorganizes the findings of the original report.¹¹ Section I presents a historical survey of the development of international humanitarian law before the creation of the ICTY. Section II examines the international context of its foundation and considers the contrasting stances of the principal international actors in relation to the ICTY. Section III provides a brief account of the circumstances surrounding the creation of the Tribunal. These three sections place the Tribunal within its historical context, explaining it in terms of a complex process, the outcome of which does not reflect directly the intentions of any one of the parties involved. Section IV turns its attention to the work of the ICTY itself, its structure and operation, taking in turn each of the major components of the organization. Section V offers a brief comparative study of the reception of the ICTY in Croatia, Serbia, and Bosnia-Herzegovina, attempting to probe the nature and sources of local perceptions of the Tribunal and to understand these within their political context. Section VI, finally, draws together and summarizes our conclusions, which provide a more nuanced view of the problems experienced by the Tribunal, and the reasons for the lack of a sympathetic response to it within the former Yugoslavia.

I. A Historical Survey

i. The Origins of International Humanitarian Law

Those who might be tempted to see in the creation of the International Criminal Tribunal for the former Yugoslavia a device directed specifically against one or another of the peoples or states of the former Yugoslavia should pause in order to place this event in its historical context. Historical accounts of the laws of war typically begin with the implications of the Peace of Westphalia, which concluded

the Dutch–Spanish War and the Thirty Years War in 1648. The rapid expansion of international trade during the nineteenth century resulted in a number of international agreements, although war continued to provide the primary stimulus to the emergence of international law. The International Committee of the Red Cross was founded in 1863. A factor that promoted this enhanced awareness of the need to control the suffering occasioned by war was the growing activity of the press in reporting it. In both the Crimean War (1854–1856) and the American Civil War (1861–1865) the action was followed by war correspondents representing the principal newspapers. Increasing exposure of the public to the experience of war through the media of mass communication has played a major part in the “moralization of international relations.”¹² Particularly important moments in this process were The Hague Convention with Respect to the Laws and Customs of War of 1899 and the 1907 convention, to which can be traced the idea of “crimes against humanity.”¹³

A significant stimulus to the development of international law was given by the formation of the League of Nations in 1919, following World War I. The Permanent Court of International Justice (PCIJ) was founded in 1921 under the auspices of the League.¹⁴ It is clear from the experience of the League of Nations, however, that international legal opinion (and that of leading political figures) was deeply divided with respect to the idea of international criminal responsibility. Despite the creation of the PCIJ, a project proposed in 1937 by the International Association for Penal Law, that this should incorporate a permanent chamber of criminal law, was never realized.¹⁵

ii. Nuremberg and After

The modern framework of international criminal law dates from the overthrow of the fascist regimes in Germany and Japan after World War II.¹⁶ The Nuremberg and Tokyo Tribunals have been criticized frequently in subsequent years because of their ad hoc status and because they represented “victors’ justice.” Most significantly, the 1945 tribunals were specifically military courts, whereas the ICTY has a purely civilian status. Trials under similar circumstances could no longer claim legitimacy, and the ICTY was created with meticulous care to avoid this label. Moreover, the war was still underway when the ICTY was established, making it relatively easy to avoid the charge of victors’ justice.

It would be a mistake to limit evaluation of the post-1945 Tribunals to this negative aspect of their work. The London Agreement of 8 August 1945, drawn up by the victorious Allied powers, ushered in three important new principles.¹⁷ The first of these was the acceptance in international law of individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity.¹⁸ Secondly the notion of crimes against humanity was clarified. These have

been described by Richard Goldstone as “crimes of such magnitude that they injured not only the immediate victims and not only people in the country or the continent where they were committed but also all of humankind.”¹⁹ Thirdly, and precisely because of their intrinsic nature, crimes against humanity were recognized as falling under “universal jurisdiction.”²⁰

The positive side of the story undoubtedly includes the impressive deployment of documentary evidence as the basis for the cases advanced by the prosecutor. In this respect they can be regarded as having set acceptable standards for subsequent endeavors. In 1946 the General Assembly of the UN reaffirmed unanimously the principles enshrined in the Nuremberg charter.

In the wake of World War II, between 1948 and 1954, the foundations were laid for the modern system of international criminal law. Although these measures are often referred to as relating to war crimes, it is significant that the first postwar treaty, the Genocide Convention of 1948, expressly acknowledged that the “odious scourge” of genocide is outlawed “whether committed in time of peace or in time of war.”²¹

The International Court of Justice (successor to the PCIJ) was set up under the auspices of the UN in 1946. Although this court was created solely in order to adjudicate disputes between states, there was extensive debate at the time about the possibility of adding an additional chamber to the court for the purpose of trying cases involving individual criminal responsibility. For a variety of reasons these discussions came to nothing. It is evident, even so, that responding to the Nuremberg and Tokyo Trials, and in the context of the passage of the Genocide Convention, the possible need for an international penal court was already under widespread consideration.

The four Red Cross (Geneva) Conventions followed in 1949. These covered the treatment of the wounded and sick in time of war, the treatment of prisoners of war, and the protection of civilians during armed conflicts. To these were added in 1954 The Hague Convention and The Hague Protocol dealing with “the protection of cultural property in the event of armed conflict.” Taken together (along with the 1977 additional protocols, noted below), these instruments can be regarded as providing the spine of contemporary humanitarian protection law.

The International Covenant on Civil and Political Rights was promulgated in 1966. After this the necessity for international intervention is defined in terms of the need to protect human rights, and conflict is addressed less in the form of situations in which the interests of states must be adjusted and more typically as primary threats to the rights of all.²²

The changing climate of thinking in this area was reflected and confirmed in 1977 with the passage of two protocols supplementary to the Geneva Conventions. Article I of the first protocol included in its coverage “armed conflicts in which peoples are fighting against colonial domination and alien occupation

and against racist regimes in the exercise of their self-determination.” Clearly, in encompassing what had hitherto been regarded generally as civil wars, the old understanding of the laws of war as regulating only armed conflict between states had been substantially attenuated.

By the time of the creation of the ICTY in 1993, the boundaries between “war” and “not war” and between “armed forces” and “civilians” had been eroded from the point of view of the status of the actors and with respect to space and time. The older concept of laws of war had by then evolved into a wider understanding of international humanitarian law. The paradoxical fact arising from this series of measures, however, is that whereas international criminal law had become a reality, the enforcement of the law was left in the hands of separate contracting states. There was no international criminal court responsible for the trial and punishment of offenders, no group of experienced professionals to work in this area, no established body of procedure governing the activity of such a court, and no legal culture within which it could be embedded. Nevertheless, it is clear that the Tribunal’s creation belongs consistently within the process of the development of international humanitarian law described here.

II. The ICTY in Its International Context

The fact that the Tribunal in The Hague is titled the International Criminal Tribunal *for the Former Yugoslavia*, marks its ad hoc status and implies that its existence requires some kind of special explanation. It is often assumed that its formation reveals the hostility of the major states toward one or another of the Yugoslav peoples or constituent republics. This assumption is questionable. An exhaustive survey of the international scene at the time of the breakup of the Yugoslav federation is unnecessary in the context of the other chapters of this book. Nevertheless, some features of that context merit special emphasis in relation to the attempt to understand the creation, form, and character of the Tribunal.

i. Genesis: The End of the Cold War

The principal feature of the configuration of political circumstances that surrounded the collapse of the former Yugoslavia was the ending of the cold war.²³ Following the collapse of Soviet hegemony in Eastern Europe, symbolized by the breaching of the Berlin Wall in 1989, the NATO states were deeply preoccupied with the reconfiguration of patterns of security as the Soviet threat receded, the possibility of a “peace dividend,” and the future role of the alliance. Nor was this debate confined to the North Atlantic area. There was widespread—indeed, global—discussion of the hypothetical emergence of a New World Order (NWO) that might come to replace the centuries-old Westphalian paradigm of interstate

relations, but it remained unclear just what were the normative or institutional components of this order—or, where these appeared already to be in existence, the degree of their effectiveness.²⁴ The beginnings of this NWO might be said to date from the founding of the Conference for Security and Cooperation in Europe (CSCE) in August 1975.²⁵ Following the end of the cold war, the adoption of the Charter of Paris on 21 November 1990 initiated the transformation of a primarily political forum for the discussion of a range of European issues into a set of institutions (the Organization for Security and Cooperation in Europe, OSCE) intended to manage conflict and ensure coordination in the face of common problems. When the Yugoslav crisis broke, however, these arrangements were entirely untested and embodied collective aspiration but without experience. What is more, as a British Foreign Office memorandum of November 1991 observed, “the consensus principle means that the CSCE’s intervention can only be effective if, and in so far as, it is welcome to the government concerned.”²⁶ In the circumstances of the breakup of Yugoslavia that consensus was not forthcoming—neither was it clear from whom it might be obtained.

ii. The Preference for Mediation and Negotiation

The strength of these predispositions and the apparent existence of appropriate European structures provided grounds upon which the U.S. could base its own preferences to allow European governments to respond to the Yugoslav crisis.²⁷

In December 1991 the European Community (EC) had just redesignated itself as the European Union (EU) with the signing of the Maastricht Treaty, and the possible expansion of concerted political and diplomatic action by Europe was on the agenda. The leaders of the Union took the state of affairs in Yugoslavia as an opening to explore opportunities in this direction.²⁸ Both the EU and the OSCE held out great expectations with respect to the possibilities for responding to a major conflict in Europe. Neither organization had experience of how its potential might be translated into action, however, and the reality of the Yugoslav crisis did not match the scenarios that had served as templates in the process of devising these institutions. Crucially, neither body had at its disposal military forces other than those of their constituent states. Consequently, within Europe, the international response to war in Yugoslavia was heavily biased from the beginning toward negotiation or mediation rather than military intervention. With hindsight it is clear that the Community, in adopting a policy of mediation between the local parties to conflict, was committed in advance to limiting itself to diplomatic and humanitarian intervention and that by this stage without the backing of armed force it stood little chance of realizing its aims.²⁹

iii. Explaining the Yugoslav Crisis

International responses to the Yugoslav crisis in 1991 were founded upon two main misunderstandings of the nature of the problem. The first of these anticipated that conflict in the Balkans would recapitulate aspects of World War II, in which (it was widely believed) Tito's partisan forces had succeeded in tying down a large number of German divisions. The impossibility of fighting a war in the Balkans without inordinate cost, based upon accounts of World War II, was taken for granted.

The second narrative was the myth of ancient hatreds fostered by publicists such as Robert Kaplan.³⁰ This view made the conflict in Yugoslavia essentially incomprehensible to the outsider, rooted as it was presumed to be in chronic mental states or cultural predispositions.

The arms embargo imposed by UNSC Resolution 713 of 25 September 1991 was clearly a reflection of such perceptions. Its justification was often framed in terms of the need to avoid pouring oil on the flames—in other words to avoid making worse a situation in which the locals were naturally combustible! The metaphor of the Balkan tinderbox was frequently deployed.³¹

Furthermore, approached by politicians or the communications media with requests for explanation, it was not uncommon for academic commentators to justify their own claims to expertise by insisting on the remarkable complexity of the Balkan situation. Academic insistence upon the complexity and intractability of this revived “Eastern Question” hardly provided assurance to politicians that effective international military involvement was possible.

It came to be believed that the best that the international community could do was to mediate and provide humanitarian support. By the time the war had spread into Bosnia-Herzegovina, the major international actors were already trapped in a framework of policy options that severely limited their capacity for action in Yugoslavia, and they were committed to the long round of fruitless negotiations, culminating in the failure of the Vance–Owen initiatives in the summer of 1993. It is against this background that, as we shall see in the next section, the proposal for a war crimes tribunal emerged as a favored response to the crisis.

iv. The Variability of Policy toward Yugoslavia

One of the most obvious features of the international context of the Balkans since 1992 has been the variability of several major international actors' stances toward the region's problems. Each of the major states involved experienced internal political conflict over the utility and character of the Tribunal. Power has as often been used in order to prevent developments as to accelerate them. The result has

been notable for the way in which the unintended consequences of action by international actors have been as significant as their intentions.³²

During the initial period of the Yugoslav crisis the attention of the administration of President George H. W. Bush was concentrated primarily upon the Middle East—particularly following the Iraqi invasion of Kuwait in 1990 and the subsequent Gulf War. The U.S. perceived no immediate threat in the Balkans to its own interests, and while taking the general view that a redrawing of the map was undesirable, the administration felt itself to be under no pressure to engage directly with the problems of Yugoslavia. The large-scale involvement of European countries in the region in the form of trade and investment (outweighing that of the U.S.) was expected to give the Europeans a superior economic leverage on the parties to the Yugoslav conflict. The policy of the administration of the U.S. toward the Tribunal shifted substantially at the point when Madeleine Albright took over as ambassador to the UN.

British attitudes under Conservative and Labour governments were far from identical, and the stances of the Mitterrand and Chirac presidencies in France were notably different. The Russian impact on events was relatively marginal in this area. As Richard Ullman has observed, “in its involvement with Yugoslavia, Russia has behaved less like a state seeking primacy than one which wants to be seen to be consulted, a member of the innermost circle.”³³

The UN itself was a significant component of the international political context of the creation of the Tribunal. As Thierry Tardy has pointed out, the new climate of cooperation between formerly opposed superpowers after 1989 created a situation in which it was possible for the UN to act in a much more interventionist spirit in general. Between its founding in 1945 and 1988, the UN authorized thirteen major peacekeeping and similar operations: thirty-three were undertaken after that date.³⁴ Whereas only five such missions had been in operation in 1985, no fewer than seventeen were current in December 1995. In understanding the ICTY, therefore, it is perhaps important to place it within an international climate that over time became more favorable to international intervention and that accorded to the UN an influence that in other times it might not have possessed.

The context during which the ICTY was conceived was unique, and the result of a number of coinciding factors. The end of the cold war, the election of the Clinton administration, the appointment of Madeleine Albright as the United States’ envoy, and the culture of legalism within the leadership of the UN all laid the foundation for a possible international war crimes tribunal, whether its jurisdiction be Bosnia, Rwanda, or elsewhere. Had this conflict erupted even five years earlier, it is doubtful whether the UN Security Council would have done anything about it.

The timing of the birth of the ICTY suggests that it was not a long-standing conspiracy created as a means of debasing the Croats, Serbs, or Bosniaks before

the international community, as some nationalists have claimed. No serious action was taken until after the flames of war had fanned from Slovenia and Croatia into Bosnia and the European stance of reliance upon negotiation and mediation had demonstrated its ineffectiveness.

v. Elite Inaction and Public Outrage

The pressure to break the international deadlock came, as Gary Bass notes, very emphatically from nonstate actors—especially from the press. Three stories were particularly important in focusing popular attention on the Balkan situation—the siege of Vukovar, which fell to Serb forces after a three-month siege in November 1991; the attack on Dubrovnik in December; and the U.S. publication of an interview by John Burns with the self-confessed war criminal Borislav Herak.³⁵

The tide of public indifference really turned, however, with the reports in July and August of 1992 of detention camps filed by journalists (in the English-speaking world) such as Roy Gutman, Penny Marshall, Ed Vuillamy, John Burns, and Maggie O’Kane and (for Francophone audiences) Jean Hatzfeld and Yves Heller.³⁶

A further impetus to the redefinition of the Yugoslav situation came in August 1992 with the publication of several reports on the war in Bosnia by significant nongovernmental and international organizations. The first of these was the Human Rights Watch report.³⁷ The first report of Tadeusz Mazowiecki, the UN special commissioner for human rights, was presented in August 1992.³⁸ (His reports were a significant factor in ensuring that governments could not remain in ignorance of the problems.) This was followed in September by publication of a report on the situation in Bosnia commissioned by the CSCE.³⁹

On 26 and 27 August the London Conference was convened—involving representatives of more than twenty states, together with the leaders of the former Yugoslav republics and autonomous provinces. This took place partly because of the obvious gap between the rising international public concern about the situation and the conspicuous failure of the European-led Carrington mission. At the London Conference, responsibility for future negotiations was formally handed over jointly to Lord David Owen (acting for the EU) and Cyrus Vance (special representative of the UN secretary-general). Their efforts to negotiate a settlement of the conflict resulted in the Vance–Owen Peace Plan for Bosnia-Herzegovina, which was presented in Geneva on 2–4 January 1993. Although this was soon endorsed both by representatives of the secessionist Bosnian Croats and the Bosnian government, it became clear rapidly that the plan would founder on the opposition of the Bosnian Serbs; by the end of March it was a dead letter. Radovan Karadžić, the political leader of the Bosnian Serbs, was put under enormous pressure to accept the plan, and at the Athens meeting of 1–2 May even put his

signature to it. He made it clear that effective endorsement was conditional upon its ratification in a referendum, which was to take place on 15–16 May. To the surprise of very few this was not forthcoming.

By the early autumn of 1992 it is possible to speak, without exaggeration, of public outrage in response to the reporting of events in Yugoslavia, and it was clear that in the face of enormous public concern a new approach was required. It is within this context that the formation of the ICTY needs to be understood.

III. The Formation of the ICTY

The Yugoslav crisis came before the General Assembly of the UN on 23 September, when the possibility of a tribunal was proposed by Germany's Klaus Kinkel. On 6 October, Resolution 780 was passed in the Security Council, establishing a Commission of Experts in order to explore the feasibility of a war crimes tribunal.⁴⁰

That commission had before it not only the material already published but the results of investigative missions that it conducted, including the exhumation of mass graves.⁴¹ In October, Amnesty International added its voice to the growing volume of well-documented protests about the scale and seriousness of "grave violations" of the Geneva and Hague Conventions in the region.⁴²

In the context of the accusations that have been made regarding the political pressures that shaped the creation of the ICTY, it is important to acknowledge several features of the commission and its work.⁴³ Its original chair, the Dutch professor of international law Frits Kalshoven, has complained publicly about the difficulties faced by the commission, attributing some of them to deliberate obstruction (blaming Britain, France, Germany, and Italy). Several secret services were accused of refusing to pass on relevant information they were believed to possess. Kalshoven resigned his post (on medical grounds) before the commission had completed its task, handing over responsibility to Cherif Bassiouni (president of the International Human Rights Law Institute at DePaul University in the U.S.). A great deal of its eventual success was owed to Bassiouni's personal dedication and hard work in overcoming problems posed by the inadequacy of the resources placed at its disposal and the lack of cooperation from relevant parties. Bassiouni also believed that British diplomacy was hostile to the investigation, although both his own published account and the interviews given by Kalshoven make it clear that many of their difficulties were rooted in the bureaucratic culture of the UN itself. The members of the commission were nominated for their individual expertise in relevant areas and not as representatives of particular states.⁴⁴

On 22 February 1993 the Security Council of the UN decided by a unanimous vote that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law

committed in the territory of the former Yugoslavia since 1991.⁷⁴⁵ Resolution 808 directed the secretary-general to submit to the UNSC a specific proposal to this effect. Accordingly, on 3 May 1993 the secretary-general submitted his report, which was approved by the council on 25 May, again by a unanimous vote (UNSCR 827) creating the International Criminal Tribunal for the Former Yugoslavia.

The experience of the Commission of Experts underlines several important general points in relation to the events that led to the creation of the ICTY. It was set up in response to widespread public concern rather than as an expression of the determination of the major international actors. Indeed, to some extent its existence seems to have been regarded as an embarrassment because the possibility that key players in the events were identified as possible war criminals was interpreted as potentially prejudicing the outcome of concurrent peace negotiations.⁴⁶

Throughout the period of its operation, funding for the commission remained irregular and insecure, dependent initially in large measure upon contributions to a voluntary trust fund. Roughly a third of its direct financial support appears to have come from the U.S. Other backing in money, in services, and in personnel was contributed by a wide range of governmental and nongovernmental sources. Bassiouni attributes the persisting problem of serious underfunding that afflicted the commission primarily to the bureaucratic character of the UN and to inefficiency rather than to any systematic attempt to subvert its work.⁴⁷

The commission's work was suddenly terminated in July 1994. Because the ICTY had already been established, the UN did not believe that it was necessary to keep the commission going. It is undoubtedly the case, however, that this did have one consequence of enormous importance. It prevented the government of Yugoslavia from making any formal presentation of its own evidence. That information was, therefore, not available in time for the commission to make its final report. This did lend credence to the idea that the ICTY, from its inception, was designed principally as an instrument to punish the Serbs and their allies. In this respect, it has been very damaging.

IV. The Structure and Operation of the Tribunal

The structure of the ICTY and its terms of reference are set out in its statute, first enacted as an annex to Resolution 827 of the UN Security Council.⁴⁸ The Tribunal was expressly set up in order to apply existing international law and not to create it. For this reason, Articles 2–5 of the statute confine its jurisdiction to international crimes already well established before its creation and, indeed, accepted by the government of the former Yugoslav federation. Any law becomes a reality, however, only when it is interpreted and tested in court. This has been particularly the case in relation to the Genocide Convention, which had not previously been

tested in any court. The legal relevance of the distinction between international armed conflict and civil war had been taken for granted in popular parlance but never securely established in international law.⁴⁹ A particularly important element of judicial innovation was undertaken by the Tribunal in its determination of the status of the law relating to rape.⁵⁰

There have been several legal challenges to the determinations reached by the Trial Chambers in The Hague, notably in its early years those relating to the concept of civil war and the possible immunity to prosecution of a former head of state. The appropriateness of the use of Chapter VII of the UN Charter as the mechanism for the creation of the Tribunal has also been called into question. Whereas these points of challenge have to do with the interpretation of international law, they have rested upon a general acceptance of the validity of the legal conventions themselves. Our report did not, therefore, explore legal issues of that kind, which for our purposes were taken as settled. The manner in which the operation of the ICTY has acquired political relevance has been shaped closely by its own structure and mode of operation. In examining its political relevance, therefore, it will be both logical and helpful to organize that discussion in terms of its several components.

i. The Trial Chambers

The Trial Chambers constitute the core of the Court. The judges are elected by the General Assembly of the United Nations for a term of four years. At the time of writing, the members of Chambers were drawn from twenty-two different countries. The president and vice president are elected by and from among the judges.

The judges are divided between three Trial Chambers, each of which elects a presiding judge, and the Appeals Chamber. Each trial is heard by a panel of three judges, of whom at least one must be selected from among the permanent judges. The Appeals Chamber is in common with the International Criminal Tribunal for Rwanda (ICTR). The judges in Chambers are collectively responsible, under Article 15 of the statute, for the determination of their own rules of procedure and evidence.

The permanent judges have important regulatory functions in relation to the work of the Tribunal, exercising collegiate responsibility under the president. They draft and adopt the legal instruments regulating the functioning of the ICTY, such as the rules of procedure and evidence.⁵¹ Care is taken to ensure that judges do not sit on cases in which they might be expected to have an interested position. The sense of the independence of the Tribunal is maintained strenuously.

The Chambers can be said to operate as a kind of hermetically sealed element in relation to the rest of the Tribunal's work. This is an important factor in

supporting its legitimacy; at the same time, however, it has resulted in some of the most serious public misunderstandings about the nature of the Tribunal. Because the members of Chambers are drawn systematically from so many states, the question of patronage has not been identified as a persisting and systematic political issue, although during the first rounds of voting great concern was expressed as to the adequacy or otherwise of the representation of Muslim countries.⁵² Generally speaking, any controversy concerning the composition of the Chambers has involved the practical competence of candidates and not their partiality.

The task of synthesizing a coherent and workable practice from these diverse elements has been far from easy. In the event, a large part of the practice of the Tribunal has been adopted from common law (as opposed to civil law) systems. A key difference here is between the adversarial confrontation between prosecution and defense counsel before the judge(s) and jury, characteristic of the former, and the primacy of the investigating magistrate(s) charged with the independent pursuit of the truth, typical of the latter. The adversarial system permitted public debate of the issues, the open interrogation of witnesses, and the dissection of argument. Nevertheless, the status of the Chambers as a hermetically sealed element has meant that they have been slow to realize the importance of explaining clearly to the outside world the nature and significance of their *modus operandi*.

The concept of an indictment, for example, which is familiar within the American system, is not necessarily generally understood—particularly the difference between indicting somebody for an offense (which takes place before the trial) and actually finding them guilty after the evidence has been heard and weighed.

An important point upon which the Chambers have found themselves exciting wider political controversy has been Rule 61. Article 21:4(d) of the Tribunal's statute confirms the right of the accused "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." Trials in absentia are thereby expressly forbidden. Rule 61 provides, however, for a revision of the indictment in the event of a prolonged failure to produce the accused in court following the original indictment. Whereas the purpose of this measure is clear—placing states under pressure not to conceal or protect those accused of serious crimes—Rule 61 has been interpreted not only as providing for trials in absentia but as aligning the judges with the work of the prosecutor, from whose office they are supposed to be clearly independent. These procedural devices are open to lay interpretation as the determination of guilt before a trial has taken place.

The penalties that the court may exact are limited (Article 24 of the statute) to imprisonment, and paragraph 1 specifies that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." This leaves room for considerable interpretation, however,

and judges from different countries have brought to their task quite different standards of appropriateness. Western European interpretations of a life sentence can appear astonishingly lenient in relation to American and Yugoslav practice. The multinational composition of the Trial Chambers has resulted in difficulties in ensuring consistency and comparability between sentences, not all of which have been settled on appeal.⁵³

One of the most contentious areas of the practice of the Trial Chambers has been questions relating to plea bargaining. This practice is well established in the U.S. but regarded with mixed feelings elsewhere. The decision to (perhaps) set aside some counts on the original indictment in return for cooperation on the part of those indicted is often misunderstood.⁵⁴ The indictments are usually long and complex and often issued at an early stage of investigation. It can be in the interests of both sides to proceed to trial on a highly simplified indictment. In all of these areas it has been noteworthy that the Tribunal has suffered from its own failure to explain adequately to the outside world aspects of its practice.⁵⁵

Rachel Kerr defends strongly the record of political independence of the Chambers. "Whilst politics permeates every other aspect of the Tribunal, including its very existence, it does not enter the courtroom and impinge upon due process of law."⁵⁶ While accepting this judgment, it is worth remarking that the most significant political consequence of the actions of the judges can be seen to flow unintentionally precisely from their determined depoliticization and their refusal to take into account extralegal considerations.

ii. The Registry

The Registry is responsible for the administration and judicial support services of the Tribunal, including the translation of documents, the interpretation of court proceedings, and the maintenance of records of evidence and material that is potentially available as evidence. Its judicial responsibilities cover the organization of the hearings, the legal files and archives, the operation of the legal aid program for indigent defendants, the provision of assistance and protection to witnesses, the management of the Tribunal's own detention unit at Scheveningen, and the provision of internal security.

To the registrar falls a good deal of the diplomatic work of the Tribunal; but whereas the president is largely concerned with the specifically judicial aspects of its work, the registrar is responsible for a good deal of the sensitive negotiation required in order to secure its budget. The Registry serves the needs of all other major elements of the Tribunal—the Trial Chambers, the prosecutor's office, and defense counsel.

The silence of commentators on the ICTY regarding the work of the Registry might well be taken as an indication of its politically uncontroversial status

with respect to the outside world, but there is at least one area in which the conduct of the Registry can be seen as having significant political consequences. This has to do with the belatedness and limited nature of its provision for communication with the outside world.

The Outreach Section of the Tribunal was not created until the end of 1999. Before then there was a very small press office, the activities of which were confined largely to The Hague. Official communication had also been limited to the English and French languages, and the Press Office waited for enquirers to come to it in search of information. Having been established, the Outreach Section initially saw its task as directed primarily to improving the information available to the legal profession and to journalists. As a result, its effort tended to address public opinion only very indirectly and through institutions that either had an interest in the issues or that had already formed their views within a specific institutional/political context—often hostile to the ICTY. The video presentation of the work of the Tribunal, *Justice at Work*, which provides an overview of the Tribunal's structure and operations, was not produced until 2001.⁵⁷ Facilities for regular television coverage were only introduced with the Milošević trial in February 2002. Other efforts to familiarize people in the region with the statute, procedures, and operations of the ICTY have been produced mostly by outside researchers rather than by Tribunal staff.⁵⁸ It is still the case that the source most heavily relied upon by journalists covering the affairs of the Tribunal is the *Tribunal Update*, produced regularly by an independent charity, the Institute for War and Peace Reporting.⁵⁹

A significant illustration of the failure of the Outreach program can be seen in the controversy surrounding the transfer of former Yugoslav President Slobodan Milošević to The Hague. Serbian President Vojislav Koštunica alleged that this was illegal on the ground that Yugoslavia had no treaty of extradition with The Hague. The transfer of Milošević took place under Article 29 of the ICTY's own statute, however, and did not require a separate treaty of extradition. A clear public rebuttal of Koštunica might have gone some way toward mollifying certain sections of Serbian public opinion.

Until very recently, the Tribunal has been very slow in appreciating the fact that it had a job to do in explaining the basics of its intentions and operations. The result of this is that, whereas the Registry has been far from political in the sense of its pursuing either its own goals or those of powerful others in the Yugoslav region, its very indifference to the outside world has given to the Tribunal a blank facade upon which it has been possible for others to project assumed purposes, uncorrected by the institution itself.

iii. The Office of the Prosecutor

The allegations that the ICTY is a political body and, in particular, that it is biased have related mostly to the work of the Office of the Prosecutor (OTP). Its members are experienced police officers, crime experts, analysts, lawyers, and trial attorneys. The prosecutor's office conducts investigations (by collecting evidence, identifying witnesses, exhuming mass graves), prepares indictments, and presents prosecutions before the judges of the Tribunal.

As with the Trial Chambers, lawyers within the OTP come from different traditions and take significantly different approaches (especially across the civil–common law divide). There are differences in the level of competence of those involved, and there may be differences of point of view between professional groups. Three areas of its activity have become the focus of allegations of bias: the supposed link between the financing of the Tribunal and the political compliance of the OTP; the pattern of detentions; and (most controversially) various aspects of policy relating to indictment.

Finance has always been a sore point in relation to the Tribunal. In the early days of its existence it operated on a shoestring—in the first year of its operation its budget was only \$276,000. Financial provision subsequently has become both more generous and more secure. Its budget for 2005–2006 was \$278,500,000—a tenfold increase. The severity of early budgetary constraints has left a legacy of suspicion that he who pays the piper must be in a position to call the tune. The U.S. has always provided a substantial proportion of the total financial resources of the ICTY, which laid it open to claims that there might be a link between its financial viability and the policy of prosecution. No clear evidence has emerged, however, that substantiates the view that specific prosecutions have been politically motivated by virtue of the Tribunal's financial dependence upon influential states.

An area of controversy relating to the Tribunal's finances has arisen in connection to the costs of defense. The statute of the ICTY provides that the accused shall be entitled to facilities for the preparation of their defense, to counsel of their own choosing, and to legal aid to ensure that defendants are adequately represented and that witnesses and evidence can support their cases. Not all defendants have taken advantage of these provisions. During the period of office of Croatian President Franjo Tuđman, defendants of Croatian national identity were supported by the Croatian state. Conspicuously also, former Yugoslav President Slobodan Milošević initially declined to recognize the court and prepared and conducted his own defense. Actions of this kind are, of course, profoundly political in their intention and are expected to create and reinforce the impression that defendants are themselves victims of the judicial system who either require support from their friends or who courageously stand alone in defiance of it. Clearly

it is the case that if the ICTY is open to accusations of political manipulation in connection with its financing it is not only the OTP itself that merits scrutiny.

The Tribunal has been criticized repeatedly in relation to the detention (or failure to detain) of those who have been indicted by the OTP. To a large extent these criticisms have been misplaced, particularly in that the Tribunal itself does not have any agency that could be responsible for the detention of suspects under its control. It is entirely dependent in this respect upon the services of military or police forces that are either attached to specific states or part of the international forces operating within the region.⁶⁰

Patterns of detainment are believed to be the objects of political pressure from one state or another. There have been significant differences in the pattern of detainment between different zones of control within Bosnia, which to some extent might support the notion that detainments take place as a reflection of policy and not by chance. There have been radically divergent interpretations of the rules of engagement by local commanders even working within the same national contingents, as a consequence of which suspicions of complicity have flourished. Detainment has been a highly controversial matter; but this fact should not be taken as supporting in one way or another the notion that the prosecutor's office itself is biased.⁶¹

Detainments have become one of the most regularly contentious aspects of the activities of successive chief prosecutors because they have attempted to use international pressure to ensure transfers to The Hague, linking these to the promise of diplomatic support or the availability of aid. Although this kind of pressure upon local governments to undertake detainments or to persuade those indicted to surrender themselves is valued by the international agencies themselves as a useful lever by means of which compliance with their own terms can be enforced in the region, its use is determined by these agencies. Its use is likely to be welcomed by the Office of the Prosecutor, but it cannot be used as evidence that the OTP itself adopts a position of systematic bias against any state that is on its receiving end, particularly because all of the post-Yugoslav states have been (from time to time and to varying degrees) the subjects of this type of leverage.

Ever since the Tribunal began its work, the pattern of indictments issued by the OTP has been the object of critical scrutiny, particularly in relation to their ethnic balance. The majority of indictments (more than two-thirds) have been issued against ethnic Serbs.⁶² There have been counterallegations, however, that, given the pattern of crimes and the level of their seriousness, the balance ought to have been more weighted in that direction.

The emphasis upon command responsibility is one of the most problematic aspects of the indictment policy of the OTP. Whereas this idea is rooted in Article 7(3) of the Tribunal's statute, so that prosecution under this head is in accordance with the law, the effect of overreliance upon it is possibly counterproductive. The

Documentation Center in Sarajevo, responsible for a detailed audit of the casualties in Bosnia-Herzegovina during the Yugoslav wars, has definitely identified more than 100,000 deaths.⁶³ In light of the fact that it is practically impossible to ever ensure that individuals are brought to account for more than a fraction of these, it has been necessary for the OTP to adopt a principle of selection. Whereas the policy of “ascending the ladder of responsibility” may indeed help to ensure that the architects of ethnic cleansing or the directors of mass murder are brought to trial, it is still the case that many thousands of small fish responsible for specific acts of barbarity are left to return to open public life, often in the communities they formerly terrorized. It is hardly surprising under these circumstances that the Tribunal is seen as falling short of local expectations of justice.⁶⁴ It is important to point out, however, that the Tribunal’s expectation is that responsibility for the prosecution of these minor cases increasingly will be taken over by municipal courts as institutions of justice become more securely established in the post-Yugoslav states and greater trust can be placed in their political independence, as well as their competence.

A further, and more dangerous, consequence of the policy of prosecuting on the basis of command responsibility is that it can be perceived as undermining the essential principle enshrined in the Tribunal’s own statute that only individuals are to be held responsible for crimes. Michael Humphrey has argued that the prosecution of leading military and political figures may bring with it a special danger.⁶⁵ In an important sense leaders stand for the community, and it becomes hard to avoid turning “prosecutions into politically and symbolically managed events” in which the community itself is on trial. While setting out to challenge popular discourse about atrocity in terms of collective guilt and insisting upon individual responsibility, the judicial process implicitly places the collectivity in the dock.⁶⁶

The most controversial area of this discussion relates to the possibility of the issue of indictments against NATO personnel for offenses alleged to have been committed during the air campaign against Serbia. Two aspects of this campaign have been claimed to constitute violations of the laws or customs of war. Article 3(a) of the Tribunal’s statute prohibits “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering,” and paragraph (b) prohibits “wanton destruction of cities, towns or villages, or devastation not justified by military necessity.” The deployment of munitions incorporating depleted uranium has been held to constitute an infraction of the first of these, and several features of the selection of targets, infractions of the second.⁶⁷ Given the fact that Article 1 of the statute gives to the ICTY “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,” this possibility would seem not to be excluded from its competence, though not positively indicated.

The Tribunal took very seriously the need to confront this issue, which was the subject of a detailed internal report, following which it was decided not to proceed with action against NATO personnel.⁶⁸ This decision, whether soundly based in law or a triumph of prudence over principle, has had enormous political consequences, not only by reinforcing the idea that the ICTY is inherently anti-Serb and a creature of the U.S., but also in entrenching U.S. opposition to the International Criminal Court.

Finally, it is necessary to enquire to what extent a strategic error has been made in relation to public acceptance of the ICTY by allowing for all intents and purposes the public face of the court to be the OTP and not the president. The express function of the prosecutor is to prosecute, whereas the Trial Chambers (headed by the president) are charged with determining the truth in the light of evidence and argument submitted by both the prosecution and the defense. It is a vital question (although hypothetical and speculative) just what difference might have been made to the frame within which the Tribunal came to be defined had its most prominent public representative been seen as more obviously neutral in relation to the task of issuing indictments and prosecuting the accused.

V. Bias and the Perception of Bias: The ICTY in the “Yugoslav Space”

Questions relating to the bias in the ICTY’s operations have been so persistent and so strongly sustained that they deserve additional consideration. These questions are patterned in such a way as to relate systematically to features of the political cultures of the different states that emerged from the former Yugoslavia. To dismiss this phenomenon as simple error would be to pass up an opportunity to investigate how the ICTY articulated with the politics of these states and learn something about the nature of the post-Yugoslav states. It is to this task that we now turn.⁶⁹

The blankness of the facade that the ICTY presented to the region permitted the projection onto it of images that had little to do with its originating purposes and that bore little relation to the manner in which it actually functioned, either as a court of law or as an element of the international political environment. Not surprisingly, under these conditions, nationalist politicians who had succeeded in occupying the larger part of the ideological space in the ex-Yugoslav states found the opportunity to write their own narratives on this blank facade as elaborations of their own proprietary myths of recent history.

Although the ICTY itself has defined its work in terms of legal questions, domestic audiences within the Yugoslav region focus instead on political issues, such as the funding and operation of the ICTY, and on ethical questions related to the legitimacy and conduct of the wars of succession in the former Yugoslavia

and on the political responsibility for war of the successor states. In contrast with the legalistic focus of international and professional actors on the punishment of crimes, local expectations often are based upon reporting that portrays the court and the accused as politically and morally controversial but has little to say about the crimes.⁷⁰

The reception of the ICTY across the region has not been uniform. If we are to understand how these differing (and largely inconsistent) accounts of bias have flourished, we need to go beyond resorting to the Machiavellian intentions of local politicians and consider a wider range of significant features of the political institutions and cultures of the former Yugoslav states.

In the successor states of Yugoslavia, national identities came to be defined dialectically in relation to one another—a process that contributed to the dissolution of the federal state and arguably determined some of the most violent aspects of the way this dissolution took place. The ICTY has come to play the role of a medium through which the relationships between national identities are played out. Issues such as the commensurability of guilt and the question of responsibility for the war remain important in the postwar period. It is still the case that relations between the states and regions of the former Yugoslavia are being defined to some extent through competing discourses about war crimes. To this end, we now examine briefly the reception of the Tribunal in Croatia, Serbia, and Bosnia-Herzegovina.

i. Croatia and the ICTY

“No issue has polarized the post-authoritarian Croatian political scene as much as the issue of cooperation with the International Criminal Tribunal for the Former Yugoslavia,” write Victor Peskin and Mieczysław Boduszynski.⁷¹ There was always an element of suspicion in Croatia toward the ICTY, reflected initially in the almost complete silence of the press regarding its foundation. The first indictments, however, were all against ethnic Serbs: up until November 1995 only one indictment was issued by the Tribunal against an ethnic Croat. That picture changed dramatically when, on 10 November, the first of twenty-one indictments were issued in connection with events in west-central Bosnia—all against ethnic Croats. In fact by March 1996 roughly a third of the indictments issued were against Croats. This was hardly consistent with the official Croatian view that the war had been a matter of Serb aggression against innocent parties whose actions were invariably defensive in character.

At the heart of President Franjo Tuđman’s anxiety about the ICTY was the issue of Bosnia-Herzegovina, at least parts of which he believed should belong by rights to Croatia.⁷² The international settlement at Dayton, however, presumed the permanence of a Bosnian state—and hence its permanent alienation from

Croatia. For as long as Tudjman was at the helm there were powerful ideological reasons for noncooperation with the Tribunal.

In the cases against Tihomir Blaškić and Dario Kordić it became evident that the policy of prosecuting on the basis of command responsibility might eventually implicate President Tudjman himself and his minister of defense, Gojko Šušak.⁷³ It seems unsurprising, therefore, that there should have been tension between the ICTY and the Zagreb government, deteriorating from 1997 onward. Under constant international pressure, culminating in the postponement of an agreement with the International Monetary Fund (IMF), the government did pass a law on cooperation with the ICTY, and in October 1997 ten Croats indicted for war crimes were transferred to The Hague by the Croatian authorities.⁷⁴

Following a January 1999 speech in which President Tudjman had criticized the ICTY, Chief Prosecutor Louise Arbour expressed her dissatisfaction with the Croatian government's record of cooperation with the Tribunal, which had been limited so far to gestures. In early March of the same year, a U.S. State Department report presented to the Organization for Co-operation and Development (OECD) criticized Croatia's human rights record and singled out for comment Croatia's noncooperation with the ICTY.

During the summer of 1999, in the case of Vinko Martinović-Štela and Mladen Naletilić-Tuta, the Tudjman government cooperated with reluctance with the ICTY, although eventually complying with its requests. Circumscribed by a high degree of legal formalism and responding to the leverage of possible international sanctions, Zagreb was finally persuaded to transfer both men to The Hague.

With the passing of Tudjman it became clear that the new government would take a different position with respect to the ICTY. In his inauguration speech to the Sabor on 18 February 2000, President Stipe Mesić reiterated his desire to accelerate the country's admission into international organizations and ultimately the European Union. This by implication meant accepting Croatia's obligations toward the Tribunal.⁷⁵ Large quantities of documentation were surrendered to The Hague, and in April the government acceded to a request to examine a reported mass grave outside Gospić. Accordingly, Croatia was accepted officially into the Partnership for Peace program on 25 May.

The new direction in policy created an opportunity for various nationalist groups to attack the policy of cooperation with the Tribunal. Matters were brought to a head on 28 August by the murder in Gospić of Milan Levar. Levar had served as a witness to the Tribunal in 1997 concerning reports of mass executions of Serbs in his hometown—a Croat testifying against other Croats. The government was compelled to act, and initiated a wave of arrests of those accused of war crimes, including a number of military officers.

The result was public uproar led by sections of the Croatian Democratic Union (HDZ) and veterans' organizations offended by accusations directed against men who were considered to be war heroes. The governing coalition found its cohesion under threat, for a rift appeared to open also between Prime Minister Ivica Račan and President Mesić on this issue. A group of senior military officers sent an open letter of protest to the press agency HINA, claiming that the arrests were part of a politically motivated attempt to discredit the 1991–1995 Homeland War. On 28 September Mesić dismissed the seven generals who had led the protest, insisting that the army should be depoliticized. Although sometimes dismissed as originating with extreme nationalists, these views do seem to have resonated with the public generally.

Three events in particular presented a challenge to the new government's position, against which it has found it difficult to defend itself—the indictments against Generals Mirko Norac, Ante Gotovina and Rahim Ademi, and Janko Bobetko.

On 8 February 2001 a warrant was issued for the arrest of General Mirko Norac, whose name was linked to the disappearance of Serb civilians from the Gospić area. Norac went into hiding, and the announcement was followed by further demonstrations led by nationalist groups and organizations of veterans. Having received assurances that he would be tried in Croatia and not handed over to the ICTY, Norac surrendered to the police, and on 5 March was formally indicted in Rijeka, at which point Mirko Čondić, head of the largest of the veterans' organizations, condemned the charges as “shameful and humiliating,” and demanded an amnesty for all Croatian veterans.⁷⁶

The cases of Gotovina and Ademi were in some respects even more controversial. Initially the government had resisted the invitation to transfer them. Following a visit to Zagreb by Carla del Ponte, at a meeting on 7 July 2001 the cabinet agreed that the two should go to The Hague, upon which Dražen Budiša, leader of the HSLS, and three ministerial colleagues resigned from the coalition government, and Račan faced a motion of no confidence in the Sabor. He survived and on 17 July successfully piloted a statement of the government's general policy toward the ICTY through the Chamber.

Ademi surrendered himself to The Hague; Gotovina went into hiding. The outrage expressed by some sections of the public and among certain professional soldiers and politicians was directed principally against the indictment of Gotovina. The events cited in the indictment against Gotovina concerned the conduct of Operation Storm, which had resulted in the successful recapture of the secessionist Serb Krajina in August 1995. The very existence of the Krajina compromised Croatian statehood. So important was this that almost any action could be regarded (by some sections of public and official opinion) as justifiable if it led to the confirmation of Croatian statehood in this area. For nationalistic Croats the

supreme importance of the end justified any means employed in its realization. To contemplate prosecuting Croatia's military heroes for war crimes was a direct challenge both to the legitimacy of the Homeland War and the dignity of the state itself.⁷⁷

A potentially greater embarrassment for the government attended the issue of an indictment against the former Croatian chief of staff, the architect of Croatia's military strength, General Janko Bobetko, in September 2002. The continuing economic difficulties of the Račan government and the fragility of its coalition rendered it ever more sensitive to controversy. Opinion polls indicated the steady recovery of the popularity of the conservative nationalist HDZ.⁷⁸ Accordingly, a policy of temporizing was adopted, beginning with a challenge to the indictment in the Appeals Chamber of the ICTY itself. Britain and the Netherlands cancelled their ratification of the Stabilization and Association Agreement between the EU and Croatia, and it became clear that the prospect of entry to the EU was under threat.⁷⁹ An apparently irreconcilable confrontation between the ICTY and the Croatian government was averted by the failing health of the eighty-three-year-old general, who died in April 2003.

The Social-Democratic government under Račan was defeated in the elections of November 2003, and an alliance headed by the HDZ returned to power under Ivo Sanader. During its period in opposition the HDZ underwent a radical change of ideological orientation, accepting the necessity of confronting the war crimes issue and the importance of cooperating with the Tribunal. The subsequent normalization of relations between Zagreb and The Hague has been recognized to some extent by the willingness of the international agency to support the prosecution of some war crimes cases in Croatian courts. The war crimes issue has remained one of the central areas of debate within Croatian political life and during June 2005 negotiations over entry to the EU featured as one of the principal points of conditionality.

The acceptance of Croatian candidacy was followed on 7 December by the arrest of Gotovina in Spain and his subsequent transfer to The Hague.⁸⁰ The relative quiet with which this news was received in Croatia, even by nationalist parties, suggests that the consolidation of the secure status of the Croatian state and its growing integration into the framework of European states has reduced the sense of anxiety that formerly hung over challenges to the sanctity of the Homeland War and the threat these might be felt to pose to Croatian identity.

ii. Serbia and the ICTY

The initial response of the international community to the breakup of Yugoslavia—insisting upon the integrity of international boundaries—encouraged the Serbian leader Slobodan Milošević to believe that his attempt to ensure the in-

tegrity of Yugoslavia by military means would be supported. It was not difficult for the Yugoslav press to shrug off the formation of the ICTY in 1993 as an irrelevance. This situation had changed dramatically by 1995, however, when in August Operation Storm ejected Serb forces from the Krajina and triggered in Bosnia a joint Croat–Muslim offensive that was eventually to threaten Banja Luka. International ineffectiveness and inaction was transformed dramatically into effective military intervention in the form of NATO's Operation Deliberate Force in September. By the end of the year Milošević had been maneuvered into pressuring the Bosnian Serb leadership into reluctant acceptance of the Dayton settlement.

The Tribunal took its place, not surprisingly, in the picture of hostile international encirclement that the Serbian leadership created, partly in order to explain this military and political collapse. This depiction of the ICTY as deliberately and unremittingly anti-Serb has persisted and was intensified by the events of the Kosovo crisis (following the Serbian rejection of the Rambouillet Plan, and the NATO bombing campaign that ended in June 1999) and the ensuing transfer to The Hague of Slobodan Milošević in October 2000.

Resistance to the ICTY has had less to do in Serbia with defense of the state (as in Croatia), and a great deal to do with defense of the regime. Delegitimation of the tribunal in The Hague through manipulative news management became for the leadership of the Socialist Party of Serbia (SPS) both an urgent practical objective, as well as a central ideological one.

The state manipulation of imagery of the war in general, and of the role of the ICTY in particular, was easier to sustain in Serbia because war remained at a distance from the majority of the population. It was not until NATO intervention over Kosovo that, for the most part, the population of Serbia itself had any direct experience of the war. The insistent demands of the Office of the Prosecutor for cooperation, together with the continuing succession of indictments, trials, and sentences of ethnic Serbs, facilitated the diffusion of an atmosphere of paranoia through the state-controlled media of communication.⁸¹ This approach to an explanation of Serb attitudes toward the ICTY, however, cannot be reduced to this single dimension.

With the ousting of Milošević on 5–6 October 2000, international opinion anticipated a marked change of stance by the new leadership of the Democratic Opposition of Serbia (DOS). It rapidly became clear, however, that this was not a revolution but a putsch replacing one set of leaders by another. The new ruling coalition was marked by extreme internal divisions. Vojislav Koštunica and Zoran Djindjić had little more in common than their desire to depose the SPS leadership. As in Croatia, therefore, the Serbian response to the ICTY became an internal political issue, although in a very different way.

The war in Serbia produced a mafia-style elite entrenched in a war economy.⁸² The new economic bosses were bound up closely with the old political bosses to an extent not matched in Croatia. The new leadership inherited not only an assembly still dominated initially by the SPS but also an unchanged military leadership and a firmly entrenched stratum who occupied the top echelons of the economy, state administration, the judiciary, and to a lesser extent the communications media.⁸³ This stratum was, in many respects, resistant to the kind of transition that Serbia was expected to make, and elite resistance was intimately bound up with the ways in which war criminality was intertwined with a range of other features of Serbian society, including the military and the “informal economy.” As a result of this internal resistance, compliance with the demands of the Tribunal generally has been secured only by the strenuous exercise of international diplomatic and economic leverage.

A spate of arrests and self-surrenders to the Tribunal followed a period of intensive diplomacy by the EU emissary, Javier Solana, beginning in November 2001. His central concern was the prospect of the further disintegration of Yugoslavia in the form of the secession of Montenegro. A deal was signed on 14 March 2002, following which a new basis for a confederal structure was agreed upon. International efforts to moderate Montenegrin demands for a fundamental restructuring of the union had been secured at a price—cooperation with the ICTY. Coincident with this constitutional agreement, the U.S. government named 31 March as the deadline for Serbian compliance with the ICTY indictments, threatening the loss of 150 million dollars in aid.⁸⁴

Relations between the Serbian and federal governments in Yugoslavia, already seriously tested by the arrest and extradition of Milošević, were placed under enormous strain. Having been defeated twice in the federal assembly (in June 2001 and March 2002), a law was finally adopted making provision for the surrender of citizens to the ICTY.⁸⁵

The situation changed following the assassination of Prime Minister Djindjić on 12 March 2003. It is generally accepted that Djindjić’s willingness to cooperate with the ICTY was one of the reasons behind his murder by agents acting for one of the large criminal organizations. Djindjić’s successor, Zoran Živković, set in motion an energetic campaign to clean out the Augean stable of Serbian political life. A large number of arrests were made, not only in direct connection with the assassination; a reform of the judiciary was announced; and measures were undertaken to hand over several high-profile indictees to The Hague. Under these circumstances, the persistent pressures from the international community to cooperate with the ICTY, might even sometimes have been counterproductive.⁸⁶

The end of the Milošević era in Serbia has not seen the rapid advance of public acceptance of the ICTY, however, and the persistence of skepticism and even hostility toward the Tribunal clearly cannot be reduced to a matter of elite

(and, in particular, media) manipulation. The persistent demands of the international community for compliance produced a response on the part of many Serbs at two levels. At the time of his extradition to The Hague, Milošević had been indicted already by Serbian courts on charges relating to his alleged economic misdemeanors. In light of the decade of economic hardship that ordinary Serbs suffered while he was in power, the intervention of The Hague was perceived not as the supervenience of a higher justice but as the setting aside of their proper grievances in favor of some distant interest and more abstract ideal.

Serb perceptions that their needs for justice were marginalized in this process resonate at a deeper level. Croats see Europe as playing an important part in their ideological self-definition. For Serbs, however, Europe does not play this positive role, and whereas at one level Serbian culture is profoundly European, the relationship to Europe is shot through with an ambivalence that mingles xenophobia and resentment.⁸⁷

Although public opinion in Serbia gradually has come to accept that there are issues relating to war crimes that need to be addressed, Serbs often feel themselves encircled by an unsympathetic and even hostile environment. Bearing in mind the enormous psychological shock of the NATO bombing campaign of 1999, it is possible to understand how it is that the ICTY took its place as one element in this picture of national isolation and exclusion. This rather paranoid image of the world cannot be reduced to the factor of elite manipulation alone but can be seen to be rooted also in far older and more complex strata of identity formation.

iii. Bosnia-Hercegovina

The experience of war in Bosnia-Hercegovina was markedly different from that of the other republics of the former Yugoslavia in two respects. Fighting touched directly the greater part of its population and territory, and the commission of war crimes was, to a greater or lesser extent, a key component of the strategy of contending forces rather than a set of incidental occurrences.

Not until the Kosovo campaign did the war directly affect the inhabitants of Serbia. Similarly, military action did not spread across the entirety of Croatia, although roughly a third of its territory was the subject of the attempted secession by its ethnic Serb population. Armed conflict was contained and stabilized with the acceptance of the Vance Plan, and the arrival of UNPROFOR in early 1992. In Bosnia-Hercegovina, on the other hand, there can have been very little of the territory and very few of its inhabitants upon whom the war did not directly impinge in one way or another. There were ethnic minorities present in every municipality of Bosnia-Hercegovina, so that at the very least, however relatively homogeneous their populations, they became the sites of ethnic cleansing.

An equally important characteristic of Bosnian experience is the fact that war crimes were not incidental to the action but intrinsic to and definitive of it. The commission of war crimes became in Bosnia-Herzegovina a primary aim of war and one of the principal means of achieving that aim. Only in this republic did one find created a network of detention camps designed as instruments for the relocation of populations, which became the sites for the commission of a succession of barbarities against those detained there.⁸⁸ For these reasons the character of the responses of the people of the region to the war crimes process in The Hague has also been different.

In general, the communications media in Bosnia have devoted greater attention than elsewhere to war crimes issues, and Bosnians have had more information about the ICTY and its operation available to them than have the citizens of other post-Yugoslav states. Nevertheless, it is probably true to say that within Bosnia opinion about the value and significance of the Tribunal is more sharply divided than elsewhere, particularly with respect to the difference between the federation and the Republika Srpska.⁸⁹

An additional factor that has defined the nature of both the war and the following peace from Bosnia's point of view has been the role of international actors. In particular, it is necessary to appreciate the character and significance of the Dayton Agreements, which brought fighting in the republic to an end in November–December 1995. These provided an internationally sanctioned framework backed by military force, which has been upheld vigorously by all international actors involved in the region in the face of every indication that their role can be at best a temporary one and anticipating the construction of a more permanent constitution.

Reading the agreements, it becomes clear that the pursuit and punishment of war criminals was not a central concern of those who drafted and signed them. The General Framework Agreement does commit the parties (in Article IX) to “cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.” Similarly, Annex 6 (the Agreement on Human Rights) commits the parties to respect the measures in international law listed in the appendix, which covers comprehensively the legal foundation of the work of the ICTY. Article XIII, paragraph 4, of Annex 6 also records that “All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to the organizations established in this Agreement,” citing explicitly among these the ICTY. The Dayton settlement is almost entirely lacking, however, in providing for the enforcement of these provisions.

The key to the operation of the Dayton constitution in Bosnia is the position of the high representative (HR), whose powers and functions are detailed in Annex 10. The office of the HR is mandated to “monitor the implementation of the peace settlement” in general and to coordinate the activities of the various agen-

cies set up under the agreements. Article II (9), however, notes that “The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations.” Although the International Police Task Force is directly responsible to the HR for its operation, it is not expressly mandated to undertake the pursuit and arrest of indicted war crimes suspects.

As a consequence of the imposition of the Dayton settlement by external agents, and the fact that questions continue to hang over both its durability and its legitimacy, the essential character of Bosnian society and a Bosnian state are permanently in question. Because of the acute sensitivity of any challenge to it, however, and the difficulty of finding a route toward an acceptable alternative, it is impossible to advocate any major constitutional change in Bosnia with any chance of success. To challenge accounts of what has happened in the past and attempt a dispassionate scrutiny of the route by which things came to be as they are, it is necessary to ask awkward questions about the role of powerful international agents and by implication to suggest that the Dayton settlement might have been contingent rather than necessary. Consequently, as Zlatko Hadžidedić expresses it graphically, “Bosnia now = no future/no past.”⁹⁰ The Bosnia created by Dayton is founded upon the “ethnoterritorialization” of the republic—its division into entities and cantons based upon “the idea of an ethnic group’s ‘ownership’ over an entire territory and its resources.”⁹¹ All questions about the past and the future of Bosnia, therefore, come to be refracted through the prism of definitions derived from this pattern of ethnic ownership of territories. By creating a rigid structure of oligarchic ethnocracy, the legacy of Dayton has been the blockage of the process of the normalization of Bosnian society in the postwar period.

Despite the fact that the Tribunal in The Hague is often justified in terms of its potential for enabling people to come to terms with their past, and thereby to move unburdened by it into their future, in Bosnia the ICTY is inescapably implicated in patterns and processes that encumber any consideration of the past or future with ideology and frustrate the possibility of recreating normal society.

Because so much of the fabric of life in the republic is bound up with an order imposed by the international community, there has emerged a tendency to see all forms of external intervention in Bosnian life as parts of a single tissue. The sense of stasis, blockage, and artificiality that has come to infuse all aspects of public life, emanating from the Dayton institutions, is diffused subjectively to all international agents. As a result, perceptions of the ICTY cannot be insulated from the prevailing mood of resignation and cynicism reflected in the responses of many in our focus group study.

These aspects of Bosnian life are clearly reflected in the pattern of cooperation or noncooperation between different local groups and organizations and the

ICTY. Although the government of Bosnia-Herzegovina recognized and agreed to cooperate with the Tribunal from the outset, the authorities within the two entities have not been distinguished by their eagerness to support its work. This has been the case particularly with the Republika Srpska, where it had not been difficult for the former leader of the Serbian Democratic Party, Radovan Karadžić, to continue to evade attempts to find and detain him. The RS has come to be regarded as a safe haven for ethnic Serbs under indictment, and Bosnian Serb politicians continue to maintain a public facade of denial. Ethnic Croats tend to be divided in their attitudes, with the uniformly Croat areas of western Herzegovina adjacent to the border with Croatia adhering to strongly separatist views and deeply suspicious of the Tribunal, and the more dispersed and ethnically mixed communities of central Bosnia and the Posavina inclined to favor the perpetuation of an ethnically diverse Bosnia and to view the ICTY with greater sympathy. In contrast, the Bošnjak parties and other groups committed to the integrity of a united Bosnia, such as the Social Democrats, have broadly given their support to the ICTY.

The situation is complicated, to some extent, by the power of the Office of the High Representative (OHR). Because the HR needs to consider the efficacy of his intervention across the entire range of issues that concern him, he is naturally likely to optimize the use of the resources available.⁹² In other words, he is not able to secure simultaneously all of the outcomes that might appear to be desirable at any one time. Refraining from putting his entire weight behind the investigations of the ICTY under these circumstances can appear to be rational where doing so might allow room for maneuver in pursuit of other political goals.

Military commanders also can, and do, point out that their duties extend well beyond support for the ICTY and that they are operating with limited resources. What is more, it is appropriate for them to consider the circumstances under which they are prepared to expose their personnel to danger, and several arrests have involved the exchange of gunfire with those they have pursued. There has been confusion over the interpretation of the responsibilities of military commanders and, hence, lack of consistency in their conduct.

A good deal of the cynicism with which many Bosnians regard the ICTY has to do with the frequency with which individuals known to have been implicated in war crimes remain free to live their lives with impunity within Bosnia—either because the Tribunal has determined that their actions were not of sufficient seriousness to merit indictment or because the evidence does not appear to be sufficiently strong. Alternatively, the actions they committed may have fallen short of the level of seriousness that could expose them to retribution through the ICTY. Justifiably and understandably or not, there are gaps between indictments issued

and arrests achieved and between perceptions of responsibility or guilt and liability for punishment. These perceived discrepancies between what might have been expected of the international presence in Bosnia and its actions are commonly seen as contributing to the prevailing cynicism about the international community and work together to reinforce the sense of disillusionment with which the Tribunal is generally regarded.

It is important to separate questions relating to legal (or moral) responsibility for the outbreak of war (*jus ad bellum*) from those relating to responsibility for conduct during war (*jus in bello*). The Tribunal in The Hague is mandated to deal with questions of the latter kind but not of the former. In the minds of many people in the Balkans, especially in Bosnia and particularly when viewed from a moral as well as a legal point of view, these two types of questions tend to merge. Because of the nature of the circumstances surrounding the extension of war into Bosnia there is a powerful sense of the extent to which the international community must be held to account for its share of responsibility for war, even if not for its conduct. These two types of questions, though separated in legal thinking in this area, are fused in popular understanding.

VI. Summary and Conclusions

This report has inevitably drawn attention to points on which the International Criminal Tribunal for the former Yugoslavia might be regarded as open to criticism. It would be a mistake to conclude without recognizing that the Tribunal has much to its credit. The team would not wish the critical points made here to distract from its positive achievements in bringing justice to the region and a measure of truth to the understanding of its recent past.

The wider importance of the Tribunal has yet to be determined, but it will certainly find an important place in the overall narrative of the development of international humanitarian law. We noted in our account of the foundation of the ICTY that international concerns with security and stability were in the forefront of the minds of international actors. Peace ranked as the primary goal, whereas justice was perceived as generally secondary and instrumental. Kerr asks whether it might be the case that the ICTY has actually succeeded “to elevate the status of justice in relation to order,” and not simply within its original Balkan context.⁹³

The conclusion to which our group has come is that there is no evidence of systematic bias—certainly not of deliberate bias—on the part of the ICTY against any of the ethnic groups in the former Yugoslavia. This is hardly a surprising conclusion because the scholarly literature available at the time of the launch of our project did not lead us to expect that we would find such evidence. We have

confirmed, nevertheless, that the perception of bias is both persistent and widespread (although diminishing over time, to be replaced in some cases by cynicism and indifference), and we believe that this perception needs to be taken seriously. In the course of our investigation several things have become clear that help to make intelligible that apparent contradiction.

First of all, the absence of deliberate partiality on the part of the Tribunal does not mean that it is free from faults that are conducive to the attribution of one-sidedness. It was created primarily to promote peace and stability in the Balkans and to implement a body of international law. These requirements were principally for internationally recognizable professional standards and mutually acceptable compromises between different judicial traditions. None of these factors took account centrally of the perceptions of, and needs for, justice held by people in the ex-Yugoslav states.

The pursuit of justice through the Tribunal had to be framed in relation to specific constraints of resources, time, and political will. Resort to the Tribunal became a sanction that could be deployed in order to further ends other than justice. Since its creation, the Tribunal has added to its original purposes an ever-growing range of expectations that no court of justice could ever be expected to meet. It has been burdened with the tasks of creating a historical record of events; “healing the wounds of war”; “lifting the burden of collective guilt”; paving the way to reconciliation; and deterring future violators. The primary goals of the institution, however, have been the search for justice and for truth.

Despite the fact that those of the team (and others) who have had direct contact with the ICTY have paid tribute to the hard work, dedication, and professionalism of its staff, the constraints under which they have been recruited, as well as the conditions under which they work, do reveal differences in their degree of competence. Errors of judgment, however, do not equate to deliberate bias, even if they might contribute to perceptions of unfairness.

These critical remarks certainly do not identify the ICTY as a failure or seriously challenge its legitimacy. It has constituted an important development in the field of international justice and one that has probably made a significant contribution to transitional justice, as well as to its original purpose of furthering peace and stability in the region. Nevertheless, the orientation that it has adopted toward global actors and the global criteria of its success have resulted in its presenting, to some extent, a blank facade toward the very region that might have been presumed to be its most important constituency—the peoples of the former Yugoslavia. In retrospect, perhaps, it can even be said to have been seriously negligent in its failure to address this audience.

On this condition of blankness and relative unintelligibility, it has been possible to project a variety of different interpretations of its character and purposes. These have varied among the states emergent in the Yugoslav space, dependent upon their different political processes and culture. The ICTY has come to be inserted in contrasting ways into local political processes, meeting responses that in many ways were quite dissimilar and following divergent trajectories. In Croatia, although the ICTY was at first experienced as a direct threat to Croatia's newly realized independent statehood, the growing security of its situation worked together with the sustained pressure of international agents to promote a fairly general acceptance of the importance of the work of the Tribunal—especially among its political elite. In Serbia, on the other hand, the manner in which political and military elites became enmeshed with a culture of violence and criminality worked together with aspects of the country's economic deprivation and its historical culture to deepen the widespread conviction that the ICTY was only one component of an international environment that was hostile to Serbs and Serbia. Public opinion studies show that the modification of these antagonistic perceptions of the Tribunal there has been far slower and is more incomplete. In Bosnia-Herzegovina the structure of ethnic oligarchies created by war has been sustained by the action of international agents, with which the ICTY is grouped in public perceptions. Here attitudes toward The Hague are inseparable from the general sense of alienation that pervades other aspects of Bosnian political culture.

Despite these differences, it has been possible to identify some uniformities in local responses to the ICTY. Aspirations that it might provide anything like a complete account of the experience of war have not been met—and for pragmatic reasons, cannot be. The hope that it might promote reconciliation between the peoples of the region does not appear to have been realized. Reconciliation, if it is to be achieved, is an immense task that will clearly require more than judicial intervention and will extend well beyond the lifetime of the ICTY. The demand that the Tribunal should furnish a reckoning of the moral responsibility for the war has been deliberately set aside. It is not because the ICTY has been a bad court of law that it has failed to deliver a sense of realized justice in these areas—it is precisely because it is a court of law and for that very reason is unable to address these questions.

Caution should be exercised, however, in the extent to which criticism of the ICTY should be reduced to the status of the proprietary myths of nationalist politicians and thereby dismissed. There is a danger that a desire to support the legitimacy of the Tribunal could lapse into a kind of Orientalism. In North America, and in a Europe intent upon expansion of the Union, there is a tendency to disparage all concerns over national identity as irredeemably nonmodern. Such

negativity is frequently implicit in the judgment of nationalism. The search for national identities and an understanding of their significance is an understandable element of cultural development throughout the Balkan region (as elsewhere). It is not always easy to judge which aspects of this process might be malevolent and to what extent.

The penetration into the Yugoslav space of global judicial institutions (which in any case are of relatively recent creation, and poorly understood anywhere) is naturally and necessarily problematic. If the Scholars' Initiative has a role to play in relation to these events, it must go beyond an aspiration merely to debunk local mythologies and embrace the task of furthering a more objective general understanding of changes that affect us all.

Notes

- 1 For a fuller recognition of the issues, see appendix 1 of the original report.
- 2 Scholars' Initiative, Prospectus, 3.
- 3 *Orientalism* here is used in the sense developed by Edward Said in his book of that title. Edward Said, *Orientalism* (London: Routledge and Kegan Paul, 1978).
- 4 The need for brevity also dictates a minimal use of footnotes on this occasion. Only works directly cited in the text, or centrally relevant to it, are singled out for mention here. A comprehensive bibliography on the ICTY would already require a text at least as long as this chapter.
- 5 Michael J. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Durham, NC: Carolina Academic Press, 1997). The verdict on Tadić had only been delivered in May of the year of publication, and the role of this book was primarily to acquaint the public with how the ICTY worked rather than to provide a critical analysis or evaluation. See also Virginia Morris and Michael P. Scharf, *An Insider's Guide to the ICTY* (Irvington on Hudson, NY: Transnational Publishers, 1995). Also available at that time was Roger S. Clark and Madeleine Sann, eds., *The Prosecution of International Crimes: A Critical Study of the International Criminal Tribunal for the Former Yugoslavia* (New Brunswick: Transaction Publishers, 1996). Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000). In French, Pierre Hazan, *La justice face à la guerre: de Nuremberg à La Haye* (Paris: Stock, 2000); Jean-Paul Bazelaire and Thierry Cretin, *La justice pénale internationale* (Paris: Presses Universitaires de France, 2000). See also Karine Lescure, *Le Tribunal pénal international pour L'Ex-Yougoslavie* (Paris: Monchrestien, Centre de Droit International de Paris 1, no. 6, 1994). In the German scholarly literature, see Herwig Roggemann, *Der Internationale Strafgerichtshof der UN von 1993 und der Krieg auf dem Balkan* (Berlin: Arno Spitz 1994). The Krstić trial had been treated in a collection of documents edited by Caroline Fetscher and Julija Bogojeva, *Srebrenica: eine Prozess* (Frankfurt am Main: Suhrkamp Verlag, 2002).
- 6 A flavor of this extensive literature can be gained from Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999); Timothy D. Mak, "The Case against the International War Crimes Tribunal for the Former Yugoslavia," *International Peacekeeping* 2, no. 4 (Winter 1995): 536–63. Other influential voices

- were those of Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin Books, 1999), and Payam Akhavan, "Justice in The Hague: Peace in the Former Yugoslavia," *Human Rights Quarterly* 20 (1998): 737–816. Representing contrasting approaches and points of view see Aleksandar Jokić, ed., *War Crimes and Collective Wrongdoing: A Reader* (Oxford: Blackwell, 2001); Mark J. Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity," *Human Rights Quarterly* 22 (2000): 118–47; Antonia Cassese and Mireille Delmas-Marty, eds., *Crimes internationaux et juridictions internationales* (Paris: Presses Universitaires de France, 2002). The question of bias was not actively pursued despite recognition that it is possible to examine the political dimension of the Tribunal's creation and functioning. See Y. Beigbeder, *Judging War Criminals: The Politics of International Justice* (London: Macmillan, 1999).
- 7 Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998).
 - 8 R. Goldstone, *Prosecuting War Criminals* (London: David Davies Memorial Institute of International Studies, no. 21, 1996); Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000).
 - 9 The following specialists, whose work would have been available to those attending the Sarajevo meeting of the Scholars' Initiative in 2002, at least mention the work of the ICTY in passing. Susan Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, DC: Brookings Institution, 1995), 322–23; Carole Rogel, *The Breakup of Yugoslavia and the War in Bosnia* (Westport, CT: Greenwood Press, 1998), 65, 72–73; John B. Allcock, *Explaining Yugoslavia* (London: Hurst, 2000), 440; Aleksandar Pavković, *The Fragmentation of Yugoslavia: Nationalism and War in the Balkans* (London: Macmillan, 2000), 172–73, 180. It is remarkable how many experienced commentators on the region at that time made no mention at all of the Tribunal and its work. Particularly noteworthy in this respect, in view of its explicit concern with issues relating to international intervention in Yugoslavia, is Richard H. Ullman, *The World and Yugoslavia's Wars* (New York: Council on Foreign Relations, 1996).
 - 10 Regrettably, Rachel Kerr's extensive study of the Tribunal came to hand too late for her work to be considered in our report. Rachel Kerr, *The International Criminal Tribunal for the former Yugoslavia: A Study in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004).
 - 11 The original 147-page report included five main sections and seven appendices. Radical abbreviation has been necessary in the preparation of this summary.
 - 12 Pascal Boniface, ed., *Morale et relations internationales* (Paris: Institut de relations internationales et stratégique, and Presses Universitaires de France, 2000).
 - 13 M. Cherif Bassiouni, "The Normative Framework of International Humanitarian Law," in Michael N. Schmidt, ed. *International Law Across the Spectrum of Conflict. Essays in Honour of Prof. L. C. Green on the Occasion of his Eightieth Birthday* (Newport, RI: Naval War College, 2000), 1–55, esp. 3.
 - 14 The League of Nations also took the first steps toward the international protection of refugees with the creation of the office of Commissioner for Refugees in 1921. This became the Intergovernmental Committee on Refugees in 1938.
 - 15 The interwar period also saw the adoption of The Hague Rules on Aerial Warfare in 1923 and the Geneva Protocol prohibiting the use of poisonous gas and bacteriological agents in 1925. In 1927 the Kellogg–Briand Pact between the U.S. and France was adopted by the Assembly of the League of Nations and subsequently ratified by forty-two

- states. This may be taken as an early effort to identify a crime of aggression, which still evades international consensus.
- 16 A useful general review of these developments for the reader who is not a legal specialist is provided by Robertson, *Crimes against Humanity*, esp. chapters 5, 6, and 7. Detailed discussions of the work of the Nuremberg and Tokyo Tribunals are provided in chapters 2 and 3 of Beigbeder, *Judging War Criminals*.
 - 17 For a broad assessment of the significance of the Nuremberg Tribunal, see Cooper, *War Crimes*.
 - 18 Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997), 185. The statutes of the Nuremberg and Tokyo Tribunals are reprinted in Bazelaire and Cretin, *La Justice*, appendices 2 and 3.
 - 19 Goldstone, *For Humanity*, 75.
 - 20 Robertson, *Crimes against Humanity*, 237–42.
 - 21 Convention on the Prevention and Punishment of the Crime of Genocide, Article I. See Adam Roberts and Richard Guelff, eds., *Documents of the Laws of War*, 3rd ed. (Oxford: Clarendon Press, 2000).
 - 22 Martti Koskenniemi argues that such was the magnitude of the shift in its character at this time that it is possible to speak of the “fall of international law” (following its “rise” in the last quarter of the nineteenth century). See, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002), especially his discussion of the work of Hans Morgenthau.
 - 23 Diane F. Orentlicher, “Internationalizing Civil War,” in Cooper, *War Crimes*, 107–12. See also Peter Maguire, “Nuremberg: A Cold War Conflict of Interest,” in Cooper, *War Crimes*, (67–86); Jörg Friedrich, “Nuremberg and the Germans” in Cooper, *War Crimes*, (87–106); and Thierry Tardy, *La France et la gestion des conflits yougoslaves (1991–1995). Enjeux et leçons d’une operation de maintien de la paix de l’ONU* (Bruxelles: Bruylant, 1999), xxi–xxii. The wider significance of this context is also stressed by Renéo Lukic, *L’Agonie Yougoslave (1986–2003). Les États-Unis et l’Europe face aux guerres balkaniques*, chapter 1 (Quebec: Les Presses de l’Université Laval, 2003).
 - 24 See the discussion of these issues in Steve Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission*, chapter 3 (Dartmouth, MA: Ashgate, 2000). Perhaps it is not surprising that in this context attention should have been focused with respect to matters of international law upon questions having to do with secession and the recognition of states as members of that order.
 - 25 See Terrett, *Dissolution of Yugoslavia*, chapter 4.
 - 26 Foreign Affairs Committee of the House of Commons, *Central and Eastern Europe: Problems of the Post-Communist Era*, vol. 2 (London: HMSO, February 1992), 18.
 - 27 David Binder has remarked that the phrase “United States policy towards Yugoslavia” at this time was “a widely noted oxymoron.” David Binder, “Thoughts on United States Policy Towards Yugoslavia,” *South Slav Journal* 16, nos. 3–4 (1995): 1.
 - 28 The foreign minister of Luxembourg proclaimed it “the hour of Europe.” Quoted by David C. Gompert, “The United States and Yugoslavia’s Wars,” in *The World and Yugoslavia’s Wars*, ed. Richard H. Ullman (New York: Council on Foreign Relations, 1996), 127.
 - 29 This abbreviated summary of events might be supplemented by a reader of the rather fuller coverage provided by chapters 1, “The Dissolution of Yugoslavia,” and 5, “The International Community and the FRY Belligerents, 1989–1997” of this volume.

- 30 Kaplan's book is widely credited as a major baneful influence in popularizing this view. See Robert Kaplan, *Balkan Ghosts* (New York: St. Martin's Press, 1993). It should be recognized, however, that these ideas were both in circulation well before the appearance of his book and, if anything, held in a more extreme form by others. In particular, several books by Stjepan G. Meštrović, in which he set out to revive and popularize the ideas of Dinko Tomašić, examining the consequences of the existence of supposedly antithetical character types among the Balkan peoples, attracted wide attention. Even a historian as respectable as Mark Wheeler referred (in 1992) to events in the Balkans at this time as "tribal madness"! Foreign Affairs Committee, *Central and Eastern Europe*, vol. 2, 77. In France, the venerable Marxist historian Étienne Balibar delivered himself of the following extraordinary opinion (also in 1992). "'Croates,' 'Serbes' et 'Mussulmans' ne sont, à coup sûr, ni des nations ni des religions. Pour leur malheur ils sont beaucoup plus: des incarnations volontaires ou involontaires de civilisations 'incorrigibles,' et ils sont beaucoup moins: de simples solidarités claniques, resurgissant comme l'ultime recours contre le ravage des identités politiques de la 'modernité.' En réalité, je ne vois qu'un seul nom qui leur convienne exactement, ce sont des races (entendons par là des racisms réciproques)." Cited in Lukic, *L'Agonie Yougoslave*, 18. Presumably their status as specific "races" called into question their relation to the human race.
- 31 Foreign Affairs Committee, *Central and Eastern Europe*, vol. 2, 98–99. The phrase is also used (apparently without irony) by Richard Ullman, *The World and Yugoslavia's Wars*, 20–22.
- 32 The original report considered these issues to be of such significance that, in addition to discussion in the main body of the text, a special appendix written by Richard Oloffson considered them further.
- 33 Ullman, *The World and Yugoslavia's Wars*, 30. This section of our report relies heavily upon Ullman's discussion, 27–31.
- 34 Tardy, *La France et la gestion des conflits yougoslave*, 39–41.
- 35 Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998), 126. See also Antoine Garapon, *Des Crimes qu'on ne peut ni punir ni pardonner: pour une justice internationale* (Paris: Odile Jacob, 2002), 30.
- 36 Lukic, *L'Agonie Yougoslave*, 7; M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia* (Chicago: International Human Rights Law Institute of De Paul University), Occasional Paper 2 (1996). *The Commission of Experts*, 29.
- 37 Helsinki Watch, *War Crimes in Bosnia-Herzegovina* (New York and London: Human Rights Watch, 1992). On the significance of this report, see Neier, *War Crimes*, 120–23. Neier was the founder, and at that time the director, of Human Rights Watch. A crucial factor motivating the organization to take up the Yugoslav question was the possibility of putting to the test legislation relating to genocide. An earlier report published in June by a Bosnian NGO was perhaps significant in drawing attention to the problem, although it had less public impact than did the Helsinki report. See Le Nouvel Observateur et Reporter sans frontières, *Le Livre Noir de l'Ex-Yougoslavie* (Paris: Arléa, 1993), 1–25. (Bass also deals with this, as does Hazan.)
- 38 *Livre Noir*, 181–97.
- 39 *Livre Noir*, 199–233.

- 40 A detailed account of the creation and operation of the commission is given by M. Cherif Bassiouni, *Commission of Experts*. See also Hazan, *La Justice face à la guerre*, 48–49. There are some minor discrepancies between these two accounts. We have relied heavily upon Bassiouni (a former chair of the commission) in this section. The idea of a tribunal was first aired by Mirko Klarin in an article in *Borba* (16 January 1991). See also the interview with Klarin by Zlatko Dizdarević, “Mirko Klarin, novinar koji je inicirao Nürnberg,” *Arhiv Dani*, (1 December 2000), 183.
- 41 *Livre Noir*, 285–95, 261–302. See also, Beigbeder, *Judging War Criminals*, 147–48.
- 42 *Livre Noir*, 235–78. Resigning from his position as head of UNPROFOR in August 1992, General Lewis MacKenzie returned to Canada. It has been suggested that his pressure upon the Canadian government (and the publication of his memoirs) was an important factor in promoting Canadian support for the creation of the ICTY at this time. See James Gow, *The Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (London: Hurst, 1997), 96.
- 43 We are grateful to Selma Leydesdorff for providing an English summary of Cees Banning and Petra de Koning, *Balkan aan de Noordzee, Over het Joegoslavië-tibunaal, over recht en onrecht* (Amsterdam: Prometheus-NRC Handelsblad, 2005), which has been useful in the preparation of this section of the report.
- 44 Bassiouni, *Commission of Experts*, 4–7; also Garapon, *Des Crimes qu'on ne peut ni punir ni pardonner*, 31.
- 45 All resolutions of the Security Council can be seen on the UN Web site, www.un.org.
- 46 Bassiouni, *Commission of Experts*, 7–8. For a wider consideration of the possible incompatibility between the diplomatic pursuit of peace and a concern for justice, see Jean E. Manas, “The Impossible Trade-Off: ‘Peace’ versus ‘Justice’ in Settling Yugoslavia’s Wars,” in Ullman, *World and Yugoslavia’s Wars*, 42–58. The tension over this issue is also noted by Richard Holbrooke in his memoirs. Richard Holbrooke, *To End a War* (New York: The Modern Library, 1999), 107–08 and 332–33.
- 47 Bassiouni, *Commission of Experts*, 8–11, esp. n25.
- 48 The following information draws heavily upon the ICTY Web site, www.un.org/icty, although the statute of the Tribunal has been widely reprinted.
- 49 See Diane F. Orentlicher, “Internationalizing Civil War,” in Cooper, *War Crimes*, 154–58.
- 50 Julie Mertus dealt with this issue extensively in appendix 6 of our original report. See also, Patricia Viseur-Sellers, “Rape under International Law,” in Cooper, *War Crimes*, 159–67.
- 51 Statute of the ICTY, Article 15. The rules of procedure and evidence are also available on the ICTY Web site, although they are not examined here.
- 52 See Scharf, *Balkan Justice*, 64–65. Although Cherif Bassiouni had been responsible for a great deal of the preparatory work in setting up the ICTY, he was not accepted as its first prosecutor, and the grounds for that appear to have included his Egyptian origins, which were assumed by some to make him partial to the Muslim cause. See Edina Bećirević, *International Criminal Court: Between Ideals and Reality* (Sarajevo: Arka Press, 2003), 175–77.
- 53 It is clear from the film *Justice Unseen* that sentencing issues are highly contentious not only among lay observers of The Hague but also among its legal personnel. The experienced Tribunal journalist Emir Suljagić comments that “sentencing policy does not exist.”

- 54 Judge Wolfgang Schomburg, interviewed for *Justice Unseen*, remarks that: “Truth can’t be found in a plea agreement.” Former Chief Prosecutor Louise Arbour also comments in the same film on the contentious nature of plea bargaining.
- 55 See the discussion of the outreach program below for further treatment of this issue. Note that the agreement of the accused to cooperate with the Tribunal has resulted in release from custody pending trial but not in a reduction of sentence from those offenses for which a guilty verdict is subsequently returned. This issue was especially controversial in the case of Biljana Plavšić.
- 56 Rachel Kerr, “International Judicial Intervention: The International Criminal Tribunal for the Former Yugoslavia,” *International Relations*, 15, no. 2 (2000): 24.
- 57 The film was produced by ICTY for publicity purposes and is available for viewing online at http://www.un.org/icty/bhs/outreach/outreach_info.htm. It is available in all of the languages of the Tribunal. A good deal of the comment in this section draws also upon interviews for *Justice Unseen*. See also, Vojin Dimitrijević, “The ‘Public Relations’ Problems of International Criminal Courts,” unpublished typescript.
- 58 The most important early efforts to provide an authoritative and balanced treatment of ICTY include Vladan Vasiljević, *Međunarodni krivični tribunal* (Belgrade: Biblioteka prava čoveka, 1996), and Edina Bećirević, *Međunarodni krivični sud: Između ideala i stvarnosti* (Sarajevo: Arka, 2003). Refik Hodžić, who directed *Justice Unseen*, formerly worked for the Outreach Department.
- 59 Its web site can be consulted at www.iwpr.net.
- 60 Article 29 of the Tribunal’s statute enjoins all states to cooperate with it in arrests or detentions. Whether or not they do so, and the circumstances under which they comply with the terms of Article 29, are not under the control of the prosecutor.
- 61 The group has been assisted in this area by Majbrit Lyck, a doctoral candidate at the University of Bradford.
- 62 Slightly over half of the remainder have been against ethnic Croats, with the remainder divided between Kosovar Albanians, Bošnjaci, and Macedonians. These figures should be treated with considerable caution for several reasons. The ICTY documents carefully refrain from identifying the ethnicity of those indicted, and it cannot be guaranteed that this is always evident from the context. Some individuals have been acquitted when brought to trial, and some indictments have been abandoned on revision. It might well be possible to produce more refined figures after very careful cross-checking, but at the time of writing we have not been able to undertake this. Because broad comparisons are sufficient to make the point in this context, however, and little would be added by an attempt at refined statistical analysis, it seems to be acceptable to leave the matter at this stage.
- 63 Center Director Mirsad Tokača’s final estimate is 101,040 military and civilian deaths. See chapter 4, 139-40.
- 64 Hugh Griffiths, “Bosnia: War Crimes Lottery,” *Balkan Crisis Report* 544 (March 2005), 4. Somewhere in the region of 9,000 criminal acts that could possibly be prosecuted under the terms of the ICTY’s statute have been identified during the war in Bosnia alone. *Justice Unseen*. This issue features prominently in the film.
- 65 Michael Humphrey, “The International Prosecution of Atrocity and National Reconciliation: The ICTY and ICTR Compared,” paper presented to the conference *Law and Justice under Fire: The Legal Lessons of the Yugoslav Wars*, Inter-University Center, Dubrovnik, June 2001, 7-8.

- 66 General problems that attach to the notion of command responsibility cannot be addressed here. See Ilias Banketas, "The Contemporary Law of Superior Responsibility," *American Journal of International Law* 93, no. 3 (July 1999): 573–95.
- 67 For some insight into the substantial controversy that raged over the use of depleted uranium munitions see *The Health Hazards of Depleted Uranium Munitions*, 2 parts (London: The Royal Society, 2001 and 2002). Also the *Regional Environmental Report of the EC*, Center for Central and Eastern Europe, July 1999.
- 68 Information at this point has been supplied in interviews and correspondence with current and former ICTY personnel.
- 69 Because of the importance of these issues the greater part of the original report was devoted to them. Three preliminary papers were written in this area, and in addition to a lengthy section of the main report, two appendices (by Mikloš Biro and Eric Gordy) examined aspects of public opinion in the region toward the ICTY. We also commissioned a small focus group study (summarized by Julie Mertus) in order to probe further some patterns that seemed to emerge. Because of the extensive nature of this material it has certainly undergone the most radical compression in the preparation of this overview of our work.
- 70 For a discussion of rejectionist approaches to crimes and legal rules, see Vojin Dimitrijević, "Two Assumptions of the Rejection of Responsibility: Denial of the Act and Denial of the Rule," *SSRC Global Security and Cooperation Quarterly*, no. 8 (Spring 2003), http://www.ssrc.org/programs/gsc/gsc_quarterly/newsletter8/.
- 71 Victor Peskin and Mieczysław P. Boduszyński, "International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia," *Europe-Asia Studies* 55, no. 7 (2003): 1117–42. See esp. 1117. The analysis offered in the following section is complemented in many respects by that of Peskin and Boduszyński (although this research was completed before the publication of their paper).
- 72 The discussions between Tudjman and Milošević at Karadjordjevo on the subject of the partition of Bosnia and subsequent negotiations in Graz have been well documented and are no longer regarded as contentious. What is still a matter of dispute, however, is the extent of the aspirations of the HDZ in this direction, particularly in the early days of the war.
- 73 The Blaškić trial ran from 24 June 1997, ending on 30 July 1999, and the Kordić trial from 12 April 1999, ending in February 2001. Details of all indictments, trials and other relevant documents can be obtained from the ICTY official web site, <http://www.un.org/icty/>.
- 74 "Croatia: Facing Up to War Crimes," International Crisis Group, *Balkan Briefing*, Zagreb/Brussels, 16 October 2001, 2.
- 75 Stipe Mesić has backed his words with actions by appearing himself as a witness at the ICTY.
- 76 The trial has turned out to be an important test of the international acceptability of the Croatian judicial system. See Tihana Tomičić, "Croatian Courts on Trial," *IWPR Tribunal Update*, no. 266, 13–18 May 2002. Norac was convicted of war crimes charges in March 2003 and sentenced to twelve years imprisonment. For further detail on the Norac case, see Peskin and Boduszyński, "Croatia and the ICTY," 1126–28.
- 77 For additional material relating to the Gotovina case, see Peskin and Boduszyński, "Croatia and the ICTY," 1128–31. On the centrality of statehood to the question of

- Croat identity, see Alex J. Bellamy, *The Formation of Croatian National Identity: A Centuries-Old Dream?* (Manchester: Manchester University Press, 2003).
- 78 For further detail of the Bobetko affair, see Peskin and Boduszyński, "Croatia and the ICTY," 1131–35. They report that an opinion poll conducted in September 2002 indicated that "84% of Croatian citizens opposed sending Bobetko to The Hague; 71% retained the same attitude even under threat of economic sanctions" (1133).
- 79 "Croatia Faces Sanctions over Bobetko," *Balkan Crisis Report*, 375, 21 October 2002.
- 80 Helen Warrell, "Fugitive General to Be Tried for Role in Operation Storm," *IWPR Tribunal Update* 433, 8 December 2005. Prosecutor Carla del Ponte, thanking the Croatian government, commented that they were now cooperating fully. Tim Judah, Dragana Nikolić Solomon, and Dragutin Hedl, "Top Croatian War Crimes Suspect in Custody," Balkan Investigative Reporting Network, *Balkan Insight* 13, 8 December 2005. The fact that Gotovina was arrested in Spain does suggest accusations that the Croatian government was actively complicit in concealing him may well have been unfounded.
- 81 The news media alone cannot be held responsible for the dissemination of a predominantly negative view of The Hague. Kosta Čavoški, an influential member of the Serbian Academy, also wrote a direct attack on the Tribunal—*Hag protiv pravde* (The Hague against Justice) (unpublished typescript, University of Belgrade, 1998). A number of established jurists in Serbia added their voices to the campaign.
- 82 See, for example, Nir Rosen, "Mafia Fuels Balkan Crisis," *IWPR Balkan Crisis Report*, no. 333, 26 April 2002, 7–9. "Serbia after Djindjić," *Balkans Report*, no. 141, Belgrade/Brussels, 18 March 2003; see esp. 2–5.
- 83 See, for example, Bojan Dimitrijević, "Serbia: Culture of Secrecy Persists," *IWPR Tribunal Update*, no. 264, 15 May 2002, 4–6. It is largely for these reasons that the relatively rapid movement toward ICTY support for the holding of war crimes trials in Croatia has not been evident in Serbia, where the competence of the judiciary is still not respected by the international community. See Slobodan Beljanski, "Could Serbia Hold War Crimes Trials?" *IWPR Tribunal Update*, no. 238, 11 October 2001, 3–4.
- 84 "Serbia: Djindjić Under Pressure to Begin Extraditions," *IWPR Balkan Crisis Report*, no. 327, 28 March 2002, 5–7. Washington linked this demand also to the release of Albanian prisoners held in Serbian prisons.
- 85 The passage of this measure was strictly cosmetic in relation to international law, where the detention and transfer of suspects to the ICTY was already provided for, independently of any extradition treaties.
- 86 Jasna Dragović-Soso, "Western Policies and the Milošević Regime," in *International Intervention in the Balkans since 1995*, ed. Peter Siani-Davies (London: Routledge, 2003), 120–35; see esp. 129.
- 87 The view suggested here is based in part upon the work of Ivan Čolović. See his *The Politics of Symbol in Serbia: Essays in Political Anthropology* (London: Hurst, 2002).
- 88 The extent and character of war crimes in Bosnia was recognized as early as 1992, in a Helsinki Watch report. Helsinki Watch, *War Crimes in Bosnia-Herzegovina* (New York: Human Rights Watch, 1992).
- 89 There is also a big difference, in Bosnia as elsewhere, between the level of information available to urban and rural populations. The fact that Republika Srpska is significantly less urbanized than the federation contributes to the relative lack of public knowledge there.
- 90 Zlatko Hadžidedić, "Bosnia Now = No Future/No Past," *Variante*, no. 18, October 2003, www.variant.randomstate.org/18texts/18bosnia.

- 91 Hadžidedić, "Bosnia Now," 1.
- 92 Consistent use of the masculine pronoun appears to be appropriate here: all of the incumbents of this position have been male. In an interview with Wolfgang Petritsch, who held the post of HR between August 1999 and May 2002, it became clear that the issue of war crimes in fact has a high degree of salience. He did acknowledge, however, that he had negotiated directly with Radovan Karadžić during his term of office. The need to persuade him to step down from any political office was construed as a more important step than his immediate arrest. Interview by John Allcock, 6 May 2004. It may well be relevant to note that occupants of the post before the appointment of Paddy Ashdown tended to be drawn from diplomatic backgrounds and possibly were inclined to interpret their role primarily in terms of negotiation rather than enforcement.
- 93 Kerr, "International Judicial Intervention," 20–21.