

## The International Criminal Tribunal for the Former Yugoslavia: the First Four Years

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### I. Introduction

When the International Criminal Tribunal for the former Yugoslavia ("the Tribunal") was set up by the United Nations Security Council on 25 May 1993 several commentators dismissed its establishment as a token gesture to appease those who criticised western powers for refusing to intervene to end the war that had ravaged the former Yugoslavia since 1991. On 17 November 1997 the first four-year term of the Tribunal came to a close. After overcoming many practical, financial and structural problems, the Tribunal has proven that it is no "paper tiger". Since its inauguration the Tribunal has issued nineteen indictments against seventy-eight individuals, twenty of whom are in custody. One trial has been completed and two are currently underway. In addition, several interlocutory and pre-trial hearings have been held, including five proceedings under Rule 61. This article examines the administrative, investigative and judicial work that the Tribunal has performed during its first term and highlights several problems that it has encountered in bringing to justice those responsible for some of the worst atrocities committed in the late-twentieth century.

### II. Background to the Establishment of the Tribunal

The war in the former Yugoslavia was as violent and barbaric as the conflicts that preceded it. All sides to the conflict are alleged to have committed various violations of international humanitarian law, including *inter alia* summary executions, indiscriminate and disproportionate use of force against civilian targets, torture and mistreatment of detainees, and the forced displacement and resettlement of civilians.<sup>1</sup>

In July 1992 the Security Council, responding to growing international condemnation of the atrocities, adopted Resolution 764 (1992) in which it reminded the parties to the conflict of their responsibilities under international humanitarian law and confirmed that those who committed or ordered atrocities would be held accountable.<sup>2</sup> One month later the Security Council formally

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<sup>1</sup> For a detailed analysis of the crimes committed in the former Yugoslavia see amongst others *Helsinki Watch, War Crimes in Bosnia-Herzegovina*, New York: Helsinki Watch (1992) and *War Crimes in Bosnia-Herzegovina: Volume II*, Helsinki Watch (1993).

<sup>2</sup> See James O'Brien, *The International Tribunal for Violations of International Humani-*

condemned the violations that were being committed, especially those associated with the policy of ethnic cleansing.<sup>3</sup>

As reports of violations continued, in October 1992 the Security Council established a Commission of Experts to examine and analyse all violations of international humanitarian law that were alleged to have been committed in the former Yugoslavia.<sup>4</sup> During the next eighteen months, the five member Commission<sup>5</sup> conducted a series of studies and on-site investigations producing two interim reports<sup>6</sup> and a final report.<sup>7</sup> The Commission found that grave breaches of the 1949 Geneva Conventions (“grave breaches”) and other violations of international humanitarian law had been committed on a large scale in the former Yugoslavia. Moreover, they concluded that ethnic cleansing and rape had been carried out so systematically that they appeared to be a product of state policy.<sup>8</sup> Finally, the Commission observed that the establishment of an *ad hoc* Tribunal to prosecute those who committed the violations would be consistent with the direction of its work.<sup>9</sup>

Following this suggestion, on 22 February 1993 the Security Council adopted Resolution 808 (1993) in which it decided in principle to establish an international tribunal to prosecute persons responsible for serious violations of international law committed in the former Yugoslavia since 1991. Pursuant to this resolution the Secretary-General prepared a report on the workings of the Tribunal and the legal basis for its establishment. This report was submitted to the Security Council on 3 May 1993;<sup>10</sup> attached to it was a draft of the Statute of the Tribunal.<sup>11</sup>

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*tarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639 (1993), at 640-641.

<sup>3</sup> Sec. C. Res. 771, U. N. Doc. S/RES/771 (1992).

<sup>4</sup> Sec. C. Res. 780, U. N. Doc. S/RES/780 (1993).

<sup>5</sup> The Commission originally consisted of Professor Cherif Bassiouni (Egypt), Commander William Fendrick (Canada), Judge Keba Mbaye (Senegal), Professor Torkel Opsahl (Norway) and Professor Frits Kalshoven (the Netherlands), who was appointed chairman. However Professor Kalshoven resigned from the Commission for medical reasons in August 1993 and Professor Opsahl, who took over the chair, passed away in September 1993. On 19 October 1993, Professor Bassiouni was appointed chairman and Professor Christine Cleiren (the Netherlands) and Judge Hanne Sophie Greve (Norway) were appointed as new members.

<sup>6</sup> *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/25274 (10 February 1993), and *Second Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/26545 (6 October 1993).

<sup>7</sup> *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674 (24 May 1994).

<sup>8</sup> *Ibid.*, para. 2.

<sup>9</sup> See comments made in Sec. C. Res. 808, U.N. Doc. S/RES/808 (1992).

<sup>10</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter “Secretary-General’s Report”].

<sup>11</sup> The drafting of the statute involved significant consultations with governments, non-governmental organisations and individual experts. The Under Secretary-General and Legal Council of the United Nations, Carl-August Fleischhauer, and the Deputy Legal Counsel of the United Nations, Ralph Zacklin, supervised the drafting.

In his report the Secretary-General stated that the Tribunal should be established under Chapter VII of the United Nations Charter as a subsidiary organ of the Security Council. Consequently, its life span should be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia. Although a tribunal of this nature would normally be established by an international treaty, such an approach was rejected as it would be too time consuming and there was no guarantee that all international states would sign the treaty.<sup>12</sup> However, to protect its impartiality, the Secretary-General stressed that the Tribunal should perform its functions independently of political considerations and should not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions.<sup>13</sup>

The Secretary-General proposed that the Tribunal should consist of three organs, (1) a judicial organ, (2) a prosecutorial organ, headed by the Prosecutor, and (3) a secretariat, which should provide general administrative and support services to the other organs of the Tribunal.<sup>14</sup> The judicial organ should be composed of two three-member Trial Chambers and one five-member Appeals Chamber. The Judges should be elected for a four-year term by the General Assembly from a list of nominees put forward by the member states and short-listed by the Security Council. When compiling the short-list the Security Council should ensure that the principal legal systems of the world were represented. No two Judges should come from the same country. The seat of the Tribunal should be at The Hague.<sup>15</sup>

In his report the Secretary-General emphasised that the Tribunal should apply rules of law that were clearly established at the time the alleged offences were committed.<sup>16</sup> Accordingly, he proposed that the Tribunal should be given the power to prosecute persons who committed grave breaches, violations of the laws and customs of war ("war crimes"), genocide and crimes against humanity. All persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these offences should be held responsible for their crimes. In addition, persons should not be relieved of their individual responsibility by virtue of their official position and military commanders should be responsible, not only for unlawful acts they ordered, but also for acts committed by their subordinates which they knew or had reason to know were being or had been committed and they failed to prevent such acts or punish those who committed them. Furthermore, the fact that persons acted pursuant to an order of a government or of a superior should not relieve them of criminal responsibility.

On 25 May 1993 the Security Council adopted Resolution 827 (1993) in which it approved the Secretary-General's report and adopted the Tribunal's Statute without change.<sup>17</sup> It also declared that all states must co-operate with the Tribunal

<sup>12</sup> Secretary-General's Report, *supra* note 10, para. 19-20. See also Paul Szasz, *The Proposed War Crimes Tribunal for Ex-Yugoslavia*, 25 N.Y.U.J. Int'l. L. & Pol. 405 (1993), 411.

<sup>13</sup> Secretary-General's Report, *supra* note 10, para.85.

<sup>14</sup> *Ibid.*, para. 69.

<sup>15</sup> *Ibid.*, para. 72-76.

<sup>16</sup> *Ibid.*, para. 34-35.

<sup>17</sup> The Security Council did not want to open the door for amendments and revi-

and take any measures necessary under their domestic law to implement its Statute. By establishing the Tribunal in this way, the Security Council expressed its determination to end the violations that were being committed in the former Yugoslavia and to bring the perpetrators of the atrocities to justice.

### III. The Initial Activities of the Tribunal

Following the adoption of Resolution 827 (1993), the Secretary-General sent letters to member states of the United Nations and non-member states who maintained permanent observer missions at the United Nations headquarters inviting them, in accordance with Article 13 of the Statute, to nominate up to two candidates to serve as Judges on the Tribunal. Each candidate had to be of high moral character, impartiality, and integrity, and had to possess the qualifications required to be appointed as a Judge in their home country. All nominations that were received by the Secretary-General within sixty days were passed to the Security Council, who short-listed the nominations to 23 people. The list was presented to the General Assembly who elected eleven Judges to serve on the Tribunal on 17 September 1993.<sup>18</sup>

On 21 October 1993, the Security Council appointed Ramon Escobar-Salom, the Attorney General of Venezuela, as Prosecutor of the Tribunal.<sup>19</sup> A month later the first plenary session of the Tribunal convened, and on 17 November the

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sions for they feared that this would delay the adoption of the Statute. Consequently some important clarifications and refinements of the Statute were not made. M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and establishing an International Criminal Tribunal*, 25 *Security Dialogue* 409 (1994), at 415.

<sup>18</sup> The eleven Judges elected under General Assembly decision A/DEC/47/328 were G. M. Abi-Saab (Egypt), A. Cassese (Italy), J. Deschenes (Canada), A. G. Karibi-Whyte (Nigeria), G. Le Foyer de Costil (France), H. Li (China), G. K. McDonald (USA), E. Odio-Benito (Costa Rica), R. Sidhwa (Pakistan), Sir N. Stephen (Australia), and L. C. Vohrah (Malaysia). Morten Bergsmo, *The Establishment of the International Tribunal on War Crimes*, 14 *Hum. Rts. L. J.* 371 (1993), at 373.

Shortly after assuming office Judge Le Foyer de Costil gave notice of his resignation and was replaced by another French jurist Claude Jorda. Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, New York: Transnational Publishers (1995), at 146-147.

On 2 October 1995 Judge Riad, Professor of Law at Cairo University, replaced Judge Abi-Saab who resigned in order to resume his academic activities. *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*, UN Doc. A/51/292 (16 August 1996) [hereinafter "1996 Annual Report"], at para. 6.

On 15 July 1996 Judge Sidhwa resigned for health reasons and was replaced by Judge Jan (Pakistan) on 6 August 1996. On 18 April 1997 Judge Deschenes also resigned for health reasons and was replaced, on 16 July 1997, by Judge Shahabuddeen (Guyana). *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*, UN Doc. A/52/375 (18 September 1997) [hereinafter "1997 Annual Report"] para. 8.

<sup>19</sup> M. Cherif Bassiouni (Egypt) J. D. Lowe (Britain) and S. Sorabjee (India) had previously failed to gain the endorsement of the Security Council. Bergsmo, *Id.*

Tribunal was inaugurated at the Peace Palace in The Hague.<sup>20</sup> During the next two weeks the Tribunal elected Antonio Cassese as its President, determined the membership of Chambers, and began considering the rules of procedure and evidence that the Tribunal would follow.

At the second plenary session of the Tribunal, held between 17 January and 11 February 1994, the Tribunal prepared and approved its Rules of Procedure and Evidence ("the Rules").<sup>21</sup> The adoption of these rules was a monumental task, especially as the rules under which the Nuremberg and Tokyo Tribunals operated were of little precedential value. The Rules specify, *inter alia*, the procedure that must be followed during the five stages of the proceedings, namely, investigation, pre-trial, trial, appeal and review, and provide guidelines for the admission of evidence and the protection of victims and witnesses. The Rules also reiterate the obligation of states to co-operate with the Tribunal and to take all necessary measures to comply with its requests. During this session Escobar-Salom announced that he would not take up office as Prosecutor.

The rules governing the detention of persons awaiting trial or appeal before the Tribunal, or otherwise detained on the authority of the Tribunal ("the Rules of Detention"), were adopted during the Tribunal's third plenary session, held from 25 April to 5 May 1994.<sup>22</sup> Such a regime had to be devised given that for the first time in history accused persons were to be held in a special detention unit governed not by national rules of detention but by "a unique system of international standards created specifically by the international body before which they will be tried."<sup>23</sup> The Rules of Detention, which take into account guidelines set out in various international instruments concerning the treatment of prisoners, including *inter alia* the 1977 UN Standard Minimum Rules for the Treatment of Prisoners<sup>24</sup>, deal with the management of the detention unit, the rights of detainees and the removal and transport of detainees.<sup>25</sup>

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<sup>20</sup> Eve-Ann Prentice and Michael Evans, *Serbs mock launch of world court to try war criminals*, The Times, 18 November 1993, at 12.

<sup>21</sup> *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, Rules of Procedure and Evidence*, UN Doc. IT/32 (1994).

<sup>22</sup> *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, Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, UN Doc. IT/38/Rev.1 (5 May 1994).

<sup>23</sup> *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*, UN Doc. A/49/342 (29 August 1994) [hereinafter "1994 Annual Report"], at para. 98.

<sup>24</sup> In addition to the 1977 UN Standard Minimum Rules for the Treatment of Prisoners, the Tribunal took account of the 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the 1990 Basic Principles for the Treatment of Prisoners, and the higher standards suggested by the European Prison Rules issued in 1987 by the Council of Europe. *Id.*, para. 99.

<sup>25</sup> The Detention Unit is located near the seat of the Tribunal in the Netherlands, within a government prison, but under the exclusive control and supervision of the United Nations. Morten Bergsmo, *International Criminal Tribunal for the Former Yugoslavia: Recent Developments*, 15 Hum. Rts. L. J. 405 (1994), at 408.

Since suspects or accused persons who are unable to pay for counsel were entitled to free legal assistance in accordance with Article 21 of the Statute, Professor Theo van Boven — the Acting Registrar — prepared a Directive on the Assignment of Defence Counsel,<sup>26</sup> which was submitted to the Tribunal during its fourth session, held in July 1994. This Directive sets out the procedure for the assignment of defence counsel to indigent suspects and accused, the calculation and payment of fees and disbursements, and the establishment of an advisory panel which will be consulted by the Registrar or the President on questions concerning the assignment of counsel.<sup>27</sup>

#### IV. Financial Problems

Before he withdrew as Prosecutor, Escovar-Salom recommended that Graham Blewitt, the Director of the Nazi War Crimes Unit in Australia, be appointed Acting Deputy Prosecutor, to which the Secretary-General agreed. A five-month stalemate in appointing a successor to Escovar-Salom followed as members of the Security Council disagreed over the appointment of various candidates.<sup>28</sup> An agreement was reached on 8 July 1994 when the Security Council unanimously appointed South African Judge Richard Goldstone as Prosecutor.<sup>29</sup>

When Goldstone took office on 15 August 1994 he found a Tribunal that was seriously underfunded. While the Security Council established the Tribunal, the Fifth Committee of the General Assembly through the Advisory Committee on Administrative and Budgetary Questions (ACABQ) decided on its financing.<sup>30</sup> In Resolution 47/235 of 21 October 1993 the General Assembly asked the Secretary-General to produce an estimate for the cost of running the Tribunal. Even though the Secretary-General estimated that the Tribunal required US \$32.2 million for the biennium 1994-1995, in December 1993 the General Assembly authorised the allocation of only US \$5.6 million for the first six months of the Tribunal's operation.<sup>31</sup>

<sup>26</sup> *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, Directive on the Assignment of Defence Counsel*, UN Doc. IT/73/Rev.1 (1 August 1994).

<sup>27</sup> Bergsmo, *supra* note 25, at 408.

<sup>28</sup> This delay was described in the First Annual Report of the Tribunal as a "major blow to the Tribunal." Madeline Albright, the United States Ambassador to the United Nations, stated more forcibly that "the victims of atrocities in the former Yugoslavia have not been well-served by the resulting delay....Never again should the pursuit of justice by this body be so stymied." *Ibid*, at 405.

<sup>29</sup> Goldstone was a Judge on the Appellate Division of the South African Court and was head of the South African Commission Concerning the Prevention of Public Violence and Intimidation. He had also conducted a series of investigations into violence in the black townships of South Africa. *Idem*.

At the start of 1996 Justice Goldstone announced he would leave the Tribunal as he wanted to return to South Africa. On 29 February 1996 the Security Council, by Resolution 1047 (1996), appointed Justice Louise Arbour of Canada as the new Prosecutor of the Tribunal. Justice Arbour took up her post when Justice Goldstone left the Tribunal on 1 October 1996. 1996 Annual Report, *supra* note 18, para. 86.

<sup>30</sup> The Statute, \*\*\*\* Art. 32

<sup>31</sup> This amount was based on recommendations from the ACABQ. 1994 Annual report, *supra* note 23, para. 34.

This limited financing had a substantial and detrimental effect on the Tribunal.<sup>32</sup> Not knowing whether its finances would be extended at the end of the six-month period the Tribunal could not enter into any long-term commitments beyond June 1994. The Tribunal could not enter into a long-term lease for its premises;<sup>33</sup> nor could it recruit experienced staff other than on short-term contracts or purchase and install the technical equipment necessary to start investigations.<sup>34</sup> In February 1994, the President of the Tribunal wrote to the General Assembly stating that in order for the Tribunal to accomplish its task it must be financed appropriately.

A further allocation by the General Assembly of US\$5.4 million in April 1994 relieved the Tribunal of some of these problems. In addition, the General Assembly gave the Secretary-General specific authority to enter into a long-term contract for the premises and to recruit personnel on a long-term basis.<sup>35</sup> A four-year lease for the premises of the Tribunal was signed in July 1994, and soon afterwards workers began to convert some of the office space of the premises into a courtroom.<sup>36</sup>

During the first half of 1995, the Tribunal faced further fiscal problems as a dispute arose within the Fifth Committee over whether the Tribunal should be funded out of the general United Nations budget or out of the peacekeeping budget.<sup>37</sup> The five permanent members of the Security Council argued that because the International Court of Justice was funded out of the general United Nations budget the Tribunal should be as well. The Group of 77, led by India, Mexico and Brazil, maintained that because the Security Council established it under the 'peacekeeping' provisions of the United Nations Charter, the Tribunal should be funded out of the peacekeeping budget. Since the United Nations could not formally approve the Tribunal's budget until the General Assembly agreed on the account from which it should be paid, the consequences of this dispute were potentially serious.<sup>38</sup>

In monetary terms the differences that member states would be forced to pay was insignificant. For the general United Nations budget, member states contribute at a 'regular rate' proportionate to their national wealth. Since peacekeeping is controlled by the Security Council, the permanent members of the Council contribute slightly more than other states towards peacekeeping. Consequently, if the Tribunal were funded from the peacekeeping budget the permanent members of the Security Council would pay more; if funded out of the general budget then other countries would pay more. Since the total budget for the Tribunal for 1995 was \$28.4 million this meant that the amount in dispute for the United States was \$1.7 million. For France and the United Kingdom the

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<sup>32</sup> *Ibid*, para. 35.

<sup>33</sup> This was especially burdensome as the Tribunal needed to alter the premises to the specific needs of the Tribunal, most specifically it needed to construct a courtroom. *Idem*.

<sup>34</sup> *Idem*.

<sup>35</sup> *Ibid*, para. 36.

<sup>36</sup> *Idem*.

<sup>37</sup> Ray Moseley, *War Crimes not everyone's priority. Some nations call Tribunal a barrier to Bosnian peace*, Chicago Tribune (30 April 1995).

<sup>38</sup> *Idem*.

difference was about \$500,000 and \$400,000 respectively. For many countries the difference was only \$2,500 but for some this dispute was a matter of pride. They felt that, by stating in Article 32 of the Statute that the costs of the Tribunal would be paid from the general United Nations budget, the Security Council was trying to appropriate certain powers of the General Assembly relating to the United Nations budget.

In early July a number of human rights groups and other non-governmental organisations urged the opposing factions to compromise. The permanent members of the Security Council reached an agreement with the G-77 non-aligned countries on 14 July 1995 agreeing that one half of the costs of the Tribunal would come out of the peacekeeping funds while the other half would come out of the general budget.<sup>39</sup>

## V. Confirmation of Indictments and Judicial Activities

Following his appointment the Deputy Prosecutor set out to organise the office of the Prosecutor. As he initially had only a few members of staff, the Deputy Prosecutor formulated a staffing plan and began recruiting qualified and experienced staff to work in the Prosecutor's office.<sup>40</sup> The structures and operational procedures and systems for investigations and subsequent prosecutions were then set up.<sup>41</sup> A wide range of information relevant to the Tribunal's jurisdiction was also assembled, a large part coming from the Commission of Experts who, in May 1994, turned over to the Prosecutor's Office most of the information obtained during its investigations.<sup>42</sup> As a result of the Deputy Prosecutor's efforts the first investigations were ready to commence when the Prosecutor finally arrived.

### a. *The Nikolic Indictment*

On 1 November 1994 the Prosecutor submitted the first indictment for confirmation.<sup>43</sup> According to the indictment, between June and September 1992 — while in command of the Susica detention camp — Dragon Nikolic directly participated in the wilful killing, torture and inhumane treatment of many of the camp's detainees. Judge Odio-Benito confirmed the indictment on 4 November 1994, and a warrant for his arrest was delivered to the government of Bosnia and Herzegovina and the Bosnian Serb administration in Pale.

In October 1995, pursuant to the provisions set out in Rule 61 of the Rules, Trial Chamber I held a public hearing in which the Prosecutor presented all the evidence supporting the indictment against Nikolic. After a five day hearing

<sup>39</sup> Under General Assembly Resolution 49/242B of 20 July 1995 the General Assembly agreed to finance the Tribunal \$39,095,900 for the period 1 January 1995 to 31 December 1995. *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*, UN Doc. A/50/728 (23 August 1995) [hereinafter "1995 Annual Report"], at para. 122

<sup>40</sup> 1994 Annual Report, *supra* note 23, para. 141.

<sup>41</sup> *Idem.*

<sup>42</sup> *Idem.*

<sup>43</sup> *The Prosecutor v. Nikolic*, Case No. IT-95-3-I (4 November 1994).



the Judges determined that there were reasonable grounds for believing that Nikolic committed the offences with which he was charged, and ordered that an international arrest warrant against him be issued and transmitted to all states.<sup>44</sup> In addition, the Chamber publicly stated that the reason why the indictment had not been served was due to the failure or refusal of the Bosnian Serb administration to co-operate with the Prosecutor.<sup>45</sup>

### **b. The Omarska Indictments**

#### *(i) Confirmation of indictments*

During its investigations, the Commission of Experts conducted a very thorough examination of events that occurred in the municipality of Prijedor in north-western Bosnia and Herzegovina during the summer of 1992. They revealed that during this period widespread and systematic breaches of humanitarian law were committed in the municipality.<sup>46</sup> On 8 November 1994, in its first public hearing, the Tribunal formally requested that the German Government defer to the Tribunal's competence the criminal proceedings currently being conducted in its national courts against Dusko Tadic, a Bosnian Serb who was alleged to have been a guard at the Omarska detention camp, one of many located in the Prijedor municipality.<sup>47</sup>

On 13 February 1995 an indictment was issued against Tadic.<sup>48</sup> It was alleged that Tadic and Goran Borovnica (who was charged in the same indictment) took part in the persecution of the Muslim population of the Prijedor municipality and the deportation of civilians to camps located in that area. Tadic was also charged with offences relating to the collection and mistreatment of civilians inside and outside the Omarska detention camp and various offences committed at the Keraterm and Trnopolje detention camps which were also located in the municipality of Prijedor.

In another indictment, confirmed on 13 February 1995, nineteen Bosnian Serbs who were commanders, guards or regular visitors to Omarska were charged with committing war crimes, grave breaches and crimes against

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<sup>44</sup> See *The Prosecutor v. Nikolic*, Case No. IT-95-3-R61, *Review of Indictment Pursuant To Rule 61* (20 October 1995) at 23.

<sup>45</sup> On 30 October 1995, pursuant to Rule 61(E) of the Rules of Procedure and Evidence, the President of the Tribunal notified the Security Council that the Bosnian Serb administration in Pale had either failed or refused to execute the arrest warrants against Nikolic. 1996 Annual Report, *supra* note 18, para. 51.

<sup>46</sup> 1995 Annual Report, *supra* note 39, para. 52.

<sup>47</sup> This request was in accordance with Rule 9(iii) of the Rules of Procedure and Evidence. The Trial Chamber agreed that the Tadic investigation was important to the prosecution of persons responsible for committing violations in the Prijedor municipality and that the alleged acts committed by Tadic would provide a clearer picture of the plan to prosecute the civilian population of the region. They also agreed that the investigation involved potential co-offenders and accomplices who might not be amenable to German jurisdiction and involved many witnesses interviewed by the Prosecutor's office who resided outside Germany. Vierucci, Luisa, *The First Steps of the International Criminal Tribunal for the Former Yugoslavia*, 6 Eur. J. Int'l L. 134 (1995), at 136-137.

<sup>48</sup> *The Prosecutor v. Tadic*, Case No. IT-94-1-I (13 February 1995).

humanity.<sup>49</sup> Zeljko Meakic, the commander of the camp, was also charged with three counts of genocide for killing, injuring and severely maltreating inmates "with the intention of destroying the Bosnian Muslim and Bosnian Croat people as national, ethnic and religious groups."

Since Tadic was the only person in custody, arrest warrants were issued for the 20 other accused. On 31 March 1994, the German Government enacted legislation on co-operation with the Tribunal and, on 24 April 1994 Tadic was transferred to The Hague.<sup>50</sup> Two days later he appeared before Trial Chamber II and pleaded not guilty to all the charges contained in the indictment.<sup>51</sup>

(ii) *Pre-trial proceedings in the Tadic Case*

Both the Prosecutor and the Defence subsequently filed several preliminary motions in the Tadic Case pursuant to Rule 72 of the Rules. On 10 August 1995 the Trial Chamber issued two rulings in the case. The first ruling related to the Prosecutor's request for a number of measures for the protection of victims and witnesses.<sup>52</sup> The Prosecutor requested, *inter alia*, that certain victims and witnesses be heard *in camera*, that certain victims and witnesses be assigned pseudonyms, that their true names be expunged from the public record and stated only in sealed records which were not to be disclosed to the public or the media, that their testimony be given by closed-circuit television with image and voice distortion, and that the identities of several victims and witnesses be withheld from the accused and his counsel. The Chamber granted all these requests.<sup>53</sup>

In the second ruling the Trial Chamber dismissed Tadic's challenge to the jurisdiction of the Tribunal.<sup>54</sup> The defence subsequently appealed. During the Appeals hearing the defence based their motion on three grounds: the establishment of the Tribunal was unlawful, the primacy the Tribunal had over component domestic courts was unjustified, and the Tribunal lacked subject matter jurisdiction under Articles 2 (grave breaches), 3 (war crimes) and 5 (crimes against humanity) of the Statute. On 2 October 1995, the Appeals Chamber upheld

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<sup>49</sup> The Prosecutor v. Meakic, Case No. IT-95-4-I (13 February 1995).

<sup>50</sup> 1995 Annual Report, *supra* note 39, at para. 13.

<sup>51</sup> *Idem*. At the initial appearance Tadic was represented by Professor Michail Wladimiroff and Mr. Milan Vujin, the former having been assigned to represent Tadic pursuant to Rule 45 of the Rules of Procedure and Evidence.

<sup>52</sup> The Prosecutor v. Tadic, Case IT-94-1-T, *Decision on the Protection of Witnesses* (10 August 1995).

<sup>53</sup> Since this ruling is procedural, therefore, pursuant to Rule 72(B), it is not subject to interlocutory appeal. See Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int'l L. 235 (1996) at 235.

This ruling gives rise to the possibility that an accused may be sentenced to life imprisonment on the testimony of witnesses whose identity he does not know. Consequently it has been criticised for misconstruing the Statute, misunderstanding judicial precedents and misdescribing the functions of the judiciary in a criminal trial, this being to balance the fundamental rights of the defendant against prosecution convenience. Geoffrey Robertson QC, *War Crimes Deserve A Fair Trial*, *The Times*, 26 June 1996.

<sup>54</sup> The Prosecutor v. Tadic, Case No. IT-94-I-T, *Decision on Jurisdiction* (10 August 1995).

the decision of the Trial Chamber.<sup>55</sup> The Appeals Chamber dismissed the plea that the Tribunal was not lawfully established, dismissed the challenge to primacy and decreed that the Tribunal had subject-matter jurisdiction in respect of each of the three articles in the Statute.<sup>56</sup>

Since this was the first time that an international appeals body had ruled on the current status of international humanitarian law, the Appeals Chamber took the opportunity to consider at length the application of international humanitarian law to the situation in the former Yugoslavia to the extent that it was necessary for the determination of issues of jurisdiction.<sup>57</sup> The Appeals Chamber found that:

...an armed conflict exists wherever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>58</sup>

Applying this concept of armed conflict to the situation in the former Yugoslavia, the Appeals Chamber found that an armed conflict existed at all relevant times. Concerning the characterisation of the conflict, the Appeals Chamber concluded that the conflicts that were fought in the former Yugoslavia between 1991 and 1995 had both internal and international aspects, "that the members of the Security Council clearly had both aspects of the conflict in mind when they adopted the Statute," and "that they intended to empower the Tribunal to adjudicate violations of international humanitarian law that occurred in either context."<sup>59</sup>

### (iii) *The Tadic Trial*

On 7 May 1996, Trial Chamber II — comprising Judges McDonald, Vohrah and Stephen — began hearing evidence against Dusko Tadic.<sup>60</sup> Some three months after the start of the trial, the Prosecution ended its examination-in-chief. During this period, seventy-six witnesses gave testimony<sup>61</sup> and 346 exhibits were

<sup>55</sup> The Prosecutor v. Tadic, Case No. IT-94-I-AR72, *Appeal on Jurisdiction* (2 October 1995) [hereinafter "Appeal's Decision"]

<sup>56</sup> See George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the former Yugoslavia*, 90 Am. J. Int'l L. 64 (1996), at 64.

<sup>57</sup> 1996 Annual Report, *supra* note 18, para. 33.

<sup>58</sup> Appeal's Decision, *supra* note 55, para. 70.

<sup>59</sup> *Ibid.*, para. 77.

<sup>60</sup> The start of the trial was delayed as the defence needed to complete its investigations and discovery in the region of the former Yugoslavia. 1996 Annual Report, *supra* note 18, para. 38.

<sup>61</sup> Pursuant to the Decision on the protection of witnesses (see note 52 above) one witness testified under full anonymity, 1997 Annual Report, *supra* note 18, para 21.

admitted into evidence.<sup>62</sup> After rejecting the submission of the defence that there was no case to answer, the Trial Chamber began hearing witnesses for the defence on 10 September 1996. Forty witnesses were presented and seventy-five exhibits admitted.<sup>63</sup> Two days of rebuttal followed, during which the Prosecution called another ten witnesses. The defence called no witnesses in rejoinder. On 28 November 1996, after one week of closing arguments, the first trial of the Tribunal came to an end.<sup>64</sup>

(iv) *The Tadic Judgement*

The judgement of the Trial Chamber was rendered on 7 May 1997.<sup>65</sup> By majority, Judge McDonald dissenting, the Chamber held that during the period in question the armed forces of Republika Srpska could not be regarded as *de facto* organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). The victims of the acts attributed to the accused were thus not "protected persons" within the meaning of the Geneva Conventions because they were not "in the hands of a party to the conflict of which they are not nationals." Tadic was therefore found not guilty of the eleven charges laid under Article 2 of the Statute.<sup>66</sup>

The Trial Chamber did find Tadic guilty of committing six counts of crimes against humanity and five counts of war crimes for his involvement in the beatings and deportation of Muslims during the Bosnian Serb take-over of the Prijedor municipality in May and June 1992. He was found not guilty of each of the charges of murder since proof that the victims died as a result of his acts was deemed insufficient, although in respect of the crime of persecution, the Chamber did find that he caused the deaths of two policemen by slitting their throats.<sup>67</sup> On 14 July 1997 Tadic was sentenced to 20 years imprisonment.<sup>68</sup> Both the Prosecutor and the Defence lodged appeals against the decision, the latter also lodging an appeal against the sentence imposed by the Chamber.<sup>69</sup>

C. *The Indictments against Karadzic and Mladic*

(i) *The first indictment*

Towards the end of April 1995 the Prosecutor announced that his office was investigating Bosnian Serb leader Radovan Karadzic, commanding General

<sup>62</sup> *Ibid*, para. 21.

<sup>63</sup> In accordance with the Decision on Video-Conferencing of 25 June 1996 eleven defence witnesses testified by video-link from Banja-Luka. *Ibid*, para 22.

<sup>64</sup> The trial lasted 23 weeks and the transcripts of the hearings amounted to a total of 7004 pages. *Ibid*, para. 24.

<sup>65</sup> The Prosecutor v. Tadic, Case No. IT-94-1-T, *Opinion and Judgment* (7 May 1997)

<sup>66</sup> 1997 Annual Report, *supra* note 18, para. 27.

<sup>67</sup> *Ibid*, para. 29.

<sup>68</sup> The Prosecutor v. Tadic, Case No. IT-94-1-T, *Sentencing Judgment* (14 July 1997)

<sup>69</sup> The Prosecutor v. Tadic, Case No. IT-94-1-A, *Notice of Appeal by the Defence* (23 May 1997); *Notice of Appeal of Judgment* (3 June 1997); *Notice of Appeal by the Prosecutor* (6 June 1997).

<sup>70</sup> 1995 Annual Report, *supra* note 39, para 59.

Ratko Mladic and former secret police chief Mico Stanisic for war crimes committed in Bosnia and Herzegovina.<sup>70</sup> The Prosecutor alleged that they were responsible, *inter alia*, for genocide, numerous acts of murder, rape and torture, and the forced removal of thousands of civilians from large parts of Bosnia and Herzegovina.

Since Bosnia and Herzegovina was conducting its own investigation into the activities of these three men, the Prosecutor asked the Tribunal to issue a formal request to the Republic that it defer its investigation to the competence of the Tribunal. This request was granted on 16 May 1995.<sup>71</sup>

On 25 July 1995, Karadzic and Mladic were indicted by the Tribunal on counts of genocide, crimes against humanity, grave breaches and war crimes.<sup>72</sup> The indictment alleged that the two Bosnian Serb leaders were responsible either directly or on the basis of command responsibility for (i) the internment of thousands of Bosnian Muslims and Croats in detention facilities where the internees were subject to torture, murder, sexual assault, robbery and other acts, (ii) the shelling and sniping campaigns conducted against civilian populations, (iii) the deportation of Bosnian Muslim and Croat civilians from areas occupied by the Bosnian Serbs, (iv) the destruction of Muslim and Roman Catholic sacred sites, and (v) the taking of United Nations hostages for use as "human shields."<sup>73</sup>

(ii) *The "Srebrenica" indictment*

On 16 November 1995, the Tribunal issued a new indictment against Karadzic and Mladic, accusing them of committing genocide and war crimes against the residents of the United Nations designated safe area of Srebrenica in July 1995.<sup>74</sup> At the start of July Bosnian Serb forces had attacked Srebrenica. According to the indictment, when it became clear that Srebrenica would fall the Bosnian Muslim population in Srebrenica either sought refuge near the UN compound in Potocari or fled in a large column towards Tuzla.

On 12 and 13 July 1995, many of those who had sought refuge near the UN compound were summarily executed. The remaining Muslim population of Srebrenica was then removed from the area by bus. Before letting the Muslims board the buses, Bosnian Serb soldiers separated the men from the women and children. Previously, throughout the night of 11 July 1995, Bosnian Serb forces attacked the column of refugees that was fleeing Srebrenica. Thousands of the refugees surrendered or were subsequently captured in the days following the attack. Hundreds of those who were captured were either summarily executed at the site of their capture, or were transported to two locations near the village of Karakaj.

On 14 July 1995, thousands of Muslim men who had either been separated from the other refugees in Potocari, or had surrendered, or had been captured while fleeing the enclave, were summarily executed in two large fields near

<sup>71</sup> *Ibid*, para. 60.

<sup>72</sup> The Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-I (25 July 1995).

<sup>73</sup> 1995 Annual Report, *supra* note 39, para. 62-63. The investigation into other members of the Bosnian Serb leadership, including Stanisic, is still proceeding.

<sup>74</sup> The Prosecutor v. Karadzic and Mladic, Case No. IT-95-18-I (16 November 1995).

Karakaj. The indictment alleged that at all times during this massacre the Bosnian Serb forces were under the command and control of Karadzic and Mladic.<sup>75</sup>

(iii) *Rule 61 proceedings*

On 16 June 1996, the Tribunal announced that a Rule 61 proceeding would be held in which Trial Chamber I would hear the evidence against Karadzic and Mladic. From 27 June to 8 July 1996 the Trial Chamber reviewed all the evidence submitted to the confirming Judges and heard testimony from several witnesses called by the Prosecutor, including the mayor of Sarajevo, the accused Erdemovic and a survivor of the Srebrenica massacre.<sup>76</sup> It also heard statements from Elizabeth Rehn, the Special Rapporteur for the United Nations Commission on Human Rights, and Christine Cleiren, a member of the Commission of Experts, who were invited by the Chamber to testify as *amicae curiae*.<sup>77</sup>

On 11 July 1997, the Trial Chamber confirmed the two indictments and issued international warrants for their arrest.<sup>78</sup> Not only were the two accused found responsible on the basis of command responsibility for violations of international law committed in the territory of Bosnia-Herzegovina by Bosnian Serb forces,<sup>79</sup> the Trial Chamber also found them personally responsible for genocide and other crimes with which they were charged. The Trial Chamber found:

<sup>75</sup> General Mladic had promised a "bloody feast" after the fall of the town, and is reported to have told prisoners confined on a football field that 1,000 Muslims would die for every Serb killed in the battle for the town. According to survivors of the massacre following Mladic's threat the prisoners were loaded into lorries and taken about half a mile away where they were machine-gunned in groups of 20 to 25. Spy photographs taken by satellites and U2 spy planes confirmed that at least 600 people were held on the football field, and showed one of the reported burial sites after the earth had been disturbed. James Bone, *Bosnia Serbs are Accused of Massacre*, *The Times*, 11 Aug. 1995, at 1. For a detailed report of the massacre see Stephen Engelberg and Tim Weiner, *Srebrenica: The days of Slaughter*, *The New York Times*, 29 October 1995, at A1, A14 and A15.

<sup>76</sup> 1996 Annual Report, *supra* note 18, para. 61.

<sup>77</sup> *Idem*.

<sup>78</sup> *The Prosecutor v. Karadzic and Mladic*, Case No. IT-95-5-R61 and IT-95-18-R61, *Review of Indictment Pursuant To Rule 61* (11 July 1996).

<sup>79</sup> The Trial Chamber found that "Radovan Karadzic's central role in the political and military preparation of the take-over by the Serbs of Bosnia and Herzegovina is clearly apparent. All of the evidence and testimony tendered by the Prosecutor shows that since July 1990, Radovan Karadzic has been the unchallenged leader of the Bosnian Serbs. His actions and statements demonstrate not only that he was abreast of his subordinate's doings, but also, notably, that he endorsed their behaviour, that he participated from the first moment on in the planning of the policy of 'ethnic cleansing' in Bosnia and Herzegovina and that he himself was in a position to order the Bosnian Serbs' operations which led to the commission of prohibited acts." *Ibid*, para. 74.

As Chief of Staff of the Bosnian Serb Army, "Ratko Mladic has full control over his generals and .... was often personally involved in the operational decisions of the various corps, going so far as to change commanders' orders and to take tactical decisions in their stead. His power also extended to the political level." The Trial Chamber concluded that "his knowledge of the obligations under international humanitarian law and generally speaking of the prohibited acts committed, as

...the evidence and testimony all concur in demonstrating that Radovan Karadzic and Ratko Mladic were not only informed of all the crimes allegedly committed under their authority, but also and in particular, that they exercised their power in order to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the said crimes.<sup>80</sup>

In its decision the Trial Chamber invited the Prosecutor to consider laying additional charges of genocide against Karadzic and Mladic,<sup>81</sup> and by determining that they were responsible on the basis of governmental or military-command responsibility, the Chamber also invited the Prosecutor to investigate decision-making responsibility at the same, or higher, echelons.<sup>82</sup>

#### D. The Keraterm, Bosanski Most and Brcko-Luka Indictments

The first of three indictments confirmed by Judge Vohrah on 21 July 1995 followed further investigations into atrocities committed in the Prijedor municipality during 1992. This indictment related to crimes committed by Bosnian Serbs at the Keraterm detention camp.<sup>83</sup> Dusko Sikirica, the commander of the camp, was accused of genocide and, along with twelve other subordinates or persons subject to his authority, with committing crimes against humanity, war crimes and grave breaches. The crimes these men were accused of included the wilful killings, torture and sexual assault of several hundred detainees of the Keraterm detention camp.

In the second indictment, six persons were accused of having committed grave breaches, war crimes and crimes against humanity while co-ordinating and waging a campaign of terror undertaken in 1992 against the non-Serb civilian population in Bosanski Samac, a municipality located in the Posavina corridor in northern Bosnia and Herzegovina.<sup>84</sup>

The third indictment related to atrocities committed by Goran Jelistic and Ranko Cestic at the Brcko-Luka detention camp, in north-eastern Bosnia and Herzegovina, during the summer of 1992.<sup>85</sup> Jelistic, allegedly one of the commanders of the camp, was charged with genocide and was accused of committing sixteen murders and numerous beatings.<sup>86</sup> Cestic was alleged to have committed thirteen murders and one sexual assault.<sup>87</sup>

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well as the absence of any disciplinary measure to punish the serious violations perpetrated by his subordinates, have been sufficiently proven at this stage of the proceedings." *Ibid.*, paras. 78-79.

<sup>80</sup> *Ibid.*, para. 83.

<sup>81</sup> *Ibid.*, para. 95.

<sup>82</sup> *Ibid.*, para. 85. The Trial Chamber also affirmed that the failure to execute the arrest warrant against the two accused was due to the refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Republika Srpska to co-operate with the Tribunal. On 11 July 1996 the President sent a letter to this effect to the Security Council.

<sup>83</sup> The Prosecutor v. Sikirica and Others, Case No. IT-95-8-I (21 July 1995).

<sup>84</sup> The Prosecutor v. Miljkovic and Others, Case No. IT-95-9-I (21 July 1995).

<sup>85</sup> The Prosecutor v. Jelistic and Cestic, Case No. IT-95-10-I (21 July 1995).

<sup>86</sup> 1995 Annual Report, *supra* note 39, para. 71.

<sup>87</sup> *Idem.*

### E. Indictment against Milan Martić

On 25 July 1995, Judge Jorda confirmed an indictment in which Milan Martić, the President of the self-proclaimed Serb Republic of Krajina, was accused of having committed war crimes by ordering cluster bomb attacks against the population of Zagreb in early May 1995. Five civilians were killed in the attacks and several others were injured.<sup>88</sup>

On 27 February 1996, Trial Chamber I examined all the evidence against Martić pursuant to Rule 61.<sup>89</sup> Based on this evidence the Chamber was satisfied that reasonable grounds existed for believing that the civilian population of Zagreb was attacked on Martić's orders.<sup>90</sup> The Chamber found that, because of their limited accuracy and striking force, the use of cluster bombs indicated that Martić did not intend to hit military targets but instead wanted to terrorise the population of Zagreb.<sup>91</sup>

### F. The Rajić Indictment

On 29 August 1995, Ivica Rajić was indicted for having committed grave breaches and war crimes.<sup>92</sup> It was alleged that Rajić — the first non-Serb to be indicted by the Tribunal — was the commander of a unit of the Croatian Defence Council (HVO) which operated in Central Bosnia. On 23 October 1993, soldiers under his command attacked the village of Stupni Do which was inhabited at the time by approximately 250 people, most of whom were Muslim. As a result of the attack, sixteen civilians were killed, the village was almost totally destroyed and the inhabitants who survived were forced to flee.

In April 1996, pursuant to Rule 61, Trial Chamber II reviewed the evidence against Rajić. The Chamber, in a decision rendered on 13 September 1996, unanimously confirmed all counts of the indictment and issued an international warrant for his arrest.<sup>93</sup> Based on the evidence produced by the Prosecutor and the testimony heard, the Trial Chamber was satisfied that:

...the Prosecutor (had) presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with Ivica's Rajić's aid and assistance or on his orders. The attack appear(ed) to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed.<sup>94</sup>

In addition, the Chamber noted that the failure to arrest Rajić was due to the refusal of the Federation of Bosnia and Herzegovina and the Republic of Croatia to co-operate with the Tribunal and asked the President of the Tribunal to report this dereliction to the Security Council.<sup>95</sup>

<sup>88</sup> The Prosecutor v. Martić, Case No. IT-95-11-I (25 July 1995).

<sup>89</sup> *Ibid*, paras. 53-55.

<sup>90</sup> *Ibid*, para 55.

<sup>91</sup> *Idem*.

<sup>92</sup> The Prosecutor v. Rajić, Case No. IT-95-12-I (29 August 1995).

<sup>93</sup> The Prosecutor v. Rajić, Case No. IT-95-12-R61, *Review of Indictment Pursuant To Rule 61* (13 September 1996), para. 72.

<sup>94</sup> *Ibid*, para. 71.



## G. The Vukovar Indictment

### (i) *Mrkic, Radic and Slijivancanin*

An indictment against three Serbian officers of the Yugoslav People's Army was confirmed by Judge Riad on 7 November 1995.<sup>96</sup> According to the indictment, on 20 November 1991, two days after the town of Vukovar was captured by Serbian forces, soldiers and paramilitary forces under the command or supervision of Mile Mrkic, Miroslav Radic and Veselin Slijivancanin removed approximately 260 staff-members and patients from Vukovar Hospital. The captives were transported to a farm building near Vukovar, where they were beaten for several hours. They were then driven in groups of ten to twenty to a nearby ravine where they were shot.

Between 20 March and 28 March 1996, Trial Chamber I conducted a Rule 61 hearing against Mrkic, Radic and Slijivancanin. After hearing the testimony of several witnesses and examining numerous documents, the Trial Chamber found that there were sufficient grounds for believing that the three officers were responsible either directly or because of superior authority for the mass killing, and issued an international warrant for their arrest.<sup>97</sup>

### (ii) *Dokmanovic*

On 26 March 1996, in a confidential amendment to the indictment, Slavko Dokmanovic, the President of the Vukovar municipality from 1990 to mid-1991, was charged with having helped organise and co-ordinate the mass killing.<sup>98</sup> On 27 June 1997, Dokmanovic was arrested by Tribunal investigators in Eastern Slavonia, acting under the supervision of personnel from the United Nations Transitional Administration for Eastern Slavonia. He was promptly transferred to The Hague and is currently awaiting trial.<sup>99</sup>

## H. The Lasva Valley Indictments

### (i) *The indictments*

Early in 1995, the Prosecutor's office became formally aware that a court in Bosnia and Herzegovina was conducting an investigation into atrocities that were committed against the Muslim population of the Lasva river valley in central Bosnia and Herzegovina by Bosnian Croats during 1993. Since his office was conducting a similar investigation, on 21 April 1995 the Prosecutor filed an application asking that the Tribunal request the Republic to defer its investigation

<sup>95</sup> The President notified the Security Council on 16 September 1996 (S/1996/763).

<sup>96</sup> The Prosecutor v. Mrksic and Others, Case No. IT-95-13-I (7 November 1995).

<sup>97</sup> 1996 Annual Report, *supra* note 18, para. 57. The Trial Chamber also held that failure to execute the arrest warrants could be attributed to the refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to co-operate with the Tribunal and invited the President of the Tribunal to notify the Security Council accordingly. This was done on 24 April 1996.

<sup>98</sup> The Prosecutor v. Mrksic and Others, Case No. IT-95-13a-I (26 March 1996).

<sup>99</sup> 1997 Annual Report, *supra* note 18, para. 47.

to the Tribunal's competence.<sup>100</sup> This request was granted and, as a consequence of the Prosecutor's investigation, on 13 November 1995 an indictment was confirmed against six Bosnian Croats, including Dario Kordic, the Vice-President of the Croatian Community of Herceg-Bosna, and General Tihomir Blaskic, the regional Commander of the HVO. It was alleged that the accused were responsible for "the persecution on political, racial and religious grounds of the Bosnian Muslim population" of the Lasva Valley.<sup>101</sup> The crimes with which they were charged were carried out on "such a large scale and widespread basis and implemented in such a systematic fashion" that they "effectively destroyed or removed almost the entire Muslim population in the Lasva Valley."

On 27 June 1996, the Tribunal released two other indictments, charging nine Bosnian Croats with atrocities committed during the attacks on the Muslim villages in the Lasva Valley.<sup>102</sup> Although Judge McDonald confirmed these indictments in November 1995, they were not publicly announced at the time, as the Prosecutor wanted time to protect the safety of victims and witnesses.<sup>103</sup>

(ii) *Voluntary surrender of General Blaskic*

On 1 April 1995, General Blaskic surrendered to the custody of the Tribunal and two days later pleaded not guilty to the counts with which he was charged.<sup>104</sup> A number of preliminary motions were filed by the Defence and the Prosecution relating to, *inter alia*, the form of the indictment, disclosure of evidence, protection of witnesses, provisional release and modification of the conditions of detention. A motion for severance was granted,<sup>105</sup> and the Prosecutor was ordered to amend the indictment by omitting excessively vague phrases such as "including, but not limited to ...", "among others" and "about" so as "to provide (General Blaskic) with a statement of facts which will permit him to prepare his defence."<sup>106</sup> The trial of General Blaskic commenced on 24 June 1997 before Trial Chamber I, composed of Judges Jorda, Riad and Shahabuddeen, and is expected to continue well into 1998.<sup>107</sup>

<sup>100</sup> This deferral request differed from the deferrals in the Tadic and Bosnian Serb leadership cases in that (a) it was the first case brought to the attention of a Trial Chamber concerning non-Serb perpetrators and thus reflected the Prosecutor's intention to bring cases irrespective of the nationality of the perpetrators; and (b) it did not state the name of any perpetrator but addressed itself solely to events in a certain time and in a certain geographical area. 1995 Annual Report, *supra* note 39, para. 66.

<sup>101</sup> The Prosecutor v. Kordic and Others, Case No. IT-95-14-I (13 November 1995).

<sup>102</sup> The Prosecutor v Marinic, Case No. IT-95-15-I (10 November 1995) and the Prosecutor v Kupreskic & Others, Case No. IT-95-16-I (10 November 1995).

<sup>103</sup> 1996 Annual Report, *supra* note 18, para. 14.

<sup>104</sup> *Id.*, para. 46.

<sup>105</sup> See The Prosecutor v. Blaskic, Case No. IT-95-14-PT, *Leave to Amend Indictment* (22 November 1996).

<sup>106</sup> The Prosecutor v. Blaskic, Case No. IT-95-14-PT, *Decision on Defence Motion to dismiss the Indictment based upon Defects in the Form thereof (Vagueness/Lack of Adequate Notice of Charges)* (4 April 1997) at para. 38.

<sup>107</sup> 1997 Annual Report, *supra* note 18, para. 45.

*(iii) Transferral of Aleksovski*

Zlatko Aleksovski, who was charged in the same indictment as General Blaskic, was arrested by the Croatian authorities in Split on 8 June 1996 and was transferred to the Tribunal in April 1997. On 29 April 1997, he pleaded not guilty to committing war crimes and grave breaches. His trial is expected to commence at the beginning of 1998.<sup>108</sup>

*(iv) Voluntary surrender of Kordic and nine others*

On 6 October 1997, Dario Kordic and nine other persons accused in the Lasva Valley indictments surrendered voluntarily to the jurisdiction of the Tribunal.<sup>109</sup> During their initial appearances all ten pleaded not guilty.<sup>110</sup> No date for their trial has been set.

**I. The Djukic Indictment**

On 12 February 1996, the head of logistics in the Bosnian Serb Army, General Djorde Djukic and his assistant Colonel Alexsa Krsmanovic, who were arrested in Sarajevo the previous month, were transferred to the Hague as witnesses pursuant to Rule 90 *bis*.<sup>111</sup> While Colonel Krsmanovic was subsequently transferred back to Sarajevo,<sup>112</sup> General Djukic was indicted by the Tribunal on 28 February 1996.<sup>113</sup> The indictment, which charged the General with committing a crime against humanity and a war crime, was based on his role in aiding the Bosnian Serb Army in operations which included the shelling of civilian targets during the Bosnian Serb siege of Sarajevo between May 1992 and December 1995. Before judicial proceedings could properly commence General Djukic was provisionally released by the Tribunal because of his medical condition. General Djukic, who was suffering from pancreatic cancer, returned to Belgrade where he died in May 1996.<sup>114</sup>

<sup>108</sup> *Ibid*, para. 46.

<sup>109</sup> Tom Walker, *Croat suspects taken to face war trial*, *The Times* (7 October 1997).

<sup>110</sup> Insisting that he and his other co-accused could prove their innocence, before boarding the plane to The Hague, Dario Kordic stated "my conscience is clear before God and before the Croatian people." Charles Bremner and Tom Walker, *Croats deny war crimes charges*, *The Times* (9 October 1997).

<sup>111</sup> 1996 Annual Report, *supra* note 18, para. 25.

<sup>112</sup> Colonel Krsmanovic was transferred back to Sarajevo when it became clear to the Prosecutor that he was not prepared to act as a witness and assist the Prosecutor in his on-going investigations. Five days after returning to Bosnia-Herzegovina the Bosnian courts announced that they had found new evidence that proved beyond doubt that Colonel Krsmanovic participated in war crimes. Despite this statement Colonel Krsmanovic was soon freed from the central prison in Sarajevo and transported to Pale. It is believed that he was exchanged for Ibran Mustafic, a Bosnian MP and member of Izetbegovic's Party of Democratic Action (SDA). Zoran Pirolic, *Bosnian's Bitter Over Slim Results*, *The Tribunal* (June/July 1996) at 7, a supplement to 42 War Report (June 1996).

<sup>113</sup> *The Prosecutor v Djukic*, Case No. IT-96-20-I (29 February 1996).

<sup>114</sup> 1996 Annual Report, *supra* note 18, para. 45

## J. The Celebici Indictment

On 21 March 1996, the Tribunal indicted three Bosnian Muslims and a Bosnian Croat for allegedly committing crimes against Bosnian Serbs who were detained in the Celebici detention camp during the summer of 1992.<sup>115</sup> The indictment stated that the detainees were subjected to serious violations of international humanitarian law including *inter alia* murder, torture (including rape of female detainees), beatings, and inhumane treatment. Within days of the confirmation of the indictment, two of the indictees, Zejnil Delalic and Zdravko Mucic, were arrested in Western Europe.<sup>116</sup> The other two indictees, Hazim Delic and Esad Landzo, were arrested by the authorities of Bosnia and Herzegovina in May 1996. All four were subsequently transferred to The Hague.<sup>117</sup>

The Celebici trial commenced on 10 March 1997 before Trial Chamber II, composed of Judges Karibi-Whyte, Odio-Benito and Jan.<sup>118</sup> With the start of the Blaskic trial, and the lack of courtroom facilities, since the end of June 1997 the Chamber has been able to sit for only two weeks every month. The progress of the trial has therefore been slow, and as a result the trial is not expected to close until the end of 1998.<sup>119</sup>

## K. The Erdemovic Indictment

In March 1996, two Bosnian Serb soldiers were transferred to The Hague pursuant to Rule 90 *bis* as it was believed that they could assist the Prosecutor in his investigation of the Srebrenica massacre.<sup>120</sup> Drazen Erdemovic was subsequently indicted by the Tribunal for participating in the summary execution of hundreds of unarmed Bosnian Muslims who had surrendered to Bosnian Serb forces after the fall of Srebrenica.<sup>121</sup> On 31 May 1996, Erdemovic pleaded guilty to committing a crime against humanity,<sup>122</sup> and was sentenced by Trial Chamber I to ten years imprisonment.<sup>123</sup> However, on 22 October 1997 the Appeals Chamber found that the guilty plea of Erdemovic was not informed and accordingly remitted the case to a Trial Chamber other than the one which sentenced him in order that he be given an opportunity to replead.<sup>124</sup>

<sup>115</sup> The Prosecutor v Delalic & Others, Case No. IT-96-21-I (21 March 1996).

<sup>116</sup> Alan Cowell, *Tribunal Files First Charges With Serbs As War Victims*, *The New York Times* (23 March 1996), at 1.

<sup>117</sup> 1996 Annual Report, *supra* note 18, para. 47.

<sup>118</sup> 1997 Annual Report, *supra* note 18, para. 35.

<sup>119</sup> *Ibid*, para. 38.

<sup>120</sup> 1996 Annual Report, *supra* note 18, para. 25.

<sup>121</sup> The Prosecutor v Erdemovic, Case No. IT-96-22-I (29 May 1996).

<sup>122</sup> When pleading guilty Erdemovic stated "...your honour, I had to do this. If I had refused I would have been killed together with the victims....when I refused they told me 'if you're sorry for them, line up with them and we will kill you too.'" *Croat soldier tells Tribunal of massacre at Srebrenica*, *International Herald Tribune*, 1 June 1996, at 1.

<sup>123</sup> The Prosecutor v. Erdemovic, Case No. IT-96-22-T, *Sentencing Judgement* (29 November 1996).

<sup>124</sup> The Prosecutor v. Erdemovic, Case No. IT-96-22-A, *Judgement* (22 October 1997)

The Appeals Chamber found that Erdemovic understood neither the nature of the charges against him nor the distinction between war crimes and crimes against humanity and the consequences of pleading guilty to one rather than the other. Neither the Trial Chamber nor his Defence Counsel had informed him that a crime against humanity was a more serious crime and that if he pleaded guilty to the alternative charge of a war crime he could expect a lighter punishment.<sup>125</sup>

#### L. The Foca Indictment

On 27 June 1996, the Tribunal indicted a group of eight Bosnian Serbs for the organised mass rape of Muslim women in the south-eastern Bosnian town of Foca from April 1992 to February 1993.<sup>126</sup> The confirmation of this indictment marked the first time that sexual assault had been treated separately as a war crime. According to the indictment, "several women were held in houses and apartments, which were run in the manner of brothels, by groups of mainly (Serb) paramilitary units," and in such places they were subjected to almost constant rape and sexual assaults, torture and other abuses. As a result of the sexual assaults "the physical and psychological health of many female detainees seriously deteriorated and many contemplated suicide."

#### M. The Kovacevic Indictment

On 13 March 1997, an indictment was confirmed against Simo Drljaca, Chief of the Public Security Station for the Prijedor municipality, and Milan Kovacevic, President of the Executive Board of the Prijedor municipality.<sup>127</sup> Both men were accused of complicity in genocide for crimes committed in the municipality between April 1992 and January 1993. To allow the arrest of the accused to occur, the confirming Judge ordered that the indictment not be disclosed to the public. On 10 July 1997, Kovacevic was apprehended by S-FOR forces in Prijedor and was immediately transferred to The Hague where he is currently awaiting trial. Drljaca was killed resisting apprehension.<sup>128</sup>

### VI. Concluding Remarks

During the first term of its existence the Tribunal has accomplished a great deal. It has evolved from a resolution of the Security Council into a fully functioning court. One trial has been completed and two are currently underway. Despite these achievements the Tribunal is far from fulfilling its mandate. Although twenty persons are currently in the Tribunal's custody, fifty-six indictees remain at large. Since it lacks authority over the territory of the former Yugoslavia in which the atrocities were committed and where most if not all the victims, witnesses, and perpetrators are residing, the Tribunal must rely on the cooperation of states in order to carry out investigations, subpoena witnesses and serve arrest warrants. At the Dayton Peace Conference in November 1995,

<sup>125</sup> *Idem.*

<sup>126</sup> The Prosecutor v Gagovic & Others, Case No. IT-96-23-I (27 June 1996).

<sup>127</sup> The Prosecutor v. Drljaca & Kovacevic, Case No. IT-97-24-I (13 March 1997)

<sup>128</sup> 1997 Annual Report, *supra* note 18, para. 49.

the governments of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia agreed to cooperate with the investigation and prosecution of war crimes. While the governments of Bosnia and Herzegovina and Croatia have lived up to this promise by enacting legislation enabling them to cooperate with the Tribunal, and have arrested and transferred indictees to the Hague, the government of the Federal Republic of Yugoslavia as well as the Bosnian Serb and Bosnian Croat authorities have all failed in varying degrees to cooperate with the Tribunal.<sup>129</sup> Most importantly they have failed to arrest indicted persons living within the territories under their control, many of whom have been accused of extremely serious crimes such as genocide, ethnic cleansing, mass rape and murder.

The disregard that the authorities of Republika Srpska have towards the Tribunal is exemplified by the President of the entity, Biljana Plavsic, who has stated:

The present position of Republika Srpska is that we are unwilling to hand over Dr. Karadzic and General Mladic for trial in The Hague as we believe that any such trial now falls outside the scope of the Tribunal's constitutional framework.<sup>130</sup>

If the Tribunal does not prosecute those responsible for the atrocities, it will not be able to deter would-be-perpetrators from committing further atrocities. Moreover, if individual perpetrators cannot be sentenced, then in the eyes of the victims responsibility for atrocities will rest with the different ethnic groups.<sup>131</sup> To exact retribution for the crimes committed against their people, the victims of the atrocities may take the law into their own hands. Thus, if the rule of law is not established in the former Yugoslavia, the circle of violence will continue.<sup>132</sup>

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<sup>129</sup> *Ibid*, para. 183-184

<sup>130</sup> *Ibid*, para. 185.

<sup>131</sup> See Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *Foreign Aff.* 112 (1993), at 112.

<sup>132</sup> In the view of the President of the Tribunal "revenge is the last resort of persons who are denied due process. As the history of past genocides illustrates, when there is no justice in response to the extermination of a people, the result is that victims are led to take the law into their own hands, both to exact retribution and to draw attention to the denied historical fact." 1997 Annual Report, *supra* note 18, para. 177.