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ix) A Tentative Appraisal

*572 THE MAJOR HURDLES AND ACCOMPLISHMENTS OF THE ICTY

What the ICC Can Learn from Them

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1. Introduction

As the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) approaches its 10th anniversary, other courts with an international component are being set up (in Cambodia and East Timor), and the International Criminal Court (ICC) is preparing for operations. It seems fitting to use the lessons learned from the ICTY to light the way for these other new courts. This necessarily requires an assessment of this very young and innovative institution; such an assessment must take into account the diversity of the tasks assigned to the Tribunal by the Security Council, and the different perspectives from which its activity can be understood.

2. Putting the Tribunal into Perspective

In 1993, the Security Council assigned to the ICTY the formidable task of prosecuting persons accused of crimes committed in that region after 1991. As we know, this ad hoc Tribunal got off to a rocky start, and we know the reasons why: state scepticism towards a court which was often considered an 'alibi' for a universal good conscience. lack of cooperation in making arrests, difficulty in obtaining evidence, almost non-existent precedents (the only ones being the Nuremberg and Tokyo Tribunals and a few major trials, such as those held in France and Israel), and budgetary and material constraints, to name just a few.

At the end of two-and-a-half terms, or 10 years, it is generally agreed that the Tribunal has accomplished most of the tasks assigned to it by the Security Council. A few figures make this clear: since its inception in 1994, 91 accused have appeared in *573 proceedings before the ICTY and 46 accused have been tried. 25 of whom have been sentenced, five of whom have been found not guilty, and 16 of whom have appealed and are awaiting decisions. In 2003, the Court had seven trials under way simultaneously, involving 11 defendants, it was engaged in pre-trial work for 20 cases, and the Prosecutor was involved in eight post-judgment appeals. [FN1]

These figures, which some believe too low, considering the number of crimes committed and the thousands of potential defendants, cannot and must not be interpreted other than in light of the enormous difficulties that the Tribunal had to overcome, which indicate just what an incredible challenge it is to implement any kind of international criminal justice procedure. In fact, to measure the true reach of this Court, one must first examine it from different perspectives, each of which raises unique questions concerning the Tribunal.

3. Potential Qualms Concerning the ICTY

A. The Historical Perspective

The ICTY is the first international court since the International Military Tribunals of Nuremberg and Tokyo. It is the precursor for other ad hoc tribunals, such as those for Rwanda and Sierra Leone. It could even serve as an institutional model for Iraq.

The legal and, above all, political foundations of the Tribunal are interesting issues from the historical point of view. Does the creation of the Tribunal reflect certain criminal justice policy choices of the Security Council (why a tribunal for one kind of conflict but not for another)? In certain cases, this model may be tempting, as it could enable victors, even well intentioned ones, to impose 'tailor-made' justice. Further-more, one may wonder to what extent the Tribunal's activity, generally positively received, played a role in the realization of the ICC. To what extent has it 'repelled' some states? These questions are relevant to the discussion of intermediate solutions that combine local judges and courts with an international component.

B. The Sociological Perspective

One may also examine the Tribunal's activity from a sociological angle, namely by studying war criminals in today's conflicts. For example, a recent study of trial-level decisions rendered during the ICTY's eight years of judicial activity raised questions of criminology and human nature. [FN2] While it is not the Tribunal's role to engage in *574 clinical psychology, these questions relate to the purpose and pedagogical role of international criminal courts. As Solzhenitsyn said. 'So as to not clothe oneself too quickly in the immaculate tunic of the just, each of us must ask ourselves: and had my life taken a different turn, would not I, too, have become one of the executioners?' [FN3]

C. The Comparative Perspective

There is no need to insist here that one of the meritorious features of international courts is the blending of legal and judicial cultures. But perhaps one should question, with regard to the ICTY, the suitability of having left it to the Judges to draft their own code of procedure. Have we taken the plunge and somehow metabolized the various cultural approaches in the extremely sensitive area of criminal procedure? Moreover, how can we reconcile the imperatives born of the obligation to adhere to international standards arising from international agreements and international customary law with the defendant's need to identify himself, as it were, through a judicial system which is part of his country's identity? This question is also relevant to the broader issue of what role national courts must play in judging their own defendants. This issue is addressed from various angles in the Statutes of the Tribunals and the ICC, which will be discussed below.

D. The Political Perspective

The relationship between law and politics is central for any analysis of the operation and evolution of an international criminal justice system, and is often debated, even within well established democracies that possess highly advanced judicial systems. This issue is particularly complex in the context of the ICTY: the political environment in which it was created, the very choice to create a tribunal for one kind of conflict and not another, the ambiguous role of legislator played by the Security Council, and the conditions in which judges are elected have muddled the image of the Tribunal from the very start.

But, to these particularities, which can be defined as primary, a second series, specific to upsetting the smooth operation of the institution, must be added. A few of these, which will be discussed in greater detail below, include a) the extent to which the Judges (who confirm the

indictments) are concerned with the criminal justice policy of the Prosecutor, an independent body; b) state cooperation in making arrests and furnishing evidence, which conditions the conduct of a fair trial; c) the completion strategy of the Tribunal, an ad hoc court, which has caused numerous international organizations and courts to intervene, bringing all their weight to bear on the *575 institution's operations and evolution over time, even if only because of budget constraints; and d) the political evolution of the states in the region and the problems they face in accepting their past and cooperating with the Tribunal.
These issues will not be as relevant to the ICC, if only because the ICC is a permanent court, whose operation is based on the free adherence of States Parties to its Statute. Nonetheless, international criminal courts must 'rub shoulders' with the world of politics, and their independence must necessarily adapt to this reality.

4. The Tribunal's Delocalization Strategy
The evolutionary dimension of the Tribunal seems particularly exemplified by its strategy of delocalization, which it implemented in the context of its policy of completing its mandate. This strategy -- initiated barely two years ago, after peace was re-established in the Balkans -- has two main thrusts: first, to concentrate on the Tribunal's assignment to try the highest political and military leaders, and, secondly, to leave the trial of lower-level defendants to domestic courts.
In fact, the Tribunal cannot by itself punish every grave violation of international humanitarian law committed in the territories of the former Yugoslavia during the years-long conflicts. It is, in fact, not possible, and it would take too long. More fundamentally, attempting to do so would, in the long run, affect the reliability of witnesses and have a negative effect on the credibility of international criminal justice. Indeed, in Bosnia--Herzegovina alone, there remain between 5,000 and 10,000 persons to be tried. A major share of war crimes and crimes against humanity must therefore be tried at the national level. Moreover, the delocalization strategy is based on the idea that inviting the Balkan nations to participate in prosecuting their own nationals effectively contributes to the achievement of true reconciliation among the peoples involved, all victims of the war, as well as a deep and lasting peace. In fact, the defence of democratic values and respect for international humanitarian and human rights law resound most convincingly with citizens when witnessed in their own domestic judicial proceedings. In other words, involving national courts in the work of the Tribunal -- which sits in The Hague, far from the daily preoccupations of the populace concerned -- will contribute to re-establishing the rule of law in the countries of the former Yugoslavia.
I would also add that the delocalization process must encourage states to bring their national legislation fully into line with the most developed principles for the protection of human rights and with international humanitarian law. Clearly, until this is done. the defendants cannot be tried locally. However, implementing this strategy has been a challenge, due to the difficulty in precisely delimiting the personal jurisdiction of the Tribunal, and to the still unstable political climate in the Balkans.

A. The Delimitation of the Tribunal's Personal Jurisdiction
The Tribunal first had to determine precisely which cases should be referred to national courts, which is neither theoretically nor practically easy. In fact, from a *576 theoretical point of view, the Statute gives the Tribunal the power to try all perpetrators of grave violations of humanitarian law, i.e. both the 'big fish' and the 'small fry'. In other words, it was not clearly stated, as in the Statute of the Nuremberg Military Tribunal, that its mission is to try the 'major war criminals', even if there were no doubts in the minds of most of the Judges. Instituted in accordance with Chapter VII of the United Nations Charter to restore peace and

international security, it seemed obvious to these Judges that the Tribunal should concentrate its efforts on trying individuals who, because of the office they held, posed a genuine threat to international public order. In fact, this interpretation was confirmed by the UN Security Council, which stated, in its presidential statement of 23 July 2002, that 'the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders'. Practically speaking, while everyone agreed that the principal political or military decision-makers (those accused of having conceived the war and ethnic cleansing systems) should be tried by the Tribunal and those who executed the orders (those accused of having physically committed the crimes) by the national courts, it was unclear who was to try the intermediate-level defendants (those accused of having given the orders to implement the plans or systems of terror conceived at a higher level). Should they be tried by the Tribunal, at the risk of its rapidly drowning in cases and being discredited, or should they be tried at the national level, even though their role was essential to committing the crimes on a grand scale and even though they probably would not receive an independent and impartial hearing? A compromise was finally reached: they would be subject to both the Tribunal's and their national court's jurisdiction, being tried by the latter after having been indicted by the Prosecutor of the Tribunal.

B. The Political Climate in the Balkans

To implement the delocalization policy, the Tribunal also had to rely on credible national courts, i.e. courts that satisfy the minimum criteria of independence, impartiality and efficacy. But one cannot reasonably hope to find such courts in countries such as those comprising the former Yugoslavia, devastated by several years of war. These countries must generally undertake major reforms before their courts will be able to comply with international norms. Such a reconstruction process can take several months -- even several years -- which is incompatible with a speedy trial. This is why the Tribunal, along with the High Representative for Bosnia--Herzegovina, suggested creating a new judicial institution to hear cases referred by the Tribunal as of 2004, while waiting for the judicial system to be entirely rebuilt. This primarily national court, initially staffed by international magistrates in order to guarantee its independence and impartiality, would apply domestic law. Once political stability has been completely re-established in Bosnia--Herzegovina, the international aspect of this court should disappear, leaving an exclusively national structure.

*577 5. A Tentative Analysis: Has the Tribunal Lived Up to Expectations?

The ICTY's performance must be relativized: it is the fruit of the labour of the Prosecutor's offices of investigation and prosecution, which did not begin until almost 1994. Judicial activity came only later. The region was the theatre of conflict until the Dayton Accords of November 1995. The countries concerned have since gone through important domestic and political changes, which have affected their cooperation with the Tribunal, which, even today, remains far from perfect and hampers the Tribunal's efficacy. All those with first-hand experience of the situation (including political leaders of all stripes) agree that the number of potential defendants reaches into the thousands.

Putting aside for a moment the assessment properly speaking, which is always subject to discussion and interpretation, it seems to me that a critical look at the ICTY's work reveals one failure and one step forward. Let me be clear: the creation of this Tribunal has not prevented a recurrence of crimes in the former Yugoslavia. The fall of the enclave of Srebrenica, and, later, the thousands of Albanians forced out of Kosovo, remain as scars on the hearts of those who believed in the exemplary virtue of a tribunal. Perhaps it is not in itself a sufficient mechanism; perhaps it is still too hesitant to pose a sufficient threat to remove all residue of nationalism, at least in this part of the world. The situation there remains

troublesome.
Establishing the truth of the events is certainly progress that can be attributed to the Tribunal in The Hague. The atrocities committed and the plans which inspired them are no longer related only by the media or described by expert commissions (which are always a subject of controversy): they have become facts established by law. Vukovar. Sarajevo, Srebrenica and so many other places of cruelty have become judicially recognized sites through the trial of the major defendants who perpetrated these crimes, which have now been proven incontrovertibly.
The facts must be established in exemplary fashion. In The Hague, under the watchful eyes of observers from all over the world, the justice dispensed in our courts complies with the highest standards of international humanitarian law. with regard to both the victims and the defendants. The jurisprudence established each day by the two ad hoc Tribunals has become an integral part of international humanitarian law.
A critical look at the ICTY work also reveals problems and dissatisfaction. There is dissatisfaction with regard to the victims, who were not represented as such at trial, were not compensated, and were not healed. There is dissatisfaction with respect to time, the sometimes erratic management of which, at all levels and within all bodies of the institution, prejudiced the victims, the defendants and, above all, the peoples in need of reconciliation. There is also dissatisfaction with state cooperation, without which no international justice system can prosper. Henry L. Stimson, former United States Secretary of State, showed great foresight when he said that 'international law *578 remains limited by international politics and we must not pretend that they can exist and grow without each other'. [FN4]
These critiques should not mask the progress made, thanks to the ad hoc Tribunals, toward eliminating impunity and promoting international humanitarian law, nor the questions that such tribunals leave unanswered, or at least without entirely satisfactory answers. These Tribunals have the merit of existing. They have proven that international justice is feasible. While we cannot say that, without the ad hoc Tribunals, the Statute of Rome would not have seen the light of day, we can say that had they proven to be failures, the ICC's creation would have been compromised.

6. From Temporary Tribunals to a Permanent Court: The Lessons Learnt from the ICTY
The experience acquired by the ICTY which, on numerous points, was transmitted to the Preparatory Commission charged with setting up the ICC, has instructive value only if viewed in relation to the particularities of the international trial, but, even more so, in relation to the effort to construct universal justice.
The shared purpose of all criminal judicial proceedings is to prosecute defendants in a fair trial. The judge's task is made singularly complex, however, when the proceedings are international; the international dimension of the conflict; the massive scale of the crimes; the difficulty in gathering evidence in a distant country where it is often withheld by the political leaders still in power or which is hit by an embargo to protect security; the fear of witnesses and victims to come and testify; and, above all, the lack of cooperation, not only from the states directly concerned, but sometimes from third-party states as well -- even those considered virtuous. All these factors come into play, not only to slow the proceedings (resulting in prolonged custody), but also to inhibit discovery of the judicial and historical truth. In addition, a procedure that is more accusatory than inquisitory leaves the Judge singularly powerless to guide the proceedings. Experience shows that with the proceedings largely in the hands of the parties, establishing the facts -- and thus the truth -- and protecting international public order are pushed to the background of a trial that becomes but a battle between the prosecution and the defence, with the victims reduced to instrumentalized witnesses.

The ICTY has gone through these stages and understands its weaknesses. It has learned a number of lessons, which it has translated into reforms, the theme of which has always been to give greater powers of initiative to the Judge. The Statute and the Rules of the ICC were inspired by this experience, as is evidenced by the creation of a Pre-Trial Chamber (for which France worked very hard), which is the embryo of a true Investigative Chamber. From whichever legal system the judges come, their legal culture must ultimately lead them to use the procedural powers granted them, *579 otherwise the same causes suffered at the ICTY will produce the same effects at the ICC; protracted trials, prolonged custody and little understanding of the Court's work.

In addition to the function of any criminal tribunal -- to try, then convict or acquit defendants -- it is generally agreed that two specific functions have fallen to international criminal courts. First, through their decisions, such courts work toward eliminating impunity, namely that of the highest civilian and military leaders, thereby helping prevent a recurrence of armed criminal conduct on a massive scale. Secondly, through individual trials, they shed light on the local history leading up to the events, thereby lighting the way to national reconciliation. It is in its performance of these two functions that the ICTY has come closest to administering genuine international justice -- justice that contributes to protecting international public order -- and where lessons may be found for the permanent international criminal institution that is being established.

A. Issues of International Criminal Justice Policy

The experience of the ICTY has shown how great is the risk of getting bogged down if we expect to patiently climb the chain of political or military command, indicting first those who executed the orders, then the middle-level defendants, and finally those at the highest level. These initial choices have considerable consequences. The procedure which structures international trials, such as they proceed before the ICTY and such as they will apparently proceed before the ICC, is complex and inevitably slows the judicial machinery, if only because of the search for sensitive evidence that can implicate national security, not to mention the always delicate problem of arresting the defendants. The Tribunal chose a criminal justice policy based on moving up the chain of command. Without a doubt, the political climate in the Balkans until the Dayton Accords justified this choice. But the result was and is a quasi-asphyxiation of the Tribunal, due to the still very high number of indictments concerning lower-level defendants, just when it must begin the biggest trials, which themselves result from the ambitious policy and dynamism of the current Prosecutor and which are more in accord with the image we hold of a major international criminal court that aims to be universal.

It is, of course, premature to make any pronouncements about which conflicts will result in their political or military leaders' being tried by the ICC. Nonetheless, there is every indication that what happened at the ICTY for the conflicts in the Balkans in the 1990s is likely to be repeated at the ICC: a political negotiation procedure, led legitimately by the international community, and judicial proceedings, initiated, no less legitimately, by the Prosecutor, will be forced to coexist. This is the specificity, as well as the ambiguity, of international courts that refuse victors' justice: a delicate balance must be struck between political realism and absolute justice. From this perspective, the truth is evident: international courts must accommodate themselves to the political environment, whether we like it or not. This truth must not be denied, as is so poignantly illustrated by the current problems in cooperation between the *580 ICTR and the Kigali Government, and between the ICTY and certain states in the Balkans -- even states neutral to the conflict.

Of course, in the ICC, the Prosecutor will be more closely supervised, namely by the Security Council. Is this to be regretted? I do not think so. International society is and shall remain,

above all, a society of sovereign states, and respect for this sovereignty is the price to pay for the promotion of any international institutional mechanism, a fortiori a judicial one. Though the Court must not appear to be a paper tiger, as it takes its first steps, the Prosecutor's criminal justice policy must be tactfully made clear, such that the Court seems neither the zealous guardian of a political balance not of its jurisdiction, nor the intransigent censor of an as-yet unspecified world order. In this regard, the Statute of the Court -- even more restrictive than that of the ICTY -- has the virtue of clarity. The respective roles of politics and the judiciary are more clearly defined. It is true that the Prosecutor at the ICTY enjoys almost complete autonomy, but I am not sure, given experience, that this is not a source of confusion. Moreover, the initial decisions of the Pre-Trial Chamber will be determinant in shaping the Court's credibility. States reticent to ratify the Statute will certainly find reasons here to ratify or abstain, depending on the Court's ability to assure the confidentiality of information touching on national security. For other states, this will determine their greater or lesser degree of cooperation. The ICTY, aware of the stakes riding on this issue, was very careful to draft procedural rules regarding confidentiality; these rules provided the model for those adopted in the Statute of the Court. But, above all, in its abundant case law, the Tribunal has defined the precise contours of this confidentiality, including protection of the source of the information -- so-called sensitive witnesses -- to clear equal space for protecting national security and the rights of the accused.

The Pre-Trial Chamber, which is a kind of investigative chamber, will have delicate issues of jurisdiction to resolve immediately. These issues will be further complicated by the fact that the ICC was created by a multilateral treaty which binds only those states having ratified it, and not by a Security Council resolution binding on all Member States of the United Nations, as was the ICTY. The ICTY's jurisdiction and legitimacy were challenged in its very first case (Tadic); showing great creativity, the Tribunal looked to general legal principles on which to base its credibility. The bilateral treaties signed between various States Parties to the Rome Treaty and the United States will certainly complicate the issue of jurisdiction. Here, again, in its very first decisions, the Court must show a high level of professionalism, as well as a lofty vision of its place in the international legal order.

B. Absolute Justice v Relative Justice

The most delicate task of an international criminal court is to find its proper place between absolute justice -- the accomplishment of a universal mission with strong normative and moral connotations -- and relative justice, which aims to place this mission within the context of a country looking to rebuild itself and of a people seeking to come to terms with itself.

*581 The trial of a political leader or military commander is truly a pivotal moment in the troubled history of a nation confronted with major humanitarian catastrophes, such as crimes against humanity, committed on a massive scale, or even genocide. It is, in fact, the precise moment when the victims of these conflicts are caught between the work of remembering, of grieving, and of forgetting. It is also the time when, through their individual trials, fallen leaders will try to explain or justify their actions, calling for history to be the judge. Like it or not, history is thus summoned to the Bar, with its entire cortege of ambiguities, such as, among others, the few judicial decisions that take on a historical role, and the subtle game played by newly ensconced leaders, little inclined to deliver secrets -- which are not all state secrets -- to the Bar.

The ICTY has been confronted with this problem, which has been treated better elsewhere by others, especially by major philosophers. [FN5] In my opinion, international criminal courts are better armed to address these issues if, in one way or another, the criminal justice policy of the court is made clear, is well identified, and is directed primarily toward the high-level leaders (if necessary, it should be the subject of a consensus between the Prosecutor and the

Judges). In addition, victims should be more closely involved and the peoples concerned better informed. In this regard, international courts must accompany the constitution of Truth and Reconciliation Commissions.

C. The Role of National Courts

The ICTY Statute provided for the primacy of the ICTY's jurisdiction, which is a very restrictive principle for the states in the region. Over the years, however, it has appeared indispensable to 're-associate' local courts with the trial of certain defendants. This task has proven to be singularly complex. Even several years after the official end of the conflicts, even in countries that have fully acceded to democracy, the poorly woven judicial fabric has remained fragile, such as that in Bosnia--Herzegovina, where it is envisaged to create a state court with an international connotation. One of its functions will be to try, by deferment of their cases from the ICTY, a certain number of intermediate-level defendants accused of war crimes. This ambitious policy still enjoys the approval of the Security Council, which views it not only as a step towards the beginning of the end of the ICTY's work, but also toward national reconciliation, as I discussed earlier.

Theoretically, the ICC's jurisdiction, as we know, is complementary to that of national courts. We should congratulate ourselves for this. Even so, the ICC's Prosecutor and Judges face serious difficulties. Even with the powers we enjoy at the ICTY, our experience in the Balkans demonstrates just how difficult it is to build fair and impartial justice. Here, again, the very first procedures related to the respective jurisdiction of the states and the Court will be a trial for this new institution, especially since the Court, unlike the ICTY, will have neither the authority a binding resolution of the Security Council confers, nor the support, at least formal, of the entire *582 international community, since only a minority of that community's members are parties to the ICC Statute.

Experience at the ICTY demonstrates that the desire displayed by states to try their own defendants is often inversely proportional to their ability or real desire to do so. What will happen, then, in the context of a Statute that confers primary jurisdiction on the states? The ICTY has exercised both primary and complementary jurisdiction: initially, it had primacy of jurisdiction; now, the delocalization process returns jurisdiction to those states that have acceded to democracy. Still, the Tribunal enjoys great discretion in deciding whether or not to retain jurisdiction, both at the Prosecutor's level (control over local prosecutions) and at the Judges' level. And, it is by making this conscious, indispensable decision that the Tribunal's Judges currently 'delocalize' a certain number of cases, while maintaining the power to retain jurisdiction.

In the system designed for the ICC, the states will have greater control over the decision of where the dividing line should be drawn between the Court's jurisdiction and their own. This will significantly complicate the work of the Court, which will have little power to bind the states. Here again, the Court's first steps will be crucial, as they will be taken between an inertia that is fatal to its reputation and an intervention that is likely to spark defiance.

D. Specific Constraints Encountered by the ICTY and Trial Solutions

A problem that plagues all judicial systems is time management. How can we render justice quickly and efficiently? In an international court, time management is even more difficult: investigations in a distant country are necessarily long, and trials involve more than two competing legal theories or one, isolated criminal act. International criminal courts are confronted with crimes on a massive scale, the ins and outs of which are often very difficult to untangle. The trial is the time when victims recount their suffering at length and the accused explain, also at great length, the legitimacy of their political or military decisions. Each fact must be proven by calling on complex legal concepts, with no prior established precedent, and

within a procedural framework that encourages neither the prosecution nor the defence to accelerate the proceedings. Time management is also an issue for the accused, whose pre-trial detention is prolonged, and for the international community, which rightly desires that the Tribunal carries out its mission of rendering justice in a reasonable time, in accordance with the rules and as required for reconciliation.
The multicultural context of an international court must also be taken into account, as it results in all texts and rules', even those on which all trial participants agree, being interpreted differently by each of them, in the light of their own legal system, not to mention their own way of thinking. Here, again, the Tribunal has implemented reforms that the Judges found necessary as the cases progressed.
Procedurally speaking, the ICTY felt it necessary to augment the Judges' powers. both in the pre-trial phase and during trial. Judicial practices have evolved considerably, and the Tribunal has thus generated an operational model, borrowing *583 from both major legal systems. There is still, however, quite a bit of room for improvement: in this area, utterly lacking in precedent, where each reform reveals new needs, adaptation is a constant obligation. A permanent judicial practice group has been created, composed of an equal number of judges from each of the two dominant legal systems, to harmonize 'procedural methods' for each Chamber or Judge. These methods are incorporated into the Rules of Evidence or Procedure, as necessary.
Despite its own specific constraints (namely the Rules already adopted by the States Parties), there is no question that the ICC will be quicker to develop an organizational model that better meets expectations. In this regard, it seems to me that there are at least two ways in which the Court will gain efficacy: in the role of the Pre-Trial Chamber [FN6] and the procedural role of the victims. [FN7]

4. Conclusion

This new century has seen the emergence of a double tendency in the area of judicial protection of human rights. On the one hand, measurable improvement has been accompanied by the proliferation of judicial bodies, the ad hoc Tribunals being, in some ways, the most complete forms. On the other hand, a withdrawal toward a certain form of judicial nationalism is pushing states to view with great suspicion the incursions made by any such body that appears to be a government of judges, a priori counter to national interests.
*584 The ICC clearly follows both of these tendencies. One need only re- read the Preamble to the Rome Statute and consider the very high number of states that signed it to be convinced of the ambition evinced by the Court's creation. But, a close reading of the Statute and the Rules of Procedure indicates the extent to which the States Parties -- in the end, many fewer than there are signatories -- wished to protect themselves from any unpleasant surprises, not to mention the avoidance schemes of certain states not party to the Treaty.
The Court must take its first steps and begin proving itself in this arena where law and politics intertwine. Debuting under very different circumstances, the ICTY's start was particularly rocky, aggravated by the continuing war in the Balkans. Yet, despite certain serious failures, such as the inability to prevent a recurrence of crimes against humanity -- as I mentioned earlier, the Tribunal's existence did not prevent the fall of Srebrenica or ethnic cleansing in Kosovo -- the ICTY's activity has allowed the idea to take hold that no political resolution of the conflict -- no national reconciliation -- was possible without justice being done for the victims. The tenacity and competence of the Judges were instrumental. The gains made in international humanitarian law and the law of armed conflict were considerable. The ICTY has demonstrated that an international criminal justice system is feasible.
It will be up to the ICC, with its first decisions, to follow the ICTY's lead by setting aside both the temptation to exercise any kind of magisterial authority for which it has no mandate and

the inclination to remain passive, which is a source of great frustration for those who believe in eliminating impunity.
In the area of international courts, it is true that the proof is in the pudding. This is the lesson to be drawn from our experience at the ICTY. It is a lesson that can inspire the brand new Court, in which so many hopes have been placed. As Pascal said, we must 'make what is just, strong'.

[FNa1]. Judge, ICC; former Judge (1994-2002) and President (1999-2002) of the ICTY; former Chief Prosecutor, Bourdeaux Court of Appeals (1989-1992); Chief Prosecutor, Paris Court of Appeals (1992).

[FN1]. For updated figures, see http://www.un.org/icty/glance/index.htm (visited 3 February 2004). as well as the President's Annual Report, found at http://www.un.org/icty/rappannu-e/2003/index.htm (visited 3 February 2004).

[FN2]. See the paper by P. Thys, Professor at the Ecole Liègoise de Criminologie Jean Constant of the Université de Liège: 'Un exemple de fonctionnement de la justice pénale Internationale: le cas de l'ex-Yougoslavie'. presented at the XVIth International Congress of the Société Internationale de Droit Militaire et de Droit de la Guerre. Thys asks: Who are these criminals? The study shows that only men -- fairly young, in general, even in high-level positions -- planned, organized and effectively carried out criminally reprehensible criminal acts over several months. Why did they act this way? Could they be 'average' people? What were their individual histories? None of those found guilty in The Hague has a criminal past. yet all committed crimes for which they generally do not feel guilty and which they do not seem to perceive as crimes. Why the almost complete absence of explicative process in the judgments, or at least of hypotheses attempting to explain the behaviour of persons whose individual guilt is sought to be established?

[FN3]. Cited by P. Moutin and M. Schweitzer in Les crimes contre l'humanité. Du silence à la parole. (Grenoble: Presses Universitaires de Grenoble, Fondation pour la mémoire de la déportation, 1994), at 30.

[FN4]. H. Stimson. 'The Nuremberg Trial: Landmark in Law', 25 Foreign Affairs (1947) 189.

[FN5]. See P. Ricoeur, La Memoire, l'Histoire, I'Oubll (Paris: Seuil, 2000).

[FN6]. Taken directly from the procedures followed in civil-law systems, the Pre-Trial Chamber, similar to the chambre d'instruction (investigative chamber) of the French Code of Criminal Procedure, will play a major role in the pre-trial phase. While investigations will not be carried out directly by the Chamber, the Prosecutor will be required to obtain the Chamber's authorization to begin an investigation, and the Chamber will issue all warrants and orders necessary to the investigation. On this particular point, there is no need to expand on the complex structure of the ICC. But the powers that the Court has been granted -- particularly in terms of control over the Prosecutor's activity, with regard to the admissibility of cases (which, in certain instances, extends to having discretion to drop a case), and with regard to conducting investigations -- will enable it to realize all the benefits to be gained from this new form of 'procedural dialogue', namely with an eye toward shorter and more focused trials.

[FN7]. The ICC Statute enables victims to air and have examined their views and

preoccupations at various stages of the proceedings. The Rules provide, in detail, for their participation in the trial, particularly their legal representation. While a true partie civile status, such as is recognized in some Roman--Germanic proceedings, has not been created, this is a considerable change which may modify the Court's operation and, above all, the perception of its role. Victims have the opportunity not only to present their cases with supporting evidence to the Prosecutor, but they may also make statements before the Court. request investigative procedures, express their opinions as to a complaint's admissibility and the Court's jurisdiction, and question the defendant, either directly or through the presiding Judge. During trial, victims may make statements and are entitled to speedy reparations. The Prosecutor will, therefore, be 'held in check' by the combined effect of the inclusion of victims and the Pre-Trial Chamber's supervision. There has been considerable change in the perception of the work of the Court as a whole. Through the presumably active role of victims and, behind them, of non-governmental organizations (NGOs), the Court's activity will be critiqued by the peoples directly concerned by the crimes committed and, through them, by the entire international community. A better synergy between the Prosecutor, the supervisory role of the Court and the external driving force of NGOs will definitely have an impact on the Court's efficacy.

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