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Bosnia War Crimes: The International Criminal Tribunal for the Former Yugoslavia and U.S. Policy

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ABSTRACT

This report provides background and analysis on the International Criminal Tribunal for the Former Yugoslavia (ICTY). It describes the origins of the Tribunal; its authority and powers; its financing; and its recent activities and problems. The report discusses U.S. policy on the ICTY; the relationship between the Tribunal and the NATO-led Stabilization Force (SFOR) in Bosnia; and Congressional action on the issue. The report also deals with the impact of the Tribunal's work on the Bosnian peace process as a whole. A final section touches briefly on questions and implications raised by the Tribunal's activities for the powers of the United Nations, the principles of international law, and the U.S. role in enforcing international law. Appendices include a chart describing the current status of those publicly indicted by the Tribunal; historical precedent for the Tribunal; proposals for a permanent international criminal court, and ICTY rules of evidence and procedure. This report will be updated as events warrant.

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Summary

War crimes were an integral part of the 1992-1995 Bosnian war. Bosnian Serb militias drove hundreds of thousands of non-Serb civilians from their homes, committing tens of thousands of acts of murder, rape and torture, in a systematic policy of "ethnic cleansing." Most observers believe most war crimes committed by the Bosnian Serbs from 1992 until the end of the war in 1995 were a vital part of the political and military strategy of Bosnian Serb leaders. Although Serbs are seen by many observers as the main culprits, Croats and Muslims also committed substantial numbers of war crimes during the conflict.

Reports of war crimes in Bosnia have had an important impact on U.S. and Western policy toward the conflict. Pictures in Western media of Serb detention camps where inmates were routinely starved, tortured and raped, as well as carnage caused by the shelling of Sarajevo, provoked international outrage and calls for (usually unspecified) action. U.S. and European policymakers felt a need to respond to the emotional issue of war crimes, but did not want to be drawn into the Bosnian war as combatants or policemen. The U.N. Security Council established The International Criminal Tribunal for the Former Yugoslavia on May 25, 1993 (Resolution 808). It is the first international tribunal for prosecution of war crimes since the Nuremberg and Tokyo trials fifty years ago. The Tribunal initially got off to a slow start in part due to difficulties in finding judges and prosecutors, and inadequate funding. As of April 1998, however, 74 suspects are known to be currently under indictment for genocide, war crimes and crimes against humanity. Fifty-six of the suspects are Serbs, 15 are Croats, and 3 are Muslims. 26 of the 74 suspects are in custody at present. One suspect was killed while resisting arrest, a second released pending trial. The first war crimes trial began on May 7, 1996. The suspect, Dusan Tadic, was found guilty on May 7, 1997. A second suspect pleaded guilty and was sentenced in November 1996. There are currently four trials underway.

U.S. policymakers are faced with the issue of how to combine support for the Tribunal with progress on implementing the Bosnian peace accords. Some observers believe that vigorous pursuit of war criminals may hurt the peace process. They feared that the Bosnian Serbs could stop implementing the peace accord or engage in acts of violence against peacekeepers. This concern appears to be one reason why IFOR and, for at least the first six months of its tenure, SFOR, appeared reluctant to seize war crimes suspects. However, more recently, a consensus appears to have emerged in the international community that the fact that war criminals remained at large undermined the implementation of critical civilian aspects of the peace agreement. In the longer term, some observers believe that a lasting peace is impossible in Bosnia unless justice is done with respect to war crimes. They believe that the recrimination can only give way to reconciliation if the desire to assign collective guilt to another ethnic group and exact revenge is replaced by the desire to bring to justice the individuals of all ethnic groups who committed the crimes.

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Introduction

War crimes were an integral part of the 1992-1995 Bosnian war, and were committed by all sides in the conflict.[1] Shortly before recognition of Bosnia by the European Community and the United States in April 1992, Bosnian Serb militiamen and the Yugoslav Army (part of which was later converted into the Bosnian Serb army) launched attacks throughout the republic against unarmed or poorly armed civilians. Most observers believe that most war crimes committed by the Bosnian Serbs from 1992 until the end of the war in 1995 were not unplanned, scattered excesses by a few soldiers, but a key aspect of the political and military strategy of Bosnian Serb leaders. They besieged the Bosnian capital of Sarajevo, killing civilians by indiscriminate shelling and sniper attacks. Bosnian Serb militias forced hundreds of thousands of non-Serb civilians from their homes, committing tens of thousands of acts of murder, rape and torture, in a systematic policy of "ethnic cleansing." This policy was aimed at creating a territorially compact, ethnically "pure" Serb state, (comprising about two-thirds of the republic's territory) which would then be united with Serbia and Montenegro and an ethnically-cleansed region carved out of Croatia by similar means in 1991.[2]

Although Serbs are seen by many observers as the main culprits, Croats also committed substantial numbers of war crimes. Croat extremists in Hercegovina and central Bosnia carried out a brutal ethnic cleansing campaign against Muslims during their 1993-1994 war in a drive to create an ethnically pure Croat state that could be united with Croatia. There are also numerous reports of war crimes committed by Muslims, albeit fewer than those committed by the other two groups, according to observers.

Reports of war crimes in Bosnia have had an important impact on U.S. and Western policy toward the conflict. Pictures in Western media of Serb detention camps where inmates were routinely starved, tortured and raped, as well as carnage caused by the shelling of Sarajevo, provoked international outrage and calls for (usually unspecified) action. U.S. and European policymakers felt a need to deal with

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[1]This section was prepared by Raphael Perl, Specialist in International Affairs and Steven Woehrel, Specialist in European Affairs.

[2]Final Report of the United Nations Commission of Experts: Annex Summaries and Conclusions, U.N. Security Council Document, S/1994/672/Add2 (Volume I) 28 December 1994.

the emotional issue of war crimes, but did not want to be drawn into the Bosnian war as combatants or police. Policymakers were also trying to establish a legal precedent for action, in order deter future war crimes elsewhere.

A first step was the establishment of a war crimes commission to collect evidence of atrocities in the former Yugoslavia. The Commission of Experts on the Former Yugoslavia was established by U.N. Security Council Resolution 780 in October 1992. The final report of the commission, more than 3,000 pages, was submitted to the U.N. Secretary-General in May 1994.

While the Commission of Experts was gathering material on war crimes, the members of the U.N. Security Council reached agreement on the establishment of a war crimes tribunal. The International Criminal Tribunal for the Former Yugoslavia was established by U.N. Security Council Resolution 808 on May 25, 1993. It is the first international tribunal for prosecution of war crimes since the Nuremberg and Tokyo trials of fifty years ago. As of April 1998, however, 74 suspects are known to be currently under indictment for genocide, war crimes and crimes against humanity. Fifty-six of the suspects are Serbs, 15 are Croats, and 3 are Muslims. 26 of the 74 suspects are in custody at present. One suspect was killed while resisting arrest. A second has been released provisionally due to ill-health. (He must return to the Hague two weeks before the trial is to begin.) Those indicted include former Bosnian Serb leader Radovan Karadzic and former army chief Ratko Mladic. The Tribunal initially got off to a slow start in part due to difficulties in finding judges and prosecutors, and inadequate funding.

War crimes played a significant role in bringing the war to an end. After the Bosnian Serbs overran the U.N.-declared "safe areas" of Srebrenica and Zepa in July 1995, reports soon emerged that the Bosnian Serbs executed an estimated 6,000 to 8,000 civilians and dumped their bodies into mass graves. International outrage over the atrocities caused the United Nations and NATO to agree, in response to strong U.S. pressure, to more extensive use of air strikes in response to attacks on safe areas. Massive NATO air strikes were launched in August 1995 in response to Bosnian Serb shelling of Sarajevo (for which Bosnian Serb leaders have been indicted by the Tribunal.) These strikes, combined with Muslim and Croat battlefield successes at around the same time, led the Bosnian Serbs and their patrons in Serbia-Montenegro to agree to U.S.-sponsored peace talks in Dayton, Ohio in November. The Dayton peace accords, initialed in November 1995, were signed in Paris a month later.

The Bosnian peace agreement includes many provisions requiring the parties to cooperate with the ICTY. The General Framework Agreement commits all parties to "cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law. (Article IX)" Article X of Annex I-A to the peace agreement provides that the parties "shall cooperate fully with all entities involved in implementation of this peace settlement...including the International [War Crimes] Tribunal for the Former Yugoslavia..." The Bosnian constitution (Annex 4 of the peace agreement) requires the entities to cooperate fully with the Tribunal (Article II, Section 8) and bars persons indicted by the Tribunal from public office (Article IX, Section 1). Annex 6 of the peace agreement requires local authorities to cooperate with the ICTY (Chapter 3, Article VIII, Section 4). Article VI of Annex 11 provides that U.N.-sponsored International Police Task Force (IPTF) personnel shall provide

information on human rights violations to the war crimes tribunal and that the parties "shall cooperate with investigations of law enforcement forces and officials".

A conference, held in Rome in February 1996 on implementation of the Dayton Accords produced further agreement on war crimes cooperation. The parties recognized "their obligation to cooperate fully in the investigation and prosecution of war crimes". They specifically agreed to provide unrestricted access to war crimes suspects and investigation sites. The NATO Implementation Force [IFOR], it was noted, "will work to provide a secure working environment for the completion of these tasks." The parties also agreed to what were dubbed the "rules of the road:" if the parties wanted to arrest or indict a suspect, an order must be reviewed by the Tribunal and deemed consistent with international legal standards.[3]

A June 1996 international peace accord review conference called for the removal of indicted war criminal Radovan Karadzic from power. Tribunal President Antonio Cassese called for the arrest and extradition of indicted war criminals as a precondition for Bosnian elections that were held in September 1996. Cassese repeated an earlier recommendation that economic sanctions be applied to enforce compliance with the tribunal. The conference demanded the removal of Karadzic but stopped short of calling for a re-imposition of sanctions against violators, but rather referred to sanctions as a measure of last resort. Karadzic was removed in July 1996, after a meeting between U.S. envoy Richard Holbrooke and Serbian leader Slobodan Milosevic. An international conference in London in December 1996 to assess the implementation of the peace accord warned the parties to the agreement that economic reconstruction assistance is closely linked to their cooperation with the Tribunal. Because of their failure to implement provisions of the peace accord, including cooperation with the Tribunal, the Republika Srpska received only about 2% of international reconstruction aid for Bosnia in 1996.

NATO policy on IFOR assistance to the International Tribunal provided that IFOR personnel would detain and transfer indicted persons to the tribunal when they come into contact with such persons in the course of carrying out their duty.[4] In December 1996, IFOR was formally replaced by a Stabilization Force (SFOR), an approximately 31,000-person NATO-led force with essentially the same mandate as IFOR. This force, which will be reduced as conditions improve in Bosnia, will stay in Bosnia until a self-sustaining peace takes hold.

An ongoing issue of central concern to the Administration and Congress is the impact of the Tribunal's activities on the peace process and on the safety of U.S. forces in Bosnia. The relationship of the Tribunal to the peace process in Bosnia is a difficult and delicate issue. Some observers have raised concerns that that vigorous pursuit of war criminals may hurt the peace process. Unlike the Nuremberg Trials, where the victors dispensed justice to a vanquished enemy, the Bosnian peace agreement was the product of negotiations among factions which counted suspected

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[3]Rome Implementation Agreement of 18 February 1995, Article 5, Cooperation on War Crimes and Respect for Human Rights.

[4]NATO Press Release (96)26, IFOR Assistance to the International Tribunal, 14 February 1996.

war criminals within their leadership (at least as far as the Bosnian Serbs and Croats are concerned). If these persons are arrested, their supporters could stop implementing the peace accord or engage in acts of violence against peacekeepers. This concern may be one reason why IFOR and its successor, SFOR, have appeared reluctant to seize suspects or guard war crimes sites. Other observers strongly believe that a lasting peace is impossible for Bosnia unless there is justice. They believe that the recriminations caused by war crimes can only give way to reconciliation if the desire to assign collective guilt to another ethnic group and exact revenge is replaced by the desire to bring to justice the individuals of all ethnic groups who committed the crimes. An additional concern, which appears to have emerged as a consensus view in the past year among U.S. and other Western leaders, is that if suspected war criminals remain at large, the implementation of the peace agreement could be undermined their direct efforts, by their ability to discredit the international community by defying it, or by keeping alive the extreme nationalist ideology that caused the war and would prevent efforts to re-integrate Bosnia.

Other related issues center around the Tribunal, its future, its ability to implement and enforce decisions. Should the Tribunal come to be seen as a success, those urging the creation of a permanent international criminal court will be encouraged. Finally, the issue of U.S. support for the International Criminal Court for the Former Yugoslavia or any subsequently established U.N. international criminal tribunal may have policy implications that go well beyond the current situation in Bosnia. Broader issues could include U.S. world leadership roles and the potential for U.S. participation in policing what could be remote areas of the world as well as what may be seen as surrender of national sovereignty to an international body.

The first part of this paper describes the principles underlying the establishment of the Tribunal, its procedural rules, organizational structure, financing mechanism and current operational problems. The next section details U.S. policy toward the Tribunal, including U.S. political, financial and intelligence support for the Tribunal's efforts. The third section addresses the relationship of IFOR and its successor, SFOR, to the Tribunal, especially on the issues of the detention of suspected war criminals and on security for mass grave sites and Tribunal investigators. The fourth section of the paper discusses congressional action on the Tribunal. The following section deals with the impact of the Tribunal on the Bosnian peace process, while the final section lays out broader questions and implications for the future raised by the establishment of the Tribunal. Appendixes list the persons indicted by the Tribunal, provide background on the historical precedent for a war crimes tribunal, discuss proposals for a permanent international criminal tribunal, and provide details on the Tribunal's rules of procedure and evidence.

The International Criminal Tribunal for the Former Yugoslavia

Although some consensus on a definition of war crimes exists and observers have noted that war crimes have been committed in the course of many armed conflicts over the last half-century, the Tribunal for the former Yugoslavia is the first war crimes tribunal convened since the Nuremberg and Tokyo Tribunals following the end of World War II. [5]

Authority and Powers

Authority for the Establishment of the Tribunal. The Security Council has passed a series of resolutions[6] culminating in the establishment of the Tribunal for the former Yugoslavia under Chapter VII of the Charter of the United Nations, which authorizes the Security Council to take measures necessary to maintain or restore international peace and security.[7] The Report of the Secretary-General on the creation of the Tribunal[8] says that the ideal method of establishing it would have been by a treaty ratified by all parties involved. Such a treaty or convention could have established a permanent international criminal tribunal, which then could have handled the war crimes cases from the former Yugoslavia. However, the Report also notes that the interest in expeditious justice and the difficulties and length of time necessary to achieve an effective treaty dictated an alternative method of establishing the Tribunal. Given the volatile, uncertain situation in the former Yugoslavia, the consensus was that immediate action had to be taken. Therefore, the Security Council

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[5]This section was prepared by Margaret Mikyung Lee, Legislative Attorney, American Law Division.

[6]S.C. Res. 771, U.N. SCOR, 3106th mtg., U.N. Doc. S/RES/771 (1992) (calling on all states to collate and report information on war crimes and requesting the Secretary-General to collate and report such information); S.C. Res. 780, U.N. SCOR, 3119th mtg., U.N. Doc. S/RES/780 (1992) (establishing the Commission of Experts to investigate and report on evidence of war crimes in the former Yugoslavia); S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (deciding to establish the Tribunal and requesting a report from the Secretary-General on proposals for establishing the Tribunal); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing the Tribunal, adopting the Statute of the Tribunal annexed to the Report of the Secretary-General on the matter, and requiring member states to cooperate with the Tribunal).

[7]The Charter of the United Nations, chapter VII, reprinted as amended at Basic Documents of the United Nations, at 10 (Louis B. Sohn, Ed. 1968)

[8]Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, U.N. Doc. S/25704 (1993) [hereinafter Report of the Secretary-General]. The information in on the establishment of the Tribunal is drawn largely from this Report. See also Letter Dated 10 February 1993 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. SCOR, U.N. Doc. S/25266 (1993); Letter Dated 16 February 1993 From the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General (1993); Letter Dated 18 February 1993 From the Permanent Representative of Sweden to the United Nations Addressed to the Secretary-General, U.N. SCOR, U.N. Doc. S/25307 (1993).

exercised its powers under Chapter VII of the Charter of the United Nations to establish the *ad hoc* Tribunal immediately, without the necessity of a convention.

There has been and is some concern that the Tribunal might undermine the peace because the parties to the Balkan conflict would be reluctant to turn over their own people, especially some of their leaders, for possible trial. There is further concern that any perceived bias of the Tribunal might cause a party to withdraw from the peace process in anger either that it was being unfairly penalized or that its grievances were being overlooked. However, the Report comments that the Tribunal could help the peace process by providing a neutral forum in which war crimes cases from all parties can be fairly resolved and redressed, thus reducing unresolved resentment and tensions over unpunished war crimes.

During the same period that the Security Council was in the process of establishing the Tribunal, Bosnia-Hercegovina filed a petition against Yugoslavia (Serbia-Montenegro) in the International Court of Justice (ICJ). The petition alleged war crimes in violation of the Genocide Convention by the military forces of Yugoslavia, sought an injunction ordering Yugoslavia to cease its genocidal actions and also sought reparations from Yugoslavia for injuries to inhabitants of Bosnia-Hercegovina.[9] This case is still pending. The jurisdiction of the ICJ is analogous to civil cases in which one party sues another for a remedy to an injury, whereas the jurisdiction of the Tribunal is analogous to criminal cases in which a public law enforcement authority prosecutes and seeks punishment of an individual accused of committing a crime. However, unlike civil suits in national courts, individuals cannot bring cases against individuals before the ICJ; only countries can bring cases of violations of international law by other countries.

Individual victims of war crimes in the former Yugoslavia may be able to seek compensation from those responsible for their injuries under national laws in national courts. Such a suit is proceeding in the federal courts of the United States. Two groups of victims seeking compensation for injuries are suing Radovan Karadzic under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991. The District Court dismissed the case for lack of subject matter jurisdiction, but the Court of Appeals for the Second Circuit reversed and remanded on appeal. A petition for certiorari has been filed with the United States Supreme Court.[10]

General Principles and Powers Under the Statute.[11] The Statute of the Tribunal defines the competence and jurisdiction of the Tribunal, that is, what crimes it is authorized to investigate and try and what general principles of law will govern the proceedings. Article 1 establishes that the Tribunal "shall have the power to

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[9]International Court of Justice, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), filed March 23, 1993.

[10]Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), rehearing denied, 74 F.3d 377 (2d Cir. 1996), petition for cert. Filed (U.S. April 4, 1996) (No. 95-1599).

[11]The Statute of the International Tribunal, Annex to the Report of the Secretary-General, supra note 9, at 36-48.

prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Articles 2 through 5 define the crimes, the subject matter jurisdiction of the Tribunal.

The Report of the Secretary-General proposing the organization of the Tribunal notes that there are two main sources of international law, customary international law, which comprises the core of principles about which there is international consensus, and treaty/conventional law. Because not all states are parties to certain conventions and "there can be no crime where there is no [pre-existing] law," the Statute of the Tribunal adopted convention-based definitions of crimes only where the convention in question expressed definitions which had become a part of customary international law. The Report lists the conventions which beyond doubt have become part of customary international law: (1) the Geneva Conventions of 12 August 1949 for the Protection of War Victims;[12] (2) the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907;[13] (3) the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 [the 1948 Convention];[14] and (4) the Charter of the International Military Tribunal of 8 August 1945 [the Charter of the Nuremberg Tribunal].[15] The definition of the crimes which may be tried by the Tribunal according to its statute are thus derived from customary international law.

The crimes include grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. The Geneva Conventions of 1949 regulate the conduct of war by protecting certain categories of persons such as civilians, prisoners of war, and sick or wounded or shipwrecked members of the armed forces from certain actions such as wilful killing and torture. Derived from the Hague Convention (IV) of 1907, the violations of the laws or customs of war include, among other things, use of poisonous weapons or other weapons of unnecessary suffering, attack of undefended towns, wanton, militarily unnecessary destruction of towns, plunder of property, and seizure, damage, or destruction of institutions dedicated to religion, charity, education, culture or science. The definition of genocide is derived from the 1948 Convention concerning

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[12]Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field of 12, August 1949; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August, 1949; Convention relative to the Treatment of Prisoners of War of 12 August 1949; Convention relative to the Protection of Civilian Persons in Time of War of 12, August 1949, 75 U.N.T.S. Nos. 970-973.

[13]Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907 100 (1915).

[14]78 U.N.T.S. No. 1021.

[15]The Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, 8 August 1945, 82 U.N.T.S. No. 251; see also Judgement of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (U.S. Government Printing Office, Nazi Conspiracy and Aggression, Opinion and Judgement) and General Assembly Resolution 95 (I) of 11 December 1946 on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.

genocide and includes certain acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, in peace time and in war time. Crimes against humanity, derived from the Charter of the Nuremberg Tribunal, include acts similar to those under genocide, but do not require intent to destroy a particular group and only include acts committed in armed conflict against a civilian population. It does not matter whether the armed conflict is civil/internal or international in character.

The personal jurisdiction of the Tribunal, *i.e.*, the persons that it can put on trial, includes only natural persons, or actual individuals, and not juridical persons, *i.e.*, groups or organizations, according to Article 6 of the Statute. In Article 7, the Statute of the Tribunal espouses the concept of individual criminal responsibility, the idea that individuals commit crimes, not organizations or nations, and that individuals who contribute to violations of international human rights laws are directly responsible. A person cannot claim the defense of immunity because violations were committed in an official governmental capacity. A person in a superior official position may be held responsible for failure to prevent or deter violations committed by subordinates if knowledge of impending violations could reasonably be imputed to him. Subordinates may not claim the defense of following orders to escape individual responsibility for violations. However, obedience to orders may be a mitigating factor at the sentencing phase.

The territorial jurisdiction of the Tribunal is defined as covering the territory of the former Socialist Federal Republic of Yugoslavia, including land, airspace and territorial waters, under Article 8 of the Statute. This article also defines the temporal jurisdiction as extending from January 1, 1991, through the present with no specified ending date.

Under Article 9 of the Statute, the Tribunal shares jurisdiction concurrently with the national courts of the former Yugoslav countries and other involved nations. The national courts exercise jurisdiction according to their national laws and procedures. However, this is subject to the primacy of the Tribunal. The Tribunal may request a national court to defer to its jurisdiction at any stage of the proceedings.

Significant and relevant to this shared jurisdiction, prohibitions against double jeopardy are provided for under Article 10 of the Statute, which uses the Latin term for the concept, *non bis in idem*. A trial by the Tribunal precludes a subsequent trial on the same charges in a national court. However, a trial in a national court would not preclude a trial by the Tribunal in two situations: (1) the characterization of the act in the national court did not correspond to its characterization under the Statute of the Tribunal, that is, it was not treated as a war crime but as an ordinary crime of murder, rape, assault, etc.; or (2) the conditions of impartiality, independence, or effective means of adjudication were not guaranteed in proceedings before the national courts. If the Tribunal retries a case which has already been tried before a national court and resulted in a prison sentence, in imposing its own sentence, the Tribunal must take into account the extent to which the sentence imposed by the national court has already been served.

The actual power of the Tribunal to enforce its will is established by Article 19 providing for the issuance of orders and warrants and Article 29 mandating the

compliance and cooperation of member states of the United Nations with the Statute and the orders and requests of the Tribunal. The member states are to cooperate in the identification and location of persons, the arrest and detention of indictees or suspects, the taking of testimony and gathering of evidence, the service of documents, and the surrender or transfer of the indictee or suspect to the Tribunal.

The special status and the privileges and immunities of the Tribunal as an international organization under the auspices of the United Nations is established under Article 30. The judges, Prosecutor and Registrar are accorded the status of diplomatic envoys. The other staff of the Prosecutor and the Registrar enjoy the status accorded to officials of the United Nations.

The expenses of the Tribunal are to be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations. See below for a discussion of the particular financial situation of the Tribunal.

Principles of fairness and justice, reflecting a consensus derived from both common-law and civil-code systems, govern the procedures for the indictment and trial, rights of the accused, the rights of the victims and witnesses, the maximum penalty, the appeals and review procedures and the enforcement of the sentence. There are provisions generally for a fair indictment process with representation for the accused and a fair and expeditious trial (Articles 18, 19 and 20). Rights are guaranteed to the accused, including the right to a public hearing, the presumption of innocence (Article 21:3), the right to a speedy trial (Article 21:4(c)), the right to counsel (Article 21:4(b, d)), the right to be present at his trial and to examine witnesses against him (Article 21:4(d, e)), the right against self-incrimination (Article 21:4(g)) and the right to have interpreter and translator services in a language he can understand if he is not proficient in the official languages of the Tribunal (Article 21:4(a, f) and Article 18:3). Protections for victims and witnesses include closed hearings and the protection of the victim's identity (Article 22).

The Tribunal is authorized to impose sentences and penalties on the convicted, including the return of confiscated property (Articles 23 and 24). The maximum penalty available under the Statute is life imprisonment; the Tribunal is not authorized to impose the death penalty (Article 24). Either the convicted defendant or the Prosecutor may appeal the decision of the Tribunal on the grounds that (1) an error on a question of law invalidates the decision or (2) an error of fact has caused a miscarriage of justice (Article 25). The Appeals Chamber may affirm, reverse, or revise the decision of the Trial Chambers. Either the convicted defendant or the Prosecutor may ask for review of the decision of the Tribunal on the grounds that a new fact has come to light which was not known at the time of the trial or the appeals proceeding and which could have been a decisive factor in the decision (Article 26).

A sentence of imprisonment shall be served in a country selected by the Tribunal from a list of countries that are willing to incarcerate convicted persons (Article 27). The incarceration shall be in accordance with the law of that country governing incarceration, subject to the supervision of the Tribunal. If a convicted person is eligible for pardon or commutation under the laws of country where he is incarcerated, that country shall notify the Tribunal and the President of the Tribunal, in consultation with the other judges, shall decide the matter (Article 28).

The Statute provides for the seat of the Tribunal to be at the Hague (Article 31), makes English and French the official working languages (Article 33), and requires the submission of an annual report to the Security Council and General Assembly (Article 34).

Rules of Procedure and Evidence.[16] The Rules of Procedure and Evidence [hereinafter Rules] for the Tribunal elaborate on the general principles established in the Statute. A summary of the most significant features of the Rules follows below. Most notable are the provisions concerning arrest warrants and the cooperation of countries with the Tribunal in the arrest and transfer of indictees and other suspects, and also the protections for the accused and for victims and witnesses. The judges drafted and adopted the Rules by February 11, 1994, pursuant to Article 15 of the Statute of the International Tribunal. These Rules became effective on March 14, 1994. They establish a significant precedent for any permanent International Criminal Tribunal by demonstrating a consensus on a workable set of rules for the operation of the *ad hoc* Tribunal. One of the concerns about establishing a permanent Tribunal has been the perceived difficulty of drafting rules that would be acceptable to nations with differing legal traditions and concepts.

The Rules are organized into nine parts: (1) General Provisions; (2) Primacy of the Tribunal; (3) Organization of the Tribunal; (4) Investigations and Rights of Suspects; (5) Pre-Trial Proceedings; (6) Proceedings before Trial Chambers; (7) Appellate Proceedings; (8) Review Proceedings; and (9) Pardon and Commutation of Sentence.

Perhaps the most important rules concern the obligation of states to cooperate with the Tribunal in the arrest of indictees. Even if a nation has implemented the necessary measures to cooperate with the Tribunal, under the Statute and rules of the Tribunal, an arrest warrant must be transmitted from the Tribunal to a national government. An indictment alone does not compel a state to apprehend and turn over an indictee who is in its jurisdiction to the Tribunal. However, once the Tribunal issues an arrest warrant and officially communicates it to the state believed to have jurisdiction over the indictee, the receiving state is obligated to act promptly and with due diligence to execute the arrest warrant (Rule 56 reinforcing Article 29 of the Statute) and to surrender or transfer the accused to the Tribunal (Rules 57 and 58 pursuant to Article 29 of the Statute). The obligation to transfer an indictee to the Tribunal supersedes any prohibition or restriction on transfer under the national laws or extradition treaties of the country concerned. If a country is unable to execute an arrest warrant, it shall report this to the Registrar with the reasons for non-execution. If such a report is not made within a reasonable time after transmission of the arrest

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[16]Rules of Procedure and Evidence, U.N. IT, U.N. Doc. IT/32 (1994); Amendment of Rule 96 concerning Evidence in Cases of Sexual Assault, reprinted at 33 I.L.M. 838 (1994); Amendment of Rule 70 concerning Matters not Subject to Disclosure, reprinted at 33 I.L.M. 1619 (1994). Other amendments are summarized and described in the Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 50th Sess., Item 49 of the Provisional Agenda, U.N. Doc. A/50/365 and U.N. SCOR, U.N. Doc. S/1995/728 (1995) [hereinafter Second Annual Report of the Tribunal].

warrant, the inaction shall be deemed a failure to execute the warrant and the Tribunal may report this inaction to the Security Council (Rule 59). The Tribunal may transmit a notice to the national authorities of a country to be published in national newspapers to inform the indictee that service of the indictment against him is sought (Rule 60).

When the whereabouts of an indictee are unknown or when an indictee attempts to evade arrest by fleeing the jurisdiction of the state that has received an arrest warrant, an international arrest warrant may be necessary. Under Rule 61 of the Rules of Procedure and Evidence, the Tribunal holds public hearings to review an indictment and the evidence supporting it and also the efforts that have been made to serve the indictment on the indictee and to arrest him. If the indictment is confirmed and the Tribunal is satisfied that the Prosecutor has taken all available actions to gain custody over the indictee, the Tribunal may issue an international arrest warrant which is universally binding on all member nations of the United Nations. It serves notice internationally that the indictee is wanted by the Tribunal for trial on war crimes and that any member nation, in whose jurisdiction the indictee is found, is obligated to arrest the indictee and turn him over to the Tribunal. If the Prosecutor convinces a Trial Chamber that failure to effect service of an indictment was due to a nation's failure or refusal to cooperate with an arrest warrant, the Trial Chamber shall certify this lack of cooperation. The Tribunal shall then notify the Security Council of a nation's failure to cooperate. The Security Council may then take such action as it deems necessary in the interests of international peace and security under Chapter VII of the United Nations Charter to enforce cooperation.

Although neither the Statute of the Tribunal nor the Rules of Procedure and Evidence authorize plea bargaining, immunity, or amnesty, the Tribunal may consider the substantial cooperation with the Prosecutor by the convicted person before and after conviction in determining the sentence and any later commutation of the sentence or pardon (Rules 101(B)(ii) and 125).

Some other salient features of the Rules include:

- the provision for informing the suspect of his rights, similar to the rights commonly referred to as "*Miranda* rights" in the United States (Rule 42);
- the provision for audio- or video-recording of questioning of a suspect by the Prosecutor (Rule 43);
- in case of urgency, the Prosecutor may request a country to arrest a suspect provisionally, seize evidence, and take all necessary measures to prevent the escape of a suspect, intimidation or injury of a victim or witness, or the destruction of evidence (Rule 40);
- the disclosure by the Prosecutor of exculpatory evidence tending to show the innocence or mitigate the guilt of the indictee;
- the ability of the Tribunal to authorize special measures for the protection of victims and witnesses, including expunging of identifying information from the public record of proceedings and closed sessions (Rule 75);
- the ability of a judge in the Trial Chamber to append a separate or dissenting opinion (Rule 88);
- the requirement that witnesses take an oath to tell the truth (Rule 90);

- the ability of the Trial Chamber to direct the Prosecutor to investigate and prepare an indictment for perjury and to impose a penalty for a perjury conviction (Rule 91);
- attorney-client privilege (Rule 97);
- a rape-shield evidentiary rule (Rule 96), which provides that corroboration of the victim's testimony is not required, consent is not allowed as a defense in certain circumstances of intimidation, and prior sexual conduct of the victim shall not be admitted in evidence.

In addition to the Rules of Procedure and Evidence, the Tribunal has also promulgated Rules on Detention and issued a Report on the assignment of defense counsel to indigent defendants and a Directive on the assignment of defense counsel.[17]

Composition.[18] There are three main divisions of the Tribunal, the judicial Chambers, the Office of the Prosecutor and the Registry. The structure and organization of the Tribunal is established by Articles 11 to 17 of the Statute of the Tribunal and by Part Three, Rules 14 to 38 of the Rules of Procedure and Evidence of the Tribunal. The Report of the Secretary-General, pursuant to Security Council Resolution 808 concerning specific proposals for the establishment of the Tribunal, elaborates on and clarifies the provisions of the Statute.

Security Council Resolution 827 established the International Tribunal for the Former Yugoslavia in 1993 and, separately, Security Council Resolution 955[19] established the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in Rwanda or committed in neighboring States by Rwandans during 1994. However, it should be noted that under articles 12:2, 14, and 15:3 of the Statute of the International Tribunal for Rwanda, annexed to Security Council Resolution 955, the International Tribunal for Rwanda shares the members of the Appeals Chamber, the chief Prosecutor and the Rules of Procedure and Evidence (with appropriate modifications) with the International Tribunal for the Former Yugoslavia. Although the two Tribunals share the same Appeals Chamber, they do not have the same

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[17]Rules covering the detention of persons waiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal, U.N. IT, U.N. Doc. IT/38/Rev.4 (1995); Report on the assignment of counsel, U.N. IT, U.N. Doc. IT/59 (1994) and Directive on assignment of defense counsel, U.N. IT, U.N. Doc. IT/73/Rev.1 (1994).

[18]In addition to the Statute of the Tribunal and the Rules of Procedure and Evidence, some of the information regarding persons who are Tribunal officers was drawn from the Report of the International Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. GAOR, 49th Sess., Agenda Item 152, U.N. Doc. A/49/342 and U.N. SCOR, U.N. Doc. S/1994/1007 (1994) [hereinafter First Annual Report of the Tribunal]; and Commission on Security and Cooperation in Europe [Helsinki Commission], Prosecuting War Crimes in the Former Yugoslavia: An Update, June 24, 1994, and June 1995 [hereinafter Helsinki Commission Tribunal Updates].

[19]S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

President. Article 13 of the Statute for the International Tribunal for Rwanda,[20] unlike Article 14 of the Statute for the International Tribunal for the Former Yugoslavia, does not require that the President of its Tribunal be a member of the Appeals Chamber, although since rotation apparently remains an aspect of Chamber procedure, it is possible that its President would rotate into the Appeals Chamber. The following descriptions of the composition and jurisdiction of the International Tribunal for the Former Yugoslavia do not necessarily apply in every respect to the International Tribunal for Rwanda.

Judges. The trials of the indictees, any appeals, and any other hearings relevant to the proceedings are to be conducted by eleven independent judges, of whom no two may be nationals of the same state, sitting in the courts, called judicial "Chambers" by the Statute. The chambers consist of two Trial Chambers with three judges in each and the Appeals Chamber with five judges. The judges should have the highest qualifications of their profession, sufficient to qualify them for the highest judicial offices in their respective countries. Consideration should be given to experience in criminal law and international law, including human rights and international humanitarian law. The Secretary-General invites nominations from member states and from non-members maintaining permanent observer missions at United Nations Headquarters. Within 60 days, each state submits the names of up to two nominees, not from the same state. The Security Council then selects 22 to 33 candidates to submit to the General Assembly, which then elects 11 judges from the list. The judges serve for a term of 4 years under the same terms and conditions as those for judges of the International Court of Justice and may be re-elected.

The judges elect a President and a Vice-President of the Tribunal for a term of 2 years; they may be re-elected once. The President shall be a member of the Appeals Chamber and preside over the appellate proceedings. He shall assign judges; each would serve in only one chamber. The Vice-President may sit as a member of the Appeals Chamber or of a Trial Chamber. Each Trial Chamber panel elects a presiding judge who conducts all the proceedings of that Trial Chamber as a whole. The judges shall rotate on a regular basis among the chambers. Within the judicial organ of the Tribunal, aside from the Chambers, there is an internal body called the Bureau which is composed of the President, Vice-President, and Presiding Judges of the Trial Chambers, and which consults on major issues of the functioning of the Tribunal. The President shall assign for each month one judge from each Trial Chamber as the judges to whom indictments are transmitted for review prior to confirmation and the issuance of any necessary warrants and orders.

The President of the Tribunal is Gabrielle Kirk McDonald of the United States. The other judges are from Guyana, Italy, France, Britain, Zambia, Colombia, Egypt, Portugal, Malaysia and China.

The Office of the Prosecutor. The Prosecutor is "responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia

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[20]The Statute for the International Tribunal for Rwanda is in the Annex to Security Council Resolution 955, supra note 20.

since 1 January 1991," according to Article 16 of the Statute. The Prosecutor is independent and does not act under the direction of any government or any other organization or body.

The Report of the Secretary-General on proposals for the International Tribunal envisioned the division of the Office of the Prosecutor into an investigation unit and a prosecution unit. According to the First Annual Report of the Tribunal for 1993-1994 and the Second Annual Report of the Tribunal for 1994-1995, the Office actually comprises four sections employing 140-odd staff members. These include: (1) the Investigations Section, composed of investigators, lawyers, intelligence analysts, advisors and support staff, responsible for conducting investigations, including those in the field;[21] (2) the Prosecution Section, composed of trial advocates, legal advisors/researchers and support staff, responsible for review of briefs submitted by the Investigations Section, finalization of indictments and actual presentation of cases before the judges; (3) the Legal Services Section comprising specialists on international law, gender law, criminal law, comparative law, and legal assistants; and (4) the Administration and Records Section, responsible for the computer systems of the Office and the handling, processing and filing of all material, evidence, statements and other records received or generated by the Office. In addition to these sections, there is a Prosecutor's secretariat which provides support and advice on a wide range of issues from legal to administrative and media-related. The Office of the Prosecutor is also establishing field liaison offices in Belgrade, Sarajevo, and Zagreb. A notable development is the appointment of a special legal advisor for gender-related crimes, to ensure the appropriate handling of the many allegations of sexual assault.

The organization of the Office of the Prosecutor is governed by Article 16 of the Statute and also by Rules 37 and 38 of the Rules of Procedure and Evidence. The Security Council shall appoint the Prosecutor upon nomination by the Secretary-General. The Prosecutor must be of high moral character and have the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The term of office is four years and the terms and conditions of service are the same as those of an Under Secretary-General of the United Nations. The Deputy-Prosecutor and other staff of the Office of the Prosecutor are appointed by the Secretary-General upon the recommendation of the Prosecutor. Qualified staff are to meet rigorous criteria of professional experience as investigators, prosecutors, criminal lawyers, law enforcement personnel, or medical experts. Due consideration is to be given to the appointment of qualified women in light of the fact that the crimes involved include rape and sexual assault.

Retaining the appointed Prosecutor has proven to be difficult for the Tribunal. The first Prosecutor, Ramon Escovar Salom resigned several months after appointment to accept a cabinet position in the Venezuelan government. He was

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[21]Initially, there was a Special Advisory Section, composed of experts in international law, military law, former Yugoslavian law, and background information for the Balkans, who were to advise the Investigations and Prosecution Sections. The experts in this section were reassigned to the Strategy Team within the Investigations Section, where they were mainly needed. The new Legal Services Section was created to replace the Special Advisory Section.

succeeded by Richard J. Goldstone, a Justice on South Africa's highest Court and a highly regarded jurist in the human rights realm. He was Chairman of the South African Commission of Enquiry regarding the Prevention of Public Violence and Intimidation, which revealed police violence and abuse and led to criminal prosecutions. Goldstone's tenure is widely credited with establishing the credibility and influence of the Tribunal. However, he had committed himself for only two years, having taken a leave of absence from his post at the South African Constitutional Court. He was succeeded on October 1, 1996, by Louise Arbour, a Judge on the Ontario Court of Appeal in Canada and a former vice-president of the Canadian Civil Liberties Union, who was appointed by the Security Council on February 29, 1996.[22] The Deputy-Prosecutor, Graham Blewitt, formerly the Director of the Australian War Crimes Prosecution Unit, has been with the Office of the Prosecutor since February 1994, lending some continuity to the Office, the staff of which includes personnel "seconded," *i.e.*, on loan, from other sources.

The Registry. The Registry is responsible for the overall financial management and administration of all parts of the International Tribunal for the Former Yugoslavia and it consists of the Registrar and any required staff, according to Article 17 of the Statute of the Tribunal. Rules 30 to 36 of the Rules of Procedure and Evidence also govern the operations of the Registry. The Secretary-General appoints the Registrar after consultation with the President, who in turn shall seek the opinion of the other judges. The Registrar serves a term of 4 years and may be reappointed. The terms and conditions of service are those of an Assistant Secretary-General of the United Nations. The Deputy Registrar and other staff of the Registry are appointed by the Secretary-General upon the recommendation of the Registrar. Currently, Dorothée de Sampayo Garrido-Nijgh, formerly the Vice-President of the Dutch Appeals Court in The Hague, is serving as the Registrar.

The various duties of the Registry specified in the rules include:

- making a full record of all proceedings of the Tribunal;
- taking the minutes of plenary meetings of the Tribunal and of the sittings of the Chambers other than private deliberations;
- maintaining a Record Book which shall list all the particulars of each case before the Tribunal and shall be open to the public;
- numerous other procedures related to various Tribunal procedures, ranging from admission and assignment of defense counsel for indigent defendants to procedures for the restitution of property and compensation to victims.

Additionally, the Report of the Secretary-General concerning proposals for the organization of the Tribunal suggests that the duties shall include:

- public information and external relations with other organizations, states, and the media and generally serving as the channel of communications to and from the Tribunal (the Press and Information Service was created by the Tribunal in June 1994 to handle these functions);
- conference-service facilities;

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[22]S.C. Res. 1947, U.N. SCOR, U.N. Doc. S/RES/1047 (1996).

- printing and publication of all documents (including the *Tribunal Handbook* and *Manual for Practitioners*);
- all administrative work, budgetary and personnel matters.

The Registry is also responsible for implementing the headquarters agreement between the United Nations and the Netherlands to ensure the smooth operations of the Tribunal in its host country. The Registrar chaired a task force in charge of the infrastructure and logistics of the Tribunal including the design and security of the courtroom. The Registry was also involved in the construction of detention facilities. The appointment and termination of lower-level staff have been delegated to the Registrar by the Secretary-General.

In addition to the general administration of the Tribunal, Rule 34 provides for the establishment of the Victims and Witnesses Unit under the Registrar consisting of staff qualified to recommend protective measures for victims and witnesses and to provide counselling and support for them, particularly in cases of rape and sexual assault. As in the Office of the Prosecutor, due consideration is to be given to the employment of qualified women. The purpose of the Unit is to provide assistance to victims and witnesses during their involvement and cooperation with the Tribunal, including psychological counselling and provision of housing at the seat of the Tribunal, and after the trial to assure the protection and support of witnesses and victims after they have returned to their home countries.

As noted above, the Registry is responsible for the assignment of counsel to defendants who it determines are indigent upon the request of such defendants for legal assistance. The Registrar has prepared, in consultation with the judges, a directive governing the procedure for assignment, status and conduct of counsel; the calculation and payment of fees; and the establishment of an advisory panel for the assignment of counsel and composed of counsel selected by lot from the lists of counsel drawn up by the Registrar and submitted by bar associations.

Financing[23]

After the establishment of the Tribunal, the U.N. General Assembly disagreed on how to assess financing for the Tribunal. Some countries argued that since the Tribunal was established by the Security Council, it should be financed like a peacekeeping operation (where the U.S. share of the budget is over 30%). Others (including the United States) argued that it should be financed from the U.N. regular budget (where the U.S. share is 25%). The General Assembly decided (Resolution 47/235, September 14, 1993) to establish a separate assessed account outside the regular budget, but whether the peacekeeping or regular budget scale of assessments would apply remained unresolved until July 1995. The General Assembly invited member countries and other interested parties to make voluntary contributions both in cash and in the form of services and supplies.

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[23]Prepared by Vita Bite, Analyst in International Affairs, and Steven Woehrel, Specialist in European Affairs.

The Tribunal's budget for calendar year 1993 was $276,200. For 1994 it was $10.8 million. For 1995, the Tribunal's budget was $28.3 million. For calendar year 1996, the Tribunal's budget was $35.43 million. The Tribunal's 1997 budget was $48.587 million.[24] The Tribunal's 1998 budget is $64.216 million.

In addition, the Tribunal receives voluntary contributions of various kinds. A number of governments have provided voluntary cash contributions as well as contributions in kind of personnel and equipment. Various Netherlands ministries have provided support in reconstruction of the Tribunal's premises, transport of the accused, security, etc. As of July 15, 1997, more than $8.6 million had been contributed as cash contributions by 22 countries. As of February 1998, the Tribunal had 29 staffers seconded from several countries, and 22 legal assistants contributed by the European Union. (For discussion of U.S. financial contributions to the Tribunal, see below.) In July 1997, Great Britain offered $500,000 to build a second, interim courtroom.

Recent Activities and Problems[25]

The Tribunal has faced several problems. One has been the lack of adequate funding and resources. Although the Tribunal has received large increases in funding and staff since its inception, Tribunal officials said these resources are not keeping up with their accelerating workload, as the number of investigations, indictments and trials increase. The Tribunal budget does not cover the costs of mass grave exhumations, and the Tribunal issued an appeal to individual countries to fund future efforts. The Tribunal has only one permanent courtroom, creating long delays in bringing cases to trial. Two new courtrooms are scheduled to be completed in April and May 1998. ICTY President Gabrielle Kirk McDonald told the U.N. Security Council in March 1998 that in order to use the new courtrooms more effectively, the Tribunal needs another trial chamber of three judges and a fourth judge who could handle preliminary issues.

The gathering of evidence, both physical evidence from mass grave sites and interviews with witnesses, has been impeded by the limited investigatory resources of the Tribunal, and the lack of cooperation from Serbia-Montenegro and the Republika Srpska.[26] The Tribunal has had to maintain a difficult balance between adequate protection of witnesses from intimidation and invasion of privacy, particularly for the victims of rape, and the concern that excessive shielding of prosecution witnesses will deprive the defense of the ability to mount an effective case by questioning the sources of prosecution information. As of March 1998, only one country had agreed to relocate witnesses. The Tribunal is seeking relocation agreements with other countries.

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[24]ICTY Bulletin, no. 18. On ICTY website (http://www.un.org/icty)

[25]This section was prepared by Margaret Mikyung Lee, Legislative Attorney, American Law Division and Steven Woehrel, Specialist in European Affairs, Foreign Affairs and National Defense Division.

[26]Second Annual Report of the Tribunal, supra note 17, at ¶¶ 191-196.

There has been an ongoing concern about the ability of the Tribunal to obtain personal jurisdiction over the indicted. At present, only 26 of the 74 indicted persons are actually in the custody of the Tribunal. (A 27th person has been released provisionally due to ill health. He must return to the Tribunal two weeks before his trial is to begin.) This problem has been a source of friction between the Tribunal and the states in whose jurisdiction the indicted persons may be found, and also between the Tribunal and NATO-led peacekeeping forces in Bosnia. The Tribunal has complained of a lack of cooperation from Serbian authorities in turning over indictees under their jurisdiction and announced that it would formally complain to the Security Council about a state's refusal to cooperate.[27] The first indictee to go to trial, Dusko Tadic, had fled to Germany where he was arrested after being recognized by former victims. Although Germany offered full cooperation, the Tribunal's ability to proceed with the Tadic case was delayed by the necessity of requesting the Germans to defer to the competence of the Tribunal and turn Tadic over to it.

As discussed more fully in the section on IFOR/SFOR and the Tribunal in this report, there has been confusion and disagreement between the Tribunal and NATO over the exact nature of the role IFOR/SFOR should play in assisting the Tribunal with its work. NATO has been concerned with "mission creep" which could undermine IFOR/SFOR's primary mission of peacekeeping by expending time and energy pursuing indictees and also possibly stirring up animosity against IFOR/SFOR. IFOR/SFOR commanders have said that their forces would detain indictees if they encountered them in the course of their duties.

On June 30, 1997, Tribunal prosecutor Louise Arbour said that in order to increase the chances of seizing suspects, the Tribunal would no longer publicize its indictments before making arrests. Ms. Arbour's announcement came four days after Tribunal investigators arrested Slavko Dokmanovic in eastern Slavonia, Croatia. Dokmanovic had been secretly indicted in April 1996 for war crimes committed in Vukovar, Croatia in 1991. Serb sources said that Dokmanovic was arrested when he showed up for a meeting with ICTY investigators to discuss his status. UNTAES, the U.N. peacekeeping force in eastern Slavonia, provided support for the arrest, and transferred Dokmanovic to the Tribunal. After the announcement, SFOR moved to arrest two indictees in Bosnia, killing one in a shoot-out and arresting the other. Both men had been earlier indicted secretly. SFOR has subsequently made several other arrests. Eleven Croat suspects and five Serb suspects turned themselves in voluntarily to the Tribunal. In April 1998, Ms. Arbour said that the main focus of secret indictments will be those who exercised command authority over those committing war crimes. She noted that these efforts are often more difficult and time-consuming than trials of actual, low-ranking perpetrators of such deeds.

In December 1997, Arbour sharply criticized France for not moving to arrest indicted war criminals (possibly including Karadzic and Mladic) in the SFOR section that it controls, saying war criminals could feel "perfectly safe" there. Arbour also criticized France for refusing to allow French military officers who served in U.N. peacekeeping forces in Bosnia during the war to testify at war crimes trials.

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[27]UN war crimes tribunal to protest to Security Council about Belgrade, Deutsche Presse-Agentur, April 3, 1996, available in LEXIS, Nexis Library, Wires File.

Another problem has been national implementation of the Statute of the Tribunal.[28] Although the adoption of the Statute and the establishment of the Tribunal creates a binding international obligation on the member states of the United Nations to cooperate with and assist the Tribunal,[29] and parties to the conflict agreed under the Dayton Peace Accords and the Rome Implementation Agreement to cooperate with the Tribunal,[30] the national laws of a member state may require the enactment of legislation specifically implementing the terms of cooperation with the Tribunal or the official adoption of administrative action by the executive branch of a member state. Unless a member nation enacts any necessary legislation authorizing the arrest, detention and surrender to the Tribunal of any of the indictees found within its jurisdiction, it cannot effectively cooperate with the Tribunal. As of March 1998, 20 countries had passed implementing legislation. While the United States and other nations, including Croatia, have enacted implementing legislation or taken other necessary domestic measures,[31] some other nations, including Serbia-Montenegro, have failed to take the necessary steps under their national laws to enable cooperation with the Tribunal.[32]

One should also note that the criminal laws of a nation may authorize the prosecution of war crimes as a domestic matter. In such a case, under Article 9 of the Statute of the Tribunal, the Tribunal would have to request the national authorities charged with enforcing their own criminal laws to defer to the Tribunal, unless legislation implementing the Statute of the Tribunal required automatic deferral to the Tribunal.

Because obtaining the arrest of the majority of the indictees has proven to be difficult, there have been a number of Rule 61 proceedings to review the indictments and issue international arrest warrants which then obligate each U.N. member nation

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[28]See First Annual Report of the Tribunal, supra note 19, at 45.

[29]See S.C. Res. 827, supra note 7, at ¶ 4, and Statute, supra note 12, Article 29.

[30]Dayton Peace Agreement on Bosnia-Hercegovina, November 21, 1995, Republics of the former Yugoslavia, Annex 6/Article XIII/¶ 4 and Annex 11/Article VI; Rome Agreed Measures, February 18, 1996, Republics of the former Yugoslavia, ¶ 5.

[31]The United States concluded an Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law in the Territory of the Former Yugoslavia, signed at the Hague, October 5, 1994, T.I.A.S. . It implemented the Agreement and its obligations under the Statute of the Tribunal adopted in Security Council Resolution 827 with the enactment of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486-87 (1996). Bosnia-Hercegovina passed implementing legislation in 1995, Second Annual Report of the Tribunal, supra note 17, at ¶ 132. Croatia passed implementing legislation this year, Croats pass law on ties with U.N. criminal court, Reuters World Service, April 19, 1996, available in LEXIS, Nexis Library, Wires File.

[32]Iain Guest, War-Crimes Trials: the First Test, The Christian Science Monitor, March 13, 1996, at 19; Upper House Endorses Bill on Cooperation with War Crimes Tribunal, BBC Summary of World Broadcasts, March 12, 1996. See also supra note 29 and accompanying text.

to arrest and transfer an indictee found within its jurisdiction.[33] In July 1996, the Tribunal issued international arrest warrants for Bosnian Serb leader Radovan Karadzic and Bosnian Serb army commander Ratko Mladic.

Another recent issue is whether the Tribunal can issue subpoenas to countries and individuals to appear before the Tribunal or turn over documents to it. Croatia refused to comply with a subpoena issued by the Tribunal to turn over documents relating to the links between Croatia and indicted war criminal Tihomir Blaskic during the war. The Tribunal said that if the documents were not turned over, Croatian Defense Minister Gojko Susak would be summoned to the court to explain the refusal. Croatia replied the Tribunal has no authority to issue subpoenas to countries or state officials operating in their official capacity, and asked the Tribunal Appeals Chamber to block the subpoenas. On October 16, 1997, five men, current and former officials in Muslim-held areas of Bosnia, were subpoenaed to testify at the trial of two Bosnian Muslims and one Croat charged with war crimes. They complied with the subpoenas and testified in the trial the following week. On October 29, the Appeals Chamber, ruling on Croatia's complaint, said that the Tribunal has no power to issue a subpoena to a country or state official. However, the Chamber said that the Tribunal could issue a "binding order" to a state, and inform the U.N. Security Council if the country fails to obey the order. The Security Council could then take action against the state, if it wished to do so.

A future problem that will arise unless the Tribunal receives more cooperation from governments is the imprisonment of convicted war criminals. Under the Statute of the Tribunal, as noted above, imprisonment is to be served in a state chosen from a list of states which have indicated their willingness to accept convicted war criminals. In 1994, the Secretary-General of the United Nations sent a note inviting all member-states to indicate their willingness. Additionally, the Tribunal sent a letter in 1994 requesting 35 states to indicate their willingness, but only a few gave a positive response.[34] Most did not respond, some indicated an inability to help or an inability to give a definite response, and the remainder indicated a willingness only to imprison their own nationals or residents. A second letter was sent in 1995, proposing less onerous commitments limited by time or by number of prisoners. Only a few responded to the second letter; none of those responses were positive. In May 1997, Finland signed agreements with the Tribunal agreeing to imprison convicted war criminals, but said it would not take prisoners who would pose a high security risk. Italy has signed a similar agreement with the ICTY.

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[33]Hearing Resumes in Case of Serbian Officers Charged with War Crimes, Agence France Presse, March 26, 1996, available in LEXIS, Nexis Library, Wires File; Arrests, Hearings Bring New Impetus to War Crimes Tribunal, Agence France Presse, March 20, 1996, available in LEXIS, Nexis Library, Wires File; War Crimes Tribunal Issues Arrest Warrant for Martic, Agence France Presse, March 8, 1996, available in LEXIS, Nexis Library, Wires File; Lack of Arrests Undercuts Tribunal; War Crimes: The U.N. Panel has made progress, but support for it may ebb if trials fail to materialize, L.A. Times, March 2, 1996, at A14.

[34]The Second Annual Report of the Tribunal, supra note 17, at ¶¶ 136-9.

U.S. Policy on the Tribunal

The United States has been a strong supporter of bringing Bosnian war criminals to justice.[35] In October 1992, the United States supported the establishment of a U.N. commission to gather data on war crimes in the former Yugoslavia. The United States contributed $800,000 to the effort as well as information, advice and investigative help.[36] It was also instrumental in the establishment of the International Criminal Tribunal for the Former Yugoslavia in May 1993.

In an October 1995 speech honoring the 50th anniversary of the Nuremberg War Crimes Tribunal, President Clinton underlined his "strong support" for the war crimes tribunal for the former Yugoslavia. He said the goals of the Tribunal were to punish those responsible for war crimes, to deter future war crimes, and to help the former Yugoslavia "begin the process of healing and reconciliation." He rejected the assertion that pursuing war criminals was incompatible with peace, saying that on the contrary "no peace can endure for long without justice. For only justice can finally break the cycle of violence and retribution that fuels war and crimes against humanity."[37]

The United States has repeatedly pressed Serbia-Montenegro and Croatia to surrender indicted war criminals on their soil, and force their clients in Bosnia to do likewise. The United States supported linking the lifting of sanctions against Serbia-Montenegro and the Republika Srpska (RS -- the Bosnian Serb entity within Bosnia-Hercegovina) to cooperation with the Tribunal. According to U.N. Security Council Resolution 1022 (November 1995), which suspended economic sanctions against Serbia-Montenegro, the sanctions could be reimposed without a vote by the Security Council if Serbia-Montenegro or the Bosnian Serbs do not fulfill their obligations under the accords (including provisions on cooperation with the Tribunal), upon the recommendation of the High Representative (who is in charge of coordinating implementation of the civil aspects of the peace accord) or the commander of IFOR. However, U.S. officials opposed a June 1996 request by Tribunal President Antonio Cassese to re-impose sanctions, saying Milosevic needed more time to produce results on the war criminals issue, but said it remained an option if Serb non-compliance continued. Sanctions against Serbia-Montenegro were lifted after Bosnia's September 1996 elections, in fulfillment of the terms of Resolution 1022.

After the U.N. sanctions against Serbia-Montenegro were lifted, U.S. officials, with the support of the other Contact Group countries, have said that the "outer wall" of sanctions against Serbia-Montenegro (including membership in and assistance from international institutions) will not be lifted if it does not cooperate with the Tribunal.[38]

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[35]This section was prepared by Steven Woehrel, Specialist in European Affairs.

[36]"Background: U.S. Contribution to the War Crimes Tribunals," unclassified State Department memorandum, March 1996.

[37]"Remarks by the President At the Opening of The Commemoration Of '50 Years After Nuremberg: Human Rights and the Rule of Law" White House transcript, October 15, 1995.

[38]"The International Tribunals for the Former Yugoslavia and Rwanda", State Department (continued...)

The United States has also repeatedly pressured Croatia to cooperate with the Tribunal, warning that failure to do so would hinder Croatia's integration into Western institutions, a key Croatian policy goal. Secretary of State Albright says the Administration is pursuing a "carrot-and-stick" approach toward international loans to Croatia. The United States has postponed IMF and World Bank loans or tranches of loans to Croatia in an effort to gain leverage over Croatian policy. In March 1997, the United States abstained from an IMF vote on a $486 million loan to Croatia, as a signal to Croatia to turn over Zlatko Aleksovski to the Tribunal. After Aleksovski was sent to The Hague, the United States approved a $13 million World Bank loan in June 1997. In July 1997, the United States forced the postponement of a $30 million World Bank loan and a $40 million tranche of the $486 million IMF loan to Croatia. David Scheffer, U.S. envoy for war crimes issues, warned in September 1997 that the United States would continue to oppose bilateral and multilateral economic assistance to Croatia until Zagreb gives its full cooperation to the Tribunal. He said Croatia could arrest Kordic and fellow indicted war criminal Ivica Rajic, if it chose to do so. Prime Minster Matesa called Scheffer's demand to turn over indicted war criminals "immoral," and vowed that Croatia would "never trade anyone, nor shall we extradite our people for loans."

So far, the results of these U.S. efforts have been mixed. The greatest progress has been with Croatia, which has taken grudging but substantial steps toward cooperation with the ICTY. Tihomir Blaskic, a former senior Bosnian Croat military commander living in Croatia, turned himself in to the Tribunal "voluntarily" in April 1996. Croatia arrested Zlatko Aleksovski in June 1996, but did not turn him over to the Tribunal until April 1997, after another round of U.S. pressure. Perhaps the greatest success for U.S. policy was the voluntary surrender to the Tribunal on October 6, 1997 of 10 Bosnian Croats indicted for war crimes, including former high-ranking Bosnian Croat leader Dario Kordic. Four days after the surrender of the 10, the IMF released two tranches, totaling $78 million, of its loan to Croatia The Croatian government said it did not plan to use the money, saying that its economic situation was good enough to do without the funds.

U.S. efforts to secure the cooperation of Serbia-Montenegro and the Republika Srpska have been less successful. Aside from Drazen Erdemovic, an RS soldier of Croat ethnicity, Serbia-Montenegro has not turned over any suspects to the Tribunal. Serbia-Montenegro offered some assistance in removing Radovan Karadzic from his official posts. On July 17, 1996 after 10 hours of talks between Milosevic and U.S. envoy Richard Holbrooke, Karadzic resigned as RS president and as chief of the ruling Serbian Democratic Party (SDS). Karadzic pledged not to take any public role in Bosnian Serb public life. However, during a power struggle between new RS President Bijlana Plavsic and Karadzic supporters in 1997, Plavsic charged that Karadzic had been guiding RS policy from behind the scenes. On November 9, 1996, Bosnian Serb President Biljana Plavsic fired Gen. Ratko Mladic as the Bosnian Serb army commander. Plavsic said that international pressure prompted her decision to depose Mladic, although other observers claimed the move was also prompted by a long-running power struggle between Bosnian Serb civilian and military leaders.

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[38](...continued)
background memorandum, undated (January 1996?).

Mladic rejected Plavsic's order to quit his post at first, but after a brief standoff, he resigned on November 27, 1996. He remains at large.

U.S. policy appeared to make some headway against RS obstructionism after the November 1997 RS parliamentary elections, during which hardliners lost their majority in the assembly. At the urging of the United States and other Western countries, Serb moderates and Croat and Muslim deputies of the new parliament elected moderate Milorad Dodik as the new Bosnian Serb Prime Minister in February. Dodik has promised to cooperate with the ICTY. Since his investiture, the RS has not turned over any suspects to the Tribunal. Dodik claims that he currently lacks the legal basis and the political strength to arrest suspects and send them to the Tribunal. However, in April 1998 Tribunal President Gabrielle Kirk McDonald said there had been a "marked increase" in RS cooperation with the Tribunal, in particular that the RS had allowed Tribunal search warrants to be executed on its territory in recent months. The political reverses suffered by hardliners in the RS may have been one factor inducing five Bosnian Serb war crimes suspects to surrender voluntarily to the Tribunal between January and April 1998. Another factor may have been the release for lack of evidence of three Bosnian Croat suspects who had turned themselves in in October 1997.

The Administration has made the arrest and prosecution of war criminals part of its exit strategy for U.S. troops in Bosnia. In December 1997, President Clinton said that U.S. forces would stay in Bosnia as part of a NATO-led stabilization force until certain benchmarks were achieved in peace implementation efforts. According to the Administration, these benchmarks, when fulfilled, would create the conditions for a self-sustaining peace in Bosnia, allowing U.S. troops to be withdrawn. Among the ten benchmarks is that "the parties are cooperating with the ICTY in the arrest and prosecution of war criminals."[39]

Financial Support

Administration officials note that the United States contributed more to the Tribunal than any other country. In March 1998, U.S. war crimes envoy David Sheffer said that the United States has provided $54 million in U.N.-assessed contributions and more than $11 million in voluntary and in-kind contributions since 1992. The voluntary aid includes $3 million in services from 22 prosecutors, investigators and other experts from the Department of Defense, the Department of Justice and the FBI, the State Department, and the intelligence community. (Twenty-one of these detailed U.S. personnel were later withdrawn from the Tribunal due to a dispute over U.N. efforts to impose an "overhead charge" on the United States to cover U.N. administrative costs associated with the detailees.)

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[39] For a list of the benchmarks, see Certification of U.S. Armed Forces Continued Presence in Bosnia and Hercegovina, March 4, 1998, 105th Congress, 2d Session, House Document 105-223.

The voluntary contributions include $450,000 in May 1997 to the Tribunal's program to unearth mass graves.[40] On December 16, 1997, the United States announced that it would contribute $1 million to help build a new courtroom for the ICTY. The Netherlands is also contributing to the construction of the courtroom. On March 13, 1998, the United States announced a voluntary contribution of $1.075 million to the ICTY. $400,000 of the amount is earmarked to investigate possible war crimes committed in the Kosovo region of southern Serbia. Another $400,000 is for additional translation capabilities and $275,000 will be allotted for review of case files and training legal professionals in the region to support the "Rules of the Road" process.

Intelligence Support

The United States voluntarily offered intelligence assistance to the Tribunal to aid it in its investigations. However, on October 30, 1995, the chief prosecutor for the Tribunal, Justice Richard Goldstone, sent a letter to the U.S. Embassy in the Hague in which he reportedly described the "quality and timeliness" of information supplied by the United States to the Tribunal as "disappointing." While stressing that the United States was the Tribunal's "strongest supporter and most reliable friend," Goldstone reportedly said that most of the material the United States supplied was from open sources and was not relevant to the 25 requests he had submitted. According to the report, he added that the most useful information the U.S. has supplied was aerial and satellite imagery of suspected mass grave sites near Srebrenica that the United States showed to the U.N. Security Council in August 1995. Goldstone asked to receive more of this type of imagery, as well as alleged communications intercepts that prove the complicity of Bosnian Serb army commander Ratko Mladic and Yugoslav army leaders in the Srebrenica massacre. (On the latter request, U.S. officials reportedly said they were unaware of any such intercepts.)[41] On November 7, 1995, White House spokesman Michael McCurry said that certain types of intelligence information could not be shared with the Tribunal for "national security reasons." However, State Department spokesman Nicholas Burns appeared to reverse course a day later, saying the U.S. would provide "100% cooperation" with the Tribunal, even if this meant the release of "national security information," with the only restriction being for the U.S. to protect its sources.[42]

After a mid-November 1995 visit by Goldstone to the United States, the U.S. agreed to devote more effort to identifying material of use to the Tribunal. U.S. officials impressed on Goldstone the need for the Tribunal to be more specific in its requests, so that U.S. agencies can respond more effectively.[43] Secretary of Defense William Perry said on January 24, 1996 that the U.S. intelligence community would sift the large amounts of data on Bosnia that it had collected for other purposes and

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[40]Congressional Record, July 11, 1997, S7314.

[41]Washington Post, November 7, 1995, 19. For more on U.S. intelligence cooperation with the Tribunal, see New York Review of Books, May 9, 1996, 10-15.

[42]Reuters news agency dispatch, November 8, 1995.

[43]"The International Tribunals for the Former Yugoslavia and Rwanda, State Department background memorandum, undated (January 1996?).

deliver to the Tribunal information that might help it in its investigations.[44] Admiral Leighton Smith, regional commander of IFOR's air, sea and land forces, said on February 1, 1996 that IFOR was flying daily reconnaissance missions over suspected war crimes sites identified by the Tribunal, using JSTARS ground surveillance aircraft, tactical reconnaissance assets and data from satellites to detect possible efforts to tamper with the sites.[45]

U.S. officials have stressed that seeking out war criminals or monitoring suspected war crimes sites is not a major part of U.S. intelligence efforts in Bosnia, which are focused on force protection and monitoring compliance with the military aspects of the peace agreement, the main mission of U.S. forces in Bosnia. Lt. Col. Melissa Patrick, chief intelligence officer for the U.S. 1st Armored Division, told a journalist in March 1996 that "probably none" of the indicted war criminals was being tracked by U.S. intelligence assets because "there is no mission to find them. The same thing for mass graves."[46]

The arrest of indicted Bosnian Serb war criminal Goran Jelisic by U.S. troops on January 22, 1998 could signal stepped up U.S. intelligence efforts to locate indicted war criminals, especially if additional arrest operations are contemplated.

IFOR, SFOR and the Tribunal

Controversy over the relationship of IFOR and its successor, SFOR, with the Tribunal has centered mainly on two issues: detaining suspected war criminals and providing security for war crimes sites. The Bosnian peace agreement makes no direct mention of IFOR assistance to the War Crimes Tribunal, although it requires the parties to the agreement to cooperate with the Tribunal. However, Assistant Secretary of State John Shattuck noted at a House International Relations Committee hearing on February 1, 1996 that the agreement permitted IFOR to carry out additional duties and responsibilities established by NATO's North Atlantic Council (Annex 1A, Article IV, Section 4), and that NAC directives permitted IFOR to detain indicted war criminals. From the beginning of the operation, IFOR and SFOR commanders have insisted that the force would apprehend indicted war criminals if they should come across them in the course of their normal duties, but would not conduct "manhunts" for them. They also underlined that IFOR had to focus on its primary mission, separating the warring sides, and did not have the resources to provide extensive assistance to the Tribunal, at least until the main military deadlines under the peace agreement had passed and its troop deployment had essentially been completed. They stressed that the Bosnian peace agreement assigns responsibility for cooperation with the Tribunal to the parties themselves, not to IFOR or SFOR. However, in recent months, SFOR has started to interpret its mandate on the issue of war criminals in a more active manner. Since July 1997, SFOR has seized six

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[44]New York Times, January 26, 1996, 1.

[45]Transcript of press conference with Adm. Smith, Washington, DC, February 1, 1996.

[46]Washington Post, September 18, 1996,

indicted war criminals and transferred them to the ICTY. A seventh was killed while resisting arrest.

Detention of Suspected War Criminals

Despite statements by IFOR and SFOR spokesmen and U.S. officials that peacekeepers would arrest war crimes suspects if they came across them in the course of their normal duties, there have been many press reports of occasions where IFOR/SFOR troops allegedly came across Karadzic and other indicted war criminals and did not make arrests. IFOR handed two suspected war criminals over to the Tribunal, but not ones who had been originally detained by IFOR. In late January, Bosnian Federation police arrested as suspected war criminals a group of Bosnian Serb officers who accidently crossed into Federation territory. None of the officers had been indicted by the Tribunal. On February 12, 1996, at the request of the Tribunal, IFOR transported two of the officers, Bosnian Serb Gen. Djordje Djukic and Col. Aleksa Krsmanovic, to the Tribunal in The Hague for investigation. The arrests by Federation police caused a brief break in relations between IFOR and the Bosnian Serb military. In order to provide more certainty in arrest procedures, Assistant Secretary of State Richard Holbrooke negotiated an agreement with the Federation on the "rules of the road" for arrests. Under the rules, the Federation would provide names and information concerning war crimes suspects to the Hague. If it wanted to arrest or indict a suspect, an order must be reviewed by the Tribunal and deemed consistent with international legal standards.

In May 1996, IFOR and the ICTY agreed to a memorandum of understanding on IFOR-ICTY cooperation. The details of the memorandum have not been released, but press reports say they involve legal and technical issues of detaining suspects and transporting them to the Tribunal, including access to lawyers and conditions of detention. They also reportedly lay out how IFOR assists Tribunal investigators at war crimes sites. The terms of the memorandum reportedly merely codified actions that have already been taken by IFOR and the Tribunal in recent months.[47] Over the 12 months of IFOR's mission, concern increased about the failure to bring indicted war criminals to justice. Before leaving his post as chief Tribunal prosecutor in September 1996, Richard Goldstone sharply criticized IFOR's unwillingness to arrest accused war criminals. He said the Tribunal had been failed by "politicians" who have conducted "a highly inappropriate and pusillanimous policy in relation to arrests." He said that the failure to arrest Karadzic and Mladic "could prove a fatal blow to this tribunal and to the future of international justice."[48]

On July 10, 1997, SFOR took its first action to arrest indicted war criminals. British SFOR soldiers (who press accounts claimed were elite SAS commandos brought into Bosnia, trained for the purpose and placed under SFOR command) arrested Milan Kovacevic without incident at a hospital in Prijedor. The British force also tried to arrest Simo Drljaca at another location on the same day. Drljaca opened fire on the British troops, wounding one soldier. Drljaca was cut down in a hail of

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[47]Reuters wire service dispatches, May 9, 1996.

[48]Reuters news agency dispatch, September 17, 1996.

bullets when the troops returned fire, and later died of his wounds. Both men had been secretly indicted by the Tribunal for war crimes committed in the Prijedor region in 1992. U.S. troops provided logistical backup for the operation, but did not participate in the arrest.

On December 18, 1997, Dutch SFOR troops captured two Bosnian Croat indictees, Vlatko Kupreskic and Anto Furundzija. Kupreskic opened fire during the arrest attempt, and was seriously wounded by return fire by the Dutch contingent. He later recovered after receiving emergency surgery for his wounds. Furundzija was arrested without incident. On January 22, 1998, U.S. SFOR troops conducted their first arrest of an indicted war criminal, seizing Bosnian Serb Goran Jelisic outside his home in Bijeljina. On April 8, 1998, British SFOR troops seized two Bosnian Serb indictees, Mladen Radic and Miroslav Kvocka, near Prijedor. Jelisic, Radic and Kvocka offered no resistance. SFOR's more aggressive interpretation of its mandate may also have played a role in the voluntary surrender of 10 Bosnian Croat suspects in October 1997 and five Bosnian Serbs in the past few months.

It is unclear whether SFOR will undertake an operation to seize perhaps the most wanted indicted war criminal, Radovan Karadzic. SFOR commanders reportedly remain leery about a possible operation to seize Karadzic, fearing that resistance from his heavily-armed bodyguard could lead to casualities among an arresting force. French forces, which control the sector in which Karadzic reportedly lives, have allegedly been especially reluctant to undertake the operation. A April 23, 1998 article in the *Washington Post* quoted unnamed U.S. officials as saying a French officer divulged NATO operational plans to Bosnian Serb leaders that caused SFOR to call off an operation to snatch Karadzic in summer 1997. The article quotes a senior U.S. official as saying the "dispicable and appalling" episode destroyed trust between U.S. and French military forces in Bosnia, and that the United States has halted virtually all consultations with France over the capture of indicted war criminals. France said that while the actions of the officer in question "may have appeared questionable," he acted without authorization, and did not in any case compromise an operation against Karadzic.

However, SFOR's arrest of other suspects, including the killing of one of them and the wounding of another, as well as SFOR's increased monitoring of special police charged with protecting Karadzic, may be encouraging Karadzic to consider a voluntary surrender. Persistent press reports in recent months have claimed that Karadzic has conducted talks with the ICTY over conditions for a voluntary surrender to the Tribunal, and has consulted with his attorneys about a possible defense. In addition, international High Representative Carlos Westendorp, ICTY Prosecutor Louise Arbour, SFOR commanders and other leading officials have expressed confidence that Karadzic will stand trial in the Hague, although they have not publicly offered evidence to support their optimism. Press reports in April 1998 indicate that Karadzic has abandoned his home in Pale, but disagree on where he has gone.

Security for War Crimes Sites

On January 22, 1996, Justice Goldstone met with Adm. Smith to discuss cooperation between IFOR and the Tribunal. A joint statement released at the end of the talks said that Adm. Smith "is satisfied that IFOR will be able to provide

appropriate assistance, at the appropriate time, to ensure area security for Tribunal teams carrying out investigations and activities at mass grave sites." Adm. Smith agreed to "have a Tribunal official liaise with IFOR." He also agreed with a request by Justice Goldstone to avoid public discussion of details of Tribunal requests for IFOR assistance. According to the statement, Justice Goldstone said he was "satisfied with the level of support offered by Adm. Smith, and agreed that IFOR support should be provided within the limits of its mandate and available resources."[49] Adm. Smith later said that IFOR would not guard individual grave sites. He added that he could foresee providing Tribunal investigators with IFOR liaison officers so that "if they do get in trouble they can call us and we can respond." He said he would prefer to have local police guard the sites, perhaps as part of a joint Federation-Republika Srpska force, monitored by U.N. police monitors.[50]

The first investigations at war crimes sites by Tribunal teams occurred in early April 1996. IFOR provided "area security" for the investigators. While the investigators did not receive armed escort at the sites, IFOR liaison officers with communications equipment joined the investigators, so that they could call on heavily armed IFOR soldiers to come to their assistance in the event of trouble. The investigators slept and ate at a U.S. Army base camp near the site. Col. John Batiste, commander of the 2nd Brigade of the U.S. First Armored Division said his forces would not clear mines from grave sites, although Adm. Smith said IFOR would provide investigators with information on possible minefields in the area.[51]

Despite statements by IFOR spokesmen that the Bosnian Serbs would be unlikely to tamper with mass grave sites, there are several reports that they have done so. In January 1996, press reports indicated that Bosnian Serbs may have dug parts of the Ljubija war crimes site, and poured acid on some of the corpses to prevent identification.[52] In April 1996, a journalist who had earlier visited and written on war crimes sites in eastern Bosnia returned to two of them and found that they had been dug up.[53] During the first investigations of war crimes sites by Tribunal teams in April 1996, investigators found evidence that several sites had been tampered with, according to U.S. Army Major Danial Zajac, who was providing security for the investigators.[54] However, while not denying that tampering may have occurred, a NATO spokesman later said that a re-examination of reconnaissance photos of the areas since January showed that tampering did not take place on IFOR's watch.[55] On April 19, 1996, Adm. Smith said that if IFOR saw a war crimes site being tampered with in the future, it could, at the request of the Tribunal, guard the site on a

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[49]"Joint Statement — COMIFOR and Chief Prosecutor International Tribunal on War Crimes for the Former Yugoslavia," January 22, 1996.

[50]Transcript of press conference with Adm. Smith, Washington, DC, February 1, 1996.

[51]Reuters news service, April 2, 1996 and transcript of press conference by Adm. Smith, April 2, 1996.

[52]New York Times, January 11, 1996.

[53]Christian Science Monitor, April 3, 1996, 1.

[54]Reuters wire service, April 4, 1996.

[55]New York Times, April 15, 1996, 8.

temporary basis until the Tribunal itself could assume responsibility for security of the site, provided that such a task would not interfere with IFOR's primary military missions.[56] In September 1997, Tribunal experts said two more mass graves, at Pilica and Lazete, had been tampered with before their excavations had begun.

In July 1996, Tribunal teams began a three-month mission to exhume corpses from 20 war crimes sites in Bosnia and Croatia. The first sites to be excavated were in the Srebrenica area. IFOR provided the promised area security, but did not guard the sites. Instead, the Tribunal surrounded the sites with barbed wire and hired several local Serbs to guard the sites at night. Several local Serbs reportedly shouted insults at the Tribunal team, but did not assault them. At a second site, U.S. IFOR forces, perhaps concerned about the possibility of assaults on the team, posted an anti-sniper unit and a few armored fighting vehicles near the site during the day.[57] IFOR also used reconnaissance assets to monitor the remaining sites that the Tribunal was to excavate in 1996. The Tribunal teams exhumed 400 to 500 bodies at Bosnian war crimes sites in 1996. The Tribunal also unearthed more than 200 bodies at another war crimes site in eastern Slavonia, Croatia in September and October 1996. Further exhumations in eastern Slavonia in June 1997 recovered several dozen more bodies. Under SFOR protection, Tribunal experts excavated a mass grave site near Brcko in July 1997, in order to find evidence against Goran Jelisic and other Bosnian Serbs indicted for war crimes at the Luka detention camp in 1992. SFOR provided security, liaison and logistical support for the ICTY exhumation efforts in Bosnia.

In December 1997, SFOR provided security for an ICTY search of a municipal building in Prijedor. The purpose of the search was not publicly disclosed. In April 1998, Tribunal experts began a new series of excavations of mass graves near Srebrenica and found bodies and bullet casings. They also set that parts of the grave sites showed evidence that tampering, including the covert removal of bodies.

Congressional Action

Since the start of the war in Bosnia, many Members have spoken strongly against war crimes in the former Yugoslavia and have stressed the need to bring the perpetrators to justice. Since the establishment of the Tribunal in 1993, Congress has taken several steps to bolster the newly-created body's efforts. Section 548(e) of the FY1994 Foreign Operations Appropriation Act (P.L. 103-87) authorized the President to provide up to $25 million in commodities and services to the Tribunal. Section 582 of the FY1996 Foreign Operations Appropriation Act (P.L. 104-107) bans U.S. aid from the act to countries who knowingly harbor persons indicted by the war crimes tribunal for the former Yugoslavia. It also requires the United States to vote against assistance to those countries in multilateral bodies. Section 1342 of the FY1996 defense authorization law (P.L. 104-106) provides the legal basis for the extradition of indicted war criminals from the United States to the Tribunal in the Hague.

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[56]NATO press conference with Adm. Smith, April 19, 1996.

[57]Reuters news agency dispatch, July 22, 1996.

The FY1997 Foreign Operations appropriation bill (H.R. 3540) permitted the President to provide up to $25 million in commodities and services to the Tribunal. Section 548 of the conference report for H.R. 3540 says the President is authorized to withhold U.S. aid to countries to countries who knowingly harbor persons indicted by the war crimes tribunal for the former Yugoslavia. It says the United States "should" vote against financing from international financial institutions for any country harboring indicted war criminals. The conference report on the bill was incorporated into H.R. 3610, an omnibus spending bill. H.R. 3610 was passed by the House on September 28, 1996 and the Senate on September 30. The President signed H.R. 3610 on September 30, 1996 (P.L. 104-208).

Section 561 of the FY 1998 foreign operations appropriations measure (P.L. 105-188) authorizes the President to withhold funds under the act to countries harboring war criminals and says he "should" vote against aid to such countries in international financial institutions. Section 573 bars U.S. aid for any program in which an indicted war criminal has financial or material interests, or in which an organization affiliated with a war criminal participates. It also bans aid (other than emergency food or medical assistance or demining aid) to any area of a sanctioned country in which local authorities are not cooperating with the Tribunal or are not allowing refugees to return to their homes. Section 573 allows the President to waive the sanctions for six months if he certifies that a majority of the indicted war criminals on the territory of a country have been turned over to the Tribunal. For the purposes of the section, Bosnia and Hercegovina is not treated as one country; the section is applied separately to the Republika Srpska and the Federation of Bosnia and Hercegovina.

Another provision, Section 583, amends the War Crimes Act of 1996 (P.L. 104-192) by allowing the United States to prosecute any war criminal located within its borders, regardless of his or her nationality. The provision also expands the scope and offers a more specific definition of what constitutes a war crime. The law also permits the President to provide up to $25 million of commodities and services to the Tribunal and requires the President to report on the steps the United States is taking to collect information on war crimes and transmit them to the Tribunal.

Since December 1997, the Administration has executed several waivers of Section 573 of the FY 1998 foreign operations appropriations law in order to provide aid to the RS. Administration officials say the money will be spent in regions where moderates, not hard-liners and war criminals, are in charge. They say that supporting moderates like RS President Bijlana Plavsic and RS Prime Minister Dodik with assistance is the best way to ensure implementation of the peace accords, including the surrender of war criminals to the Tribunal. Skeptics say that aid to the RS should wait until Plavsic and Dodik deliver on their promises. They also say that the Dodik government contains figures who, while not currently on the list of those publicly indicted by the Tribunal, may have committed war crimes.

IFOR/SFOR's participation in seizing suspected war criminals has been a matter of debate in Congress. Some Members of Congress hailed the July 10, 1997 SFOR operation to seize two indicted Bosnian Serb war criminals. On July 11, Senator Feinstein, on the second anniversary of the atrocities committed by Bosnian Serb forces in Srebrenica, also praised the NATO operation in a speech to the Senate. She

said that while the apprehension of indicted war criminals is "primarily the responsibility of the governments of the former Yugoslavia, yesterday's action illustrates the important role that SFOR has to play in this process as well... I can think of no better way to honor the memory of Srebrenica than if today SFOR turns over a new leaf, and vows to pursue its mandate vigorously and to the maximum degree possible." During a July 15 press conference sponsored by the Coalition for International Justice, Senator Lieberman and former Senator Robert Dole hailed the SFOR operation and pressed President Clinton to support SFOR efforts to seize other indicted war criminals. In remarks to the Senate on July 16, 1997, Senator Kerrey said that peace could not take hold in Bosnian until war criminals are brought to justice. He praised the operation and urged NATO to make additional raids to capture indicted war criminals.

While some Members would like SFOR to take a more active stance in seizing suspected war criminals, other Members (including those who were opposed to or skeptical about sending U.S. troops to Bosnia in the first place) are opposed to such a change in policy. After SFOR's operation to seize two Bosnian Serb war criminals on July 10, the Senate passed by voice vote on July 15 Amendment 849 to S. 1005, the FY 1998 defense appropriations bill. The amendment expressed the sense of the Senate that "international efforts to bring indicted war criminals to justice in Bosnia and Herzegovina consistent with the 1995 Dayton Accords should be supported as an important element in creating a self-sustaining peace in the region."

The amendment also said the Administration "should consult closely with the Congress" on efforts to bring indicted war criminals to justice consistent with the Dayton accords as well as "consult closely and in a timely manner" with the Congress on the NATO-led Stabilization Force's mission concerning the apprehension of indicted war criminals, including any changes in the mission which could affect American forces." Senator Hutchinson, one of the amendment's sponsors (Senators Lott, Lieberman, McCain, Smith, Levin, Lugar and Warner also sponsored the amendment), said that while she was concerned that war criminals are not being brought to justice in Bosnia, she also warned that Congress should be consulted if SFOR's mission were changed to include apprehending war criminals, saying that such a task is not in the force's current mandate or in the Dayton accords. She said the United States should learn from the U.S. experience in Somalia, "when there was mission creep without the complete accord of Congress."

A previous amendment on the issue, submitted by Senators Hutchison and Warner, was ordered to lie on the table. The sense of the Congress amendment offered a harsher judgement on the arrest of war criminals by SFOR than the one ultimately adopted by the Senate. It warned that efforts to apprehend war criminals "could expose U.S. and NATO troops to direct combat action and ultimately jeopardize the peacekeeping progress, to date, of U.S. and NATO forces in Bosnia." It expressed the sense of the Congress that there should be no U.S. or NATO efforts to seize indicted war criminals until Congress "has had the opportunity to review any proposed change in policy and authorize the expenditure of funds for this mission."

Impact of the Tribunal on the Peace Process

The relationship of the Tribunal to the peace process in Bosnia has been a controversial issue. Some observers believed that vigorous pursuit of war criminals may hurt the peace process. They feared that the Bosnian Serbs could stop implementing the peace accord or engage in acts of violence against peacekeepers. This concern appears to be one reason why IFOR and, for at least the first six months of its tenure, SFOR, have appeared reluctant to seize war crimes suspects.

However, more recently, a consensus appears to have emerged among U.S. officials, and international officials on the ground in Bosnia that that the fact that war criminals remained at large undermined the implementation of critical civilian aspects of the peace agreement. In June 1997, a constitutional crisis erupted within the Republika Srpska during a power struggle between RS President Plavsic and fellow SDS members who support Karadzic. Plavsic attempted to fire RS Interior Minister Dragan Kijac for obstructing an investigation into two Bosnian Serb companies associated with Karadzic and Krajisnik, who Plavsic charges have been engaged in massive corruption. Plavsic also charged that Karadzic continues to control the SDS, the government and police from behind the scenes. Plavsic signed a decree dissolving the pro-Karadzic parliament, while the parliament has voted to strip Plavsic of key powers. The SDS leadership has expelled Plavsic from the party. NATO leaders warned Karadzic supporters against using force against Plavsic. U.S. and other Western governments backing Plavsic, who, while an extreme nationalist like Karadzic, has shown some willingness to implement the peace agreement. SFOR has assisted Plavsic in her power struggle by seizing television transmitters used by hard liners to attack Plavsic and the international community. SFOR has also helped pro-Plavsic police seize police stations in several areas. On August 8, 1997, SFOR announced that it will monitor the heavily armed RS "special police" units that are a mainstay of Karadzic's power and supply his bodyguard. Under SFOR pressure, on August 15, the "special police" signed an agreement with SFOR that it would no longer provide protection to indicted war criminals.

Western officials in Bosnia report that after Simo Drljaca was killed in a firefight with SFOR troops who attempted to arrest him on war crimes charges in July 1997, other Karadzic-installed hard-liners in Prijedor dropped out of sight, providing an opportunity for relatively more moderate pro-Plavsic leadership to gain the upper hand there.

In the longer term, some observers believe that a lasting peace is impossible in Bosnia unless justice is done with respect to war crimes. They believe that the recrimination can only give way to reconciliation if the desire to assign collective guilt to another ethnic group and exact revenge is replaced by the desire to bring to justice the individuals of all ethnic groups who committed the crimes.

One important problem has been the non-cooperation of Serbia-Montenegro. Many analysts view Milosevic as the chief culprit in causing the war in Bosnia and the organized war crimes known as "ethnic cleansing." Yet he was also instrumental in bringing about the peace settlement and a key player in determining the success or failure of the peace agreement. Serbia-Montenegro's non-cooperation is especially

evident in its refusal to turn over two Yugoslav Army officers indicted for war crimes in Croatia. Indeed, one of them reportedly has been promoted since the crimes were committed. In June 1996, Tribunal President Antonio Cassese called on High Representative Carl Bildt (coordinator of the implementation of non-military aspects of the peace accords) to triggering sanctions against Serbia-Montenegro and the Republika Srpska for their lack of cooperation with the Tribunal.[58] However, the High Representative declined to do so, because of the possible impact of the move on the peace process as a whole. U.S. officials supported Bildt's stance on the issue. In July 1997, Bildt's replacement as High Representative, Carlos Westerndorp, recommended to the U.N. Security Council that the assets of indicted war criminals be identified and frozen.

In a disturbing echo of the beginnings of the conflicts in Croatia and Bosnia, in late February and March 1998, a massive Serbian police operation in the Drenica region of Kosovo (a reputed KLA stronghold) resulted in at least 67 deaths among ethnic Albanians, as well as six Serbian police deaths, according to Serbian officials. Albanian sources cite a higher death toll of about 83 persons. Press reports from the scene after the operation strongly indicate that Serbian police committed atrocities against civilians. In March 1998, ICTY Prosecutor Louise Arbour issued a statement noting that the ICTY's mandate includes the former Yugoslavia as a whole, including Kosovo.

Questions and Implications for the Future

The U.N.- established war crimes tribunals for the former Yugoslavia and Rwanda may turn out to be ad hoc institutions of no lasting consequence beyond the specific situations for which they were created. Regardless of their longevity, U.S. support for these two U.N. international criminal tribunals might have implications for international law and the conduct of U.S. foreign policy which go beyond the current situation in Bosnia. International legal and political experts believe that support for the tribunals could set legal and political precedents that will have implications in at lease three areas of international politics and law. Relevant areas include a potential expansion of: (1) the overall power and prestige of the United Nations; (2) the overall role of international law; and (3) the U.S. role in enforcing international law. Areas of concern and questions include:

Powers of the United Nations

- Could the creation of these two tribunals significantly strengthen the United Nations particularly with respect to international criminal law giving it potential new powers and enhanced international prestige?
- Is expanding the U.N.'s power and claim to international legitimacy an overall policy direction one seeks to promote?

- On the other hand, do constraints placed on the United Nations by the Charter, including the veto given the five permanent members of the Security Council,

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[58] Agence France Press wire service report, April 25, 1996.

assure that U.S. interests will be adequately protected and assure that the powers of the United Nations in this and other areas will remain limited?

Principles of International Law

- Do the tribunals constitute a new step in the evolution of international criminal law or are they non-precedent-creating responses to unique situations that may not recur?

- To what extent might the precedent of a standing and active international court in one area of law pave the way for expanded U.N. court jurisdiction in other legal areas, both criminal and civil?

- To what degree does support for the tribunal establish precedent for U.S. funding of expanded tribunal activity in other parts of the world?

- Also, what would the relationship be between the current tribunals and any new, but separate, international criminal court established within the U.N. framework?

U.S. Role in Enforcing International Law

- How does an active U.S. presence on the courts and an active role in supporting them promote or detract from overall U.S. foreign policy goals and objectives? A strong U.S. presence on the court may not be popular in the international community, yet a less-than-leading role may diminish U.S. stature in the international community.

- Finally, to what extent are concerns of "mission creep" justified? If a U. N. tribunal were to be given an expanded jurisdictional role would there be an increasing call for U.S. intervention to provide a stable environment for the tribunal to operate effectively, i.e. could the war crimes angle have the ultimate effect of setting up the U.S. as a policeman for numerous conflicts where the United States has little or no other foreign policy interests? Arguably, hand-in-hand with a broad mandate for an active international war crimes tribunal is the requirement for a policing power to enable the court to operate effectively. On the other hand, are not U.S. policy makers savvy enough to evaluate such situations on a case-by-case- basis and to resist such pressures where the national interest may not warrant involvement?

Prepared by Raphael Perl, Specialist in International Affairs

Appendix 1: International Criminal Court For The Former Yugoslavia Public Indictments

(Prepared by Julie Kim and Steven Woehrel, Foreign Affairs and National Defense Division, CRS)

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
11/01/94	Dragan Nikolic (Bosnian Serb camp commander)	For crimes relating to treatment of prisoners at Susica prison camp (near Vlasenica), from June-Sept 1992	at large; ICTY held hearings on Oct 9, 1995; issued international arrest warrant on Oct 20, 1995.
02/13/95	Dusan Tadic; Goran Borovnica (Bosnian Serb guards at Omarska camp)	For crimes relating to murder and mistreatment of Muslim and Croat prisoners at Omarska camp (near Prijedor), from May 24 to Aug 30, 1992	Tadic arrested in Germany in Feb 1994; extradited to the Hague on Apr 24, 1995; pleaded not guilty on Apr 26, 1995; trial began on May 7, 1996. Convicted of war crimes and crimes against humanity on May 7, 1997; sentenced to 20 years imprisonment on July 14. Borovnica at large.
02/13/95	Zeljko Meakic (Bosnian Serb camp commander); and 18 acting under his authority: Miorslav Kvocka; Dragoljub Prcac; Mladen Radic; Milojica Kos; Momcilo Gruban; Zdravko Govedarica; Gruban; Predrag Kostic; Nedeljko Paspalj; Milan Pavlic; Milutin Popovic; Drazenko Predojevic; Zeljko Savic; Mirko Babic; Nikica Janjic; Dusan Knezevic; Dragomir Saponja; Zoran Zigic	For crimes relating to treatment of Muslim and Croat prisoners at the Omarska camp (near Prijedor), from May 25 to Aug 30, 1992	Kostic arrested in Italy on March 17, 1998, after he attempted to extort money from a Catholic priest. Radic and Kvocka were arrested by SFOR on April 8, 1998.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
06/26/95	Dusko Sikirica (Bosnian Serb camp commander); and 12 acting under his authority: Damir Dosen; Dragan Fustar; Dragan Kulundzija; Nenad Banovic; Predrag Banovic; Nikica Janjic; Dusan Knezevic; Dragan Kondic; Goran Lajic; Dragomir Saponja; Nedeljko Timarac; Zoran Zigic	For crimes relating to treatment of Muslim and Croat prisoners at the Keraterm camp (just outside of Prijedor), from May 24 to Aug 30, 1992	Lajic arrested near Nuremberg, Germany, on Mar 18, 1996.. Germany transferred Lajic to the Tribunal on May 13. Charges against Lajic were dropped in June 1996, after witnesses failed to identify him as a guard at Keraterm. Zigic surrendered voluntarily to the Tribunal on April 16, 1998. Others at large.
06/29/95	Slobodan Miljkovic (Bosnian Serb paramilitary unit commander); and 5 of his officers: Blagoje Simic; Milan Simic; Miroslav Tadic; Stevan Todorovic; Simo Zaric	For crimes relating to "ethnic cleansing" and terror campaigns against Muslim and Croat residents around Bosanski Samac in the Posavina corridor, beginning in April 1992	Milan Simic and Miroslav Tadic surrendered voluntarily to the Tribunal on February 14, 1998. Simo Zaric surrendered voluntarily on February 24, 1998. Simic was given provisional release on March 26, 1998 for reasons of ill health. He must reappear at the Tribunal two weeks before his trial begins. Others at large.
06/30/95	Goran Jelisic (Bosnian Serb prison camp commander); Ranko Cesic (worked at Luka camp)	For crimes committed against Croat and Muslim inmates at the Luka prison camp (near Brcko), from May 7 to early July 1992	Jelisic was arrested by U.S. SFOR troops on January 22, 1998. Cesic at large.
07/24/95	Milan Martic (President of self-proclaimed Krajina Serb Republic)	For crimes relating to rocket attacks on civilians in Zagreb on May 2-3, 1995	at large. ICTY held hearings in late Feb 1996; issued international arrest warrant on Mar 8, 1996. Reportedly living in Banja Luka in the Republika Srpska.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
07/24/95	Radovan Karadzic (President of Bosnian Serb Republic); Ratko Mladic (commander of Bosnian Serb army)	For crimes perpetrated against civilian populations and places of worship in Bosnia; for crimes relating to sniping against civilians in Sarajevo; for crimes relating to the taking of U.N. peacekeepers as hostages	at large. International arrest warrants issued on July 11, 1996
09/05/95	Ivica Rajic (Bosnian Croat militia leader)	For crimes relating to attack on Stupni Do (central Bosnia) on Oct 23, 1993	ICTY issued international arrest warrant on Aug 29, 1995. Rajic was in custody of Bosnian Croat authorities in Mostar, but was released on Dec 5, 1995; currently at large.
11/09/95 (Dokmanovic was added to the indictment secretly on March 26, 1996)	Mile Mrksic; Miroslav Radic; Veselin Sljivancanin (JNA commanders); Slavko Dokmanovic	For crimes relating to mass executions at Vukovar hospital during military takeover of Vukovar, Croatia, in November 1991	Mrksic, Radic and Sljivancanin at large; Slavko Dokmanovic was arrested by Tribunal investigators in eastern Slavonia, Croatia on June 27, 1997, and transferred to the Tribunal. Dokmanovic's trial began on January 19, 1998
11/10/95 (secret indictment, made public after arrest)	Anto Furundzija (Bosnian Croat)	For torture and rape of two Muslim prisoners in Vitez	Arrested without incident by Dutch SFOR troops on December 18, 1998.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
11/13/95	6 Bosnian Croat political and military leaders: Tihomir Blaskic; Dario Kordic; Mario Cerkez; Ivan Santic; Pero Skopljak; Zlatko Aleksovski	For crimes against Muslims and ethnic cleansing in the Lasva Valley in central Bosnia between May 1992-May 1993.	Gen. Blaskic turned himself in to the Tribunal on April 1, 1996. His trial opened on June 24, 1997. Aleksovski arrested by Croatian government on June 8, 1996. Transferred to the Tribunal on April 28, 1997, after a delay allegedly due to Aleksovski's ill health. Kordic, Cerkez, Ivan Santic and Pero Skopljak voluntarily surrendered to the Tribunal and entered a plea of not guilty on October 8, 1997. All charges against Skopljak and Santic were dropped by the Tribunal prosecutor due to a lack of evidence on December 19, 1997, and they were released from custody. Aleksovski's trial opened on January 6, 1998.
11/16/95	Radovan Karadzic (President of Bosnian Serb Republic); Ratko Mladic (commander of Bosnian Serb army)	For crimes against Muslims during seizure of Srebrenica in July 1995	at large
03/01/06	Djordje Djukic (Bosnian Serb commander)	For crimes relating to shelling of Sarajevo between May 1992 and Dec 1995	Transferred, with Col. Aleksa Krsmanovic, to the Hague by NATO on Feb 12, 1996 Ordered released by the Tribunal on Apr. 24, due to ill health, but charges were not dropped. Djukic died in Serbia on May 18, 1996.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
03/22/96	Zejnil Delalic, Hazim Delic, Esad Landzo (Bosnian Muslims), Zdravko Mucic (Bosnian Croat)	For crimes against Bosnian Serbs associated with Muslim-Croat takeover of Konjic (central Bosnia), and with detention of Serbs at Celebici camp, in May 1992	Delalic arrested in Munich on Mar 18, 1996 Mucic arrested in Vienna on Mar 18, transferred to the Tribunal on May 8, 1996. Delic and Landzo arrested by the Bosnian government on May 2, transferred to the Tribunal on June 13. Delic and Landzo pleaded not guilty on June 18. The trial of the four men opened on March 10, 1997.
05/29/96	Drazen Erdemovic (Bosnian Croat)	For murders of Bosnian Muslims near Srebrenica in July 1995, while serving with the Bosnian Serb army	Arrested by Serbia-Montenegro and transferred to the Tribunal in March 1996. Pleaded guilty on May 31. Sentenced to 10 years imprisonment on Nov. 29, 1996. On appeal, the Tribunal ruled that Erdemovic had been poorly advised on the implications of pleading guilty to crimes against humanity. He was permitted to plead guilty to war crimes only, and on March 5, 1998, his sentence was reduced to 5 years imprisonment.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
06/27/96 (formally issued by the Tribunal on 11/9/96, but not publicized until 6/27/96, due to fears for the safety of witnesses and victims.)	Zoran Marinic (Bosnian Croat)	For the murder of four Bosnian Muslims in the Lasva valley in central Bosnia in April 1993.	At large.
06/27/96 (formally issued by the Tribunal on 11/9/96, but not publicized until 6/27/96, due to fears for the safety of witnesses and victims.)	Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Vladimir Santic, Stip Alilovic, Drago Josipovic, Marinko Katava, Dragan Papic (Bosnian Croats)	For crimes against Muslims and ethnic cleansing in the Lasva Valley between May 1992-May 1993	Zoran Kupreskic, Mirjan Kupreskic, Vladimir Santic, Drago Josipovic, Marinko Katava, Dragan Papic surrendered voluntarily to the Tribunal and entered a plea of non guilty on October 8, 1997. All charges against against Katava, were dropped by the Tribunal prosecutor due to a lack of evidence on December 19, 1997, and he was released from custody. Vlatko Kupreskic was arrested on December 18, 1997 by Dutch SFOR troops. He was shot several times by the SFOR troops after he opened fire on them. He has since recovered from his wounds.

Indict-ment Issued	Against	Charge(s) [incl war crimes, genocide, murder, and crimes against humanity]	Status
06/27/96	Dragan Gagovic, Gojko Jankovic, Janko Janjic, Radomir Kovac, Zoran Vukovic, Dragan Zelenovic, Dragoljub Kunarac and Radovan Stankovic (Bosnian Serbs)	For rape, torture and enslavement of Bosnian Muslim women at Foca (southeast Bosnia).	Kunarac surrendered voluntarily to the Tribunal on March 4, 1998. Kunarac attempted to plead guilty to rape on March 9, 1998, and not guilty to other charges. However, a plea of not guilty to all charges was entered on his behalf, when the judge ruled that Kunarac had been ill-advised on the consequences of pleading guilty to crimes against humanity. Janjic was interviewed by a CBS reporter in a cafe in Foca in October 1997.
03/13/97 (indict-ment was not made public until after the arrest was made)	Simo Drljaca and Milan Kovacevic	For complicity in the commission of genocide in the Prijedor region.	Kovacevic was arrested by British SFOR soldiers on July 10, 1997. On the same day, Drljaca opened fire on British soldiers attempting to arrest him, and was killed when the soldiers returned fire.
TOTAL:	74 individuals (57 Serbs , 14 Croats, 3 Muslims) currently under public indictment. An additional, undisclosed number have been indicted secretly. 26 individuals (10 Serbs , 13 Croats, 3 Muslims) currently in custody. In addition, one indictee was given provisional release due to ill health. He must reappear at the Tribunal two weeks before his trial begins.		

Information current through April 23, 1998 Chief sources are Tribunal fact sheets and press accounts.

Appendix 2: Historical Precedent for a War Crimes Tribunal

(Prepared by Margaret Mikyung Lee,
Legislative Attorney, American Law Division, CRS)

The concept of war crimes and of a permanent international tribunal to try such crimes has evolved over the last two centuries.[59] The Age of Enlightenment gave rise to the idea that while armies might clash in the conflict between nation-states, innocent civilians should not be harmed. Napoleon adopted codes prohibiting the execution of prisoners of war and the wanton destruction of civilian property. The Union Army adopted a code of conduct during the Civil War in the United States and tried and executed the commandant of the Confederate prison camp at Andersonville for war crimes. The First Hague Convention for the Pacific Settlement of International Disputes of 1899 and the Hague Convention (IV) on the Laws and Customs of War of 1907 were the first two multilateral agreements to recognize and create an international law of humanitarian conduct, applicable during war time.[60]

Treaties ending World War I attempted to provide for the prosecution of war crimes. The Treaty of Versailles of 1919,[61] establishing the terms of peace with Germany at the end of World War I, provided for the prosecution of Kaiser Wilhelm II for starting a war of aggression and of German military personnel who committed war crimes. In 1919, a special commission was created to investigate responsibility for acts of war, including the crime "against the laws of humanity." Ultimately, this crime was not included among the offenses prosecutable by an international criminal court. The Treaty of Sevres,[62] establishing the terms of peace with the Turkish Ottoman Empire at the end of World War I, provided for the surrender by Turkey of persons accused of crimes "against the laws of humanity." This Treaty was not ratified and, in any case, such persons were ultimately granted amnesty. In 1937, the League of Nations, of which the United States was not a member, signed a Convention Against Terrorism,[63] which had a protocol providing for the establishment of a special international criminal court to prosecute crimes of terrorism. This Convention was adopted in response to nationalistic acts of terrorism in the Balkans.

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[59]The historical information is largely drawn from M. Cherif Bassiouni and Christopher L. Blakesley, The Need for an International Criminal Court in the New International World Order, 25 Vand. J. Transnat'l L. 151, 152-8 (1992); Steve Coll, In the Shadow of the Holocaust, Washington Post Magazine, September 25, 1994, at 8, 13.

[60]Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907 100 (1915).

[61]Treaty of Peace with Germany, June 28, 1919, 2 Bevans 43.

[62]Treaty of Peace Between the Allied Powers and Turkey, Aug. 10, 1920, reprinted in 15 Am. J. Int'l L. 179 (Supp. 1921) (not ratified).

[63]Convention for the Creation of an International Criminal Court, opened for signature, Nov. 16, 1937, League of Nations O.J. Spec. Supp. 156 (1938); League of Nations Doc. C.547(I)M.384(I)1937V (never entered into force), reprinted in 7 International Legislation (1935-1937), at 878 (Manley D. Hudson ed. 1941).

Notwithstanding provisions described above, the first real multinational war crimes tribunals were created after World War II. The London Charter of August 8, 1945, established the International Military Tribunal at Nuremberg to prosecute persons accused of crimes against peace, war crimes, and "crimes against humanity" in Europe.[64] The following year, the International Military Tribunal for the Far East was established at Tokyo to prosecute major war criminals in the Asian-Pacific region.[65] However, these tribunals were held by a multinational group of the victors in the conflict.

The *ad hoc* international Tribunals for the Former Yugoslavia and Rwanda may be considered the first truly international war crimes tribunals because they were established by an international organization representing the global community, not only the victors in a conflict. However, because the Tribunals do not represent clear victors in a conflict, they do not have most of the accused war criminals in custody. The extent to which the Tribunals can effectively and fairly prosecute the accused will likely set a precedent for and influence the prospects for the establishment of any permanent international criminal tribunal.

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[64]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[65]International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

Appendix 3: Proposals for a Permanent International Criminal Tribunal

[66]Proposals and studies for a permanent international criminal tribunal have been circulating since World War II.[67] More recently, the United Nations Commission on Human Rights commissioned Professor Cherif Bassiouni to draft a Statute for the establishment of an international criminal court for the implementation of the Convention on the Suppression and Punishment of the Crime of Apartheid; the final report was submitted in 1980, but no further action was taken.[68] A meeting of experts at the International Institute of Higher Studies in Criminal Studies in 1990 produced a revised text that was submitted to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders later that year. This text was widely circulated.

In 1992, the General Assembly of the United Nations passed a resolution requesting the International Law Commission to prepare a draft Statute for an international criminal court. In 1994, the Commission adopted a draft Statute for an international criminal court at its forty-sixth session and recommended that an international conference be convened to study the Statute and conclude a convention establishing an international criminal court. In 1994, the General Assembly passed a resolution establishing an *Ad Hoc* Committee to study the draft Statute. After receiving the report of the Committee, the General Assembly passed a resolution establishing a Preparatory Committee to prepare the text of a convention establishing an international criminal court, based on the draft Statute and the report of the *Ad Hoc* Committee.[69] This Preparatory Committee is currently meeting and is to submit its report to the General Assembly at the start of its fifty-first session in September 1996. The agenda of that session is to include consideration of the report of the Preparatory Committee and a decision on whether to convene an international conference to finalize and adopt a convention.

It appears unlikely that a convention establishing a permanent international criminal court or tribunal will be concluded and ratified by sufficient parties to enter into force effectively before the *ad hoc* Tribunals for the former Yugoslavia and Rwanda conclude their work. Even if a permanent tribunal were to be established and operational before the termination of the *ad hoc* Tribunals, it seems likely that they

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[66]Prepared by Margaret Mikyung Lee, Legislative Attorney, American Law Division.

[67]The historical information on the efforts to create an international criminal tribunal were largely drawn from Bassiouni and Blakesley, supra note 1, at 157-8, and from Daniel Hill Zafren, An International Criminal Court?, Congressional Research Service Report for Congress, No. 93-298 A, revised March 9, 1993, at 11-12.

[68]See Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Doc. E/CN.4/1416 (1980); M. Cherif Bassiouni & Daniel H. Derby, Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and other Relevant International Instruments, 9 Hofstra L. Rev. 523 (1981).

[69]G.A. Res. 50/46, U.N. GAOR, 50th Sess., Agenda Item 142, U.N. Doc. A/RES/50/46 (1995).

would continue to exist and exercise their special jurisdiction, and that a newly created permanent tribunal would prepare for other future cases. The outgoing Prosecutor for the *ad hoc* Tribunals has suggested that those Tribunals should become the actual embodiment of an established permanent tribunal.[70]

[70]44 Nations to Urge Creation of International Criminal Court, Associated Press, March 6, 1996, available in LEXIS, Nexis Library, Wires File.

Appendix 4: Tribunal Rules of Procedure and Evidence

[71]The Rules of Procedure and Evidence[72] [hereinafter Rules] for the Tribunal elaborate on the general principles established in the Statute. A summary of the most significant features of the Rules follows below. Most notable are the provisions concerning arrest warrants and the cooperation of countries with the Tribunal in the arrest and transfer of indictees and other suspects, and also the protections for the accused and for victims and witnesses. The judges drafted and adopted the Rules by February 11, 1994, pursuant to Article 15 of the Statute of the International Tribunal. These Rules became effective on March 14, 1994. They establish a significant precedent for any permanent International Criminal Tribunal by demonstrating a consensus on a workable set of rules for the operation of the *ad hoc* Tribunal. One of the concerns about establishing a permanent Tribunal has been the perceived difficulty of drafting rules that would be acceptable to nations with differing legal traditions and concepts.

The Rules are organized into nine parts: (1) General Provisions; (2) Primacy of the Tribunal; (3) Organization of the Tribunal; (4) Investigations and Rights of Suspects; (5) Pre-Trial Proceedings; (6) Proceedings before Trial Chambers; (7) Appellate Proceedings; (8) Review Proceedings; and (9) Pardon and Commutation of Sentence.

The General Provisions define terms, working languages and other basic operations. More significantly, under this part, the accused has the right to use his language instead of the working languages of the Tribunal and his counsel may petition the Tribunal to use a language other than either the working languages or the language of the accused (Rule 3). The President may authorize a Chamber to exercise its functions away from the official seat of the Tribunal if necessary (Rule 4). A party to the proceedings may object to the actions of another party on the grounds of non-compliance with the Rules; if the Tribunal decides the action does not comply, it is void (Rule 5).

Part Two on the Primacy of the Tribunal details the procedures for requesting a deferral of a national court to the Tribunal and for enforcing the prohibition on double jeopardy. Most importantly, this part provides that if a national court does not comply with a request for deferral or tries a person who has already been tried by the

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[71]This section was prepared by Margaret Mikyung Lee, Legislative Attorney, American Law Division.

[72]Rules of Procedure and Evidence, U.N. IT, U.N. Doc. IT/32 (1994); Amendment of Rule 96 concerning Evidence in Cases of Sexual Assault, reprinted at 33 I.L.M. 838 (1994); Amendment of Rule 70 concerning Matters not Subject to Disclosure, reprinted at 33 I.L.M. 1619 (1994). Other amendments are summarized and described in the Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 50th Sess., Item 49 of the Provisional Agenda, U.N. Doc. A/50/365 and U.N. SCOR, U.N. Doc. S/1995/728 (1995) [hereinafter Second Annual Report of the Tribunal].

Tribunal, the Tribunal may report the matter to the Security Council (Rules 10 and 13).

Part Three on the Organization of the Tribunal details the structure and composition of the Tribunal. Discussion of these is incorporated in the section below on the composition of the Tribunal.

Part Four on the Investigations and Rights of Suspects elaborates on investigatory procedures, the rights of suspects, and the assignment and conduct of counsel for indigent defendants, including the censure and reportage of misconduct of counsel. The salient features of this part are the provision for informing the suspect of his rights, similar to the rights commonly referred to as "*Miranda* rights" in the United States (Rule 42), and the provision for audio- or video-recording of questioning of a suspect by the Prosecutor (Rule 43). In case of urgency, the Prosecutor may request a country to arrest a suspect provisionally, seize evidence, and take all necessary measures to prevent the escape of a suspect, intimidation or injury of a victim or witness, or the destruction of evidence (Rule 40).

Part Five on Pre-Trial Proceedings establishes the procedures for indictments, issuance of and compliance with arrest warrants, arraignment of the indictee, and the disclosure of evidence, including the protection of witnesses and victims. Arrest warrants are to be transmitted to the country under whose jurisdiction the indictee resides, or was last known to be, together with instructions regarding the "cautioning" ("Mirandizing") of the indictee and the reading of the indictment to him in a language he understands. States are obligated to act promptly and with due diligence to execute any arrest warrants which they receive (Rule 56 reinforcing Article 29 of the Statute) and to surrender or transfer the accused to the Tribunal (Rules 57 and 58 pursuant to Article 29 of the Statute). The obligation to transfer an indictee to the Tribunal supersedes any prohibition or restriction on transfer under the national laws or extradition treaties of the country concerned. If a country is unable to execute an arrest warrant, it shall report this to the Registrar with the reasons for non-execution. If such a report is not made within a reasonable time after transmission of the arrest warrant, the inaction shall be deemed a failure to execute the warrant and the Tribunal may report this inaction to the Security Council (Rule 59). The Tribunal may transmit a notice to the national authorities of a country to be published in national newspapers to inform the indictee that service of the indictment against him is sought (Rule 60).

If the Prosecutor is unable to obtain the arrest of an indictee and the service of the indictment despite the cooperation of the national authorities where the indictee was last known to be and despite publication of the indictment, then there may be a public review of the indictment and issuance of an international arrest warrant. Under Rule 61 of the Rules of Procedure and Evidence, the Tribunal holds public hearings to review an indictment and the evidence supporting it and also the efforts that have been made to serve the indictment on the indictee and to arrest him. If the indictment is confirmed and the Tribunal is satisfied that the Prosecutor has taken all available actions to gain custody over the indictee, the Tribunal may issue an international arrest warrant which is universally binding on all member nations of the United Nations. It serves notice internationally that the indictee is wanted by the Tribunal for trial on war crimes and that any member nation, in whose jurisdiction the indictee is found, is obligated to arrest the indictee and turn him over to the Tribunal. If the

Prosecutor convinces a Trial Chamber that failure to effect service of an indictment was due to a nation's failure or refusal to cooperate with an arrest warrant, the Trial Chamber shall certify this lack of cooperation. The Tribunal shall then notify the Security Council of a nation's failure to cooperate. The Security Council may then take such action as it deems necessary in the interests of international peace and security under Chapter VII of the United Nations Charter to enforce cooperation. Once arrested and detained, an indictee normally remains in custody and will only be released in exceptional circumstances (Rule 65).

Other pre-trial rules require disclosure of evidence by both the Prosecutor and the defense, the disclosure by the Prosecutor of exculpatory evidence tending to show the innocence or mitigate the guilt of the indictee, and protection of victims and witnesses, including, in exceptional circumstances, the non-disclosure of the identity of a victim or witness until such person has been brought under the protection of the Tribunal.

Part six on the Proceedings before Trial Chambers regulates the actual conduct of the trial. The more notable provisions include the ability of the Tribunal to authorize special measures for the protection of victims and witnesses, including expunging of identifying information from the public record of proceedings and closed sessions (Rule 75); the ability of a judge in the Trial Chamber to append a separate or dissenting opinion (Rule 88); the requirement that witnesses take an oath to tell the truth (Rule 90); the ability of the Trial Chamber to direct the Prosecutor to investigate and prepare an indictment for perjury and to impose a penalty for a perjury conviction (Rule 91); attorney-client privilege (Rule 97); and a rape-shield evidentiary rule (Rule 96). Part six also provides for guidelines for sentencing, incarceration, restitution of property to victims. Payment of civil compensation to victims may be sought under national laws in national courts; the judgment of the Tribunal shall be binding with respect to the criminal liability of the convicted person for the injury (Rule 106).

Part Seven on Appellate Proceedings authorizes and establishes the procedures for appeals, including briefs, admission of additional evidence, and the status of the accused following appeal.

Part Eight on Review Proceedings provides that, where a new fact has been discovered which was not known at the time of the trial or appellate proceedings and could not have been discovered earlier through the exercise of due diligence, the defense or, within one year following final judgment, the Prosecutor, may make a motion to the Chamber which rendered final judgment for review of the judgment (Rule 119). If a majority of the judges of the Chamber which rendered final judgment agree that the new fact, if proved, could have been a decisive factor in the judgment, the Chamber shall review the judgment (Rule 120). After hearing the parties, the Chamber shall pronounce a further judgment (Rule 121). The judgment on review of a Trial Chamber may be appealed in accordance with Part Seven. If a judgment to be reviewed is pending appeal at the time that the motion for review is filed, the Appeals Chamber may return the judgment to the Trial Chamber for disposition on the motion for review (Rule 122).

Part Nine on Pardon and Commutation of Sentence reiterates the provisions of the Statute discussed above regarding the pardon and commutation a of sentence. In

determining whether it is appropriate for a prisoner to be granted a pardon or commutation of a sentence under the laws of the country where the sentence is being served, the President of the Tribunal shall consider, the gravity of the crime for which the prisoner was convicted, the treatment of similarly situated prisoners, the rehabilitation of the prisoner, and any substantial cooperation of the prisoner with the Prosecutor.

In addition to the Rules of Procedure and Evidence, the Tribunal has also promulgated Rules on Detention and issued a Report on the assignment of defense counsel to indigent defendants and a Directive on the assignment of defense counsel.[73]

[73]Rules covering the detention of persons waiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal, U.N. IT, U.N. Doc. IT/38/Rev.4 (1995); Report on the assignment of counsel, U.N. IT, U.N. Doc. IT/59 (1994) and Directive on assignment of defense counsel, U.N. IT, U.N. Doc. IT/73/Rev.1 (1994).