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The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

Geoffrey R. Watson*

Happy Birthday, ICTY! I remember the birth of the International Criminal Tribunal for the Former Yugoslavia quite well because I was in the room for the big event. A guest of the U.S. delegation, I sat behind U.S. Representative Madeleine K. Albright in May, 1993, as she negotiated and voted for the establishment of the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. (That's me behind Secretary Albright in the CNN file footage, rocking from side to side like an expectant father, straining to get a better look at the proceedings.) Like any birth, this one had its share of labor pains, and like any newborn, this one – a piece of paper, the Statute of the International Criminal Tribunal – was an almost weightless little bundle, lacking definition but full of promise.

How the little one has grown! The Tribunal now employs over a thousand people, and its annual budget exceeds \$200 million.¹ As of this writing, thirty-four defendants have been tried for violations of the Tribunal's Statute, of whom sixteen have been convicted and sentenced, another twelve have been convicted and are currently appealing their convictions, another one has just been convicted but not yet appealed, and five have been acquitted. Eight other defendants, including former Serbian President Slobodan Milosevic, are currently being tried for various violations of international criminal law. Forty-five accused, including

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1. See *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 14 August 2002, A/57/150, available at <http://www.un.org/icty/rappannu-e/2002/index.htm> (last visited Feb. 23, 2003); see also U.N.G.A. Res. 56/247B (2002) (approving a revised budget of more than \$248 million gross, or \$223 million net, for 2002-03).

Milosevic, are currently imprisoned in the Tribunal's Detention Unit.² The perceived success of the ICTY, and that of its sister tribunal, the International Criminal Tribunal for Rwanda, helped pave the way for the new International Criminal Court.³

During its ten-year existence, the ICTY has produced an impressive body of jurisprudence on international humanitarian law and international criminal procedure. Its most important jurisprudential achievement has been to clarify that rape and other crimes of sexual violence can constitute genocide, torture, war crimes, or crimes against humanity.⁴ But the Tribunal has also had occasion to add to the law of the U.N. Charter; one of its first decisions pronounced on the validity of the Security Council resolution that gave it life.⁵ At the same time, the Tribunal has developed

2. See *The ICTY at a Glance, List of Detainees*, at <http://www.un.org/icty/glance/index.htm>.

3. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9. The Rome Statute entered into force on July 1, 2002. As of this writing, there are 87 parties to the Statute.

4. See *Prosecutor v. Kvočka*, Case No.: IT-98-30/1-T, Judgement, paras. 546-61, 2 Nov. 2001 (holding that rape can constitute torture); *Prosecutor v. Delalic*, Case No.: IT-96-21-T, Judgement, 16 November 1998 (torture); *Prosecutor v. Kunarac*, Case Nos.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 Feb. 2001 (holding that sexual enslavement can constitute a crime against humanity); *Prosecutor v. Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, *appeal dismissed* 21 July 2000 (violations of the laws and customs of war). The Rwanda Tribunal has made particularly important contributions to the development of the law on sexual violence. See *Prosecutor v. Akayesu*, No.: ICTR-96-4-A, Judgement, 1 June 2001 (genocide); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999).

The Tribunal Statute does list rape as a crime against humanity, but the Statute's definitions of war crimes and genocide make no mention of rape or sexual violence. Thus, as the Tribunal's first Prosecutor, Richard Goldstone, put it,

It fell to the United Nations tribunals for the former Yugoslavia and Rwanda to employ concepts such as torture and inhuman treatment in order to issue indictments against those accused of systematic mass rape in Bosnia and Rwanda. In was presumably in light of this experience that the Rome Statute for a permanent international criminal court (ICC) treats the subject of gender-related crimes appropriately for the first time in the history of modern humanitarian law.

Richard J. Goldstone, Book Review, 94 AM. J. INT'L L. 416 (2000) (reviewing THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* (1998)). Indeed, the Rome Statute's definition of crimes against humanity now covers not only rape but also "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other "sexual violence," and its definition of war crimes contains similar provisions. See Rome Statute, *supra* note 3, art. 7(1)(g) and art. 8(2)(b)(xxii).

5. See *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, *reprinted* in 35 I.L.M. 32, paras. 28-

its own judicial style, a curious hybrid between civil- and common-law legal systems. In both style and substance, then, the Tribunal has grown into something unique.

That is not to say that the Tribunal's youth was trouble-free. In its infancy, the Tribunal interpreted its Statute aggressively, brashly holding that Article 3 of the Tribunal's Statute – which criminalizes violations of the “laws and customs of war” – applies not just to international armed conflict, but also to internal armed conflict.⁶ Likewise, the young Tribunal struggled to find its judicial style, leaning toward a civil-law model as it eschewed plea bargains and permitted prosecutorial appeals of acquittals. Thankfully, in both style and substance, the Tribunal has achieved more of a balance over the years. This essay⁷ briefly addresses both facets – substantive and stylistic – of the Tribunal's development.

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The Tribunal's earliest decisions were characterized by a certain amount of *chutzpah*.⁸ One example was the Appeals Chamber's holding in *Prosecutor v. Tadic* that the U.N. Security Council had the authority to establish the ICTY. The Trial Chamber had taken the easy way out, holding that the Council's authority was a nonjusticiable political question, though also observing in lengthy *dicta* that the Council appeared to have acted reasonably.⁹ The Appeals Chamber took a different approach. It swept aside the justiciability objection in three short paragraphs, quoting from the opinion of the International Court of Justice in *Certain Expenses*:

It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.¹⁰

“This dictum,” the Appeals Chamber intoned, “applies almost literally to

48 (1996).

6. See *id.*, paras. 86-91.

7. The title of this essay derives from a study of a different jurist's legal evolution. See generally Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

8. As to which, see generally ALAN M. DERSHOWITZ, *CHUTZPAH* (1991).

9. See *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, *reprinted in* 35 I.L.M. 32, paras. 21-24 (1996).

10. *Id.* at para. 24 (quoting *Certain Expenses of the United Nations*, 1962 I.C.J. Reports 151, at 155 (July 20) (advisory opinion)).

the present case.”¹¹ Without further explanation, the Chamber declared that the validity of this exercise of the Security Council’s Chapter VII powers was not a political question.¹² This astonishing lack of analysis brings to mind Grant Gilmore’s crack about the methodology of common-law judges applying the doctrine of estoppel: “for reasons which the court does not care to discuss, there must be judgment for the plaintiff.”¹³

In assessing the validity of the Security Council resolution establishing the ICTY, the Appeals Chamber in *Tadic* was more garrulous but no less audacious. While affirming that the Council has broad discretion to determine whether there is a threat to the peace under Article 39 of the Charter, the Appeals Chamber went out of its way to make clear that this discretion is not absolute:

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).¹⁴

The Chamber also concluded that it had “incidental jurisdiction” to exercise judicial review over the Security Council resolution establishing the Tribunal.¹⁵

To be sure, the International Court of Justice has also intimated that it has a power of judicial review over Council resolutions, but in much more ambiguous and cautious terms. In *Certain Expenses*, the Court seemed to reject the notion of judicial review, finding no “procedure” in the “structure of the United Nations” for assessing the validity of the acts of other organs, and concluding that those organs must, in the first instance, “determine [their] own jurisdiction.”¹⁶ Its 1971 *Namibia* advisory opinion again

11. *Id.*

12. *See id.*, para. 25.

13. GRANT GILMORE, *THE DEATH OF CONTRACT* 64 (1974).

14. Prosecutor v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, reprinted in 35 I.L.M. 32, para. 28 (1996).

15. *See id.*, paras. 21-22.

16. *Certain Expenses*, *supra* note 10, 1962 I.C.J. at 168.

adopted an ambiguous stance, declaring that “[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned,” but proceeding to consider such “objections” anyway “in the course of its reasoning.”¹⁷ In *Libya v. United States*, the majority again shied away from exercising a power of judicial review over a Security Council resolution, but a number of concurring and dissenting opinions argued that the ICJ should consider whether the resolution was valid.¹⁸ Thus, the ICJ has been comparatively reluctant to rule on the constitutional validity of acts of other U.N. organs – in my view too reluctant¹⁹ – and it has never invalidated a resolution of the Security Council.²⁰

The Appeals Chamber in *Tadic*, by contrast, displayed no such reluctance; it went on for more than twenty paragraphs on its way to concluding, unsurprisingly, that the Council had authority under Chapter VII to establish the Tribunal. Furthermore, it is true that arbitral panels have often exercised the *compétence de la compétence* to examine the scope of their own jurisdiction, including sometimes the validity of the underlying arbitration agreement itself.²¹ As I have argued elsewhere, however, there is a difference between passing on the validity of a private arbitration agreement and passing on a decision of the U.N. Security Council.²²

17. Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 45 (June 21).

18. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 I.C.J. 114, 140, 156, 192-93, 196, 174-75 (Provisional Measures Order of April 14) (Shahabuddeen, J., concurring) (Bedjaoui, J., dissenting) (Ajibola, J., dissenting) (Weeramantry, J., dissenting).

19. See Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT’L L.J. 1, 1-14, 28-43 (1993) (arguing that the drafting history of the Charter suggests that it did not rule out all forms of judicial review) (arguing for a “Jeffersonian” model of judicial review).

20. For more on the World Court’s power of judicial review, see Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT’L L.J. 81 (1999); José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1 (1996); Watson, *supra* note 19; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993); Thomas M. Franck, *The “Powers of ‘Appreciation’: Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT’L L. 519 (1992).

21. See generally IBRAHIM F.I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION; COMPÉTENCE DE LA COMPÉTENCE* (1965).

22. Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT’L L. 687, 703 (1996) (“it is one thing to say that an arbitral panel may rule on its own jurisdiction and perhaps on the validity of an arbitration agreement between private parties; it is quite another to say that a

I'm not suggesting that the Appeals Chamber reached the wrong result, or even that it should have refrained from examining the Council resolution; but I am suggesting that the tone and length of the Chamber's opinion adds up to a much more aggressive approach than the World Court's own jurisprudence on the same subject. The Appeals Chamber wrote as if it were for the Tribunal to lead the way, when one might expect it to be the other way around; it is the ICJ, of course, that is the "principal judicial organ" of the United Nations.²³ Of course, there is precedent for a dialogue between U.N. organs and other subsidiary bodies in international law. As David Bederman points out, for example, there has been a productive "feed-back loop" between the International Law Commission and the ICJ, as when the ICJ made use of the draft rules on state responsibility in the *Case Concerning the Gabčíkovo-Nagymaros Project*,²⁴ and the ILC later made use of the ICJ's interpretation of the rules in its final draft of the rules.²⁵ And indeed, the ICJ has started to take note of ICTY precedent.²⁶ But the ICTY's early attitude toward the ICJ seemed to be more one of indifference or even disregard.

This attitude was especially apparent in the Appeals Chamber's 1997 judgment in *Tadic*.²⁷ The court had to decide whether there had been an international armed conflict in Bosnia & Herzegovina, and in particular whether the Army of the Serbian Republic of Bosnia and

subsidiary organ may pass on the validity of a resolution of the U.N. Security Council, the 'top dog' in international law.").

23. U.N. CHARTER, art. 92.

24. (*Hungary v. Slovakia*), 1997 I.C.J. 7, 56 (Sept. 25) (requiring that countermeasures be, among other things, "commensurate" with the original wrong).

25. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc> (last visited Mar. 28, 2003), reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), art. 51 (adopting the "commensurate" test); David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 821-22 (2002) (discussing the ICJ's role in the evolution of draft Article 51) (citing *Gabčíkovo-Nagymaros Project* (*Hung. v. Slov.*), 1997 I.C.J. REP. 7 (Sept. 25)).

26. See, e.g., *Case Concerning the Arrest Warrant of 11 April 2000* (*Congo v. Belgium*), Request for Provisional Measures (Dec. 8, 2000), Declaration Of Judge Van Den Wyngaert, 2000 I.C.J. REP. 182, 232 & n.15 (noting that several decisions of the ICTY and the Rwanda Tribunal tend to support the proposition that "there is a right and even a duty on States to prosecute" the most serious "core crimes" in international, such as genocide, crimes against humanity, and war crimes).

27. *Prosecutor v. Tadic*, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, reprinted in 36 I.L.M. 908 (1997). For a useful contemporaneous analysis of the holding, see generally Michael P. Scharf, *International Decisions*, 91 AM. J. INT'L L. 718 (1997).

Herzegovina/Republika Srpska (“VRS”) was sufficiently linked to the Federal Republic of Yugoslavia so as to establish an international conflict. Like the Trial Chamber before it, the Appeals Chamber found it useful to resort to the ICJ’s holding, in *Nicaragua v. United States*, that a state could incur international responsibility if it exercised a certain degree of control (“effective control,” the Court said at one point) over armed rebels fighting another state.²⁸ It is surprising enough that the ICTY found that *Nicaragua* was so central to the issue in *Tadic*; the question of Yugoslavia’s responsibility was not at issue in *Tadic*. As Professor (now Judge) Meron put it: “[C]onsider a conflict in a country where practically all the fighting is done by a foreign state, but where the rebels maintain their independence from the intervening power and do not satisfy the Nicaragua test. Could anyone seriously question the international character of such a conflict?”²⁹ Still, there is at the very least an analogy between imputation of state responsibility, at issue in *Nicaragua*, and whether an armed conflict is international or internal, at issue in *Tadic*.³⁰

But what’s most interesting for my purposes is what the Appeals Chamber said next: “The Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive.”³¹ At the ripe old age of six, in a case not

28. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 62, 64-65 para. 109 (June 27) (requiring a certain degree of “dependence on the one side and control on the other”); *id.* (finding “no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf”); *id.*, para. 115 (requiring “effective control”).

29. Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 AM. J. INT’L L. 236, 241 (1998). *Cf. also* Prosecutor v. Tadic, Case No.: IT/32/Rev. 10, Trial Chamber, Judgement, Separate and Dissenting Opinion of Judge McDonald, 7 May 1997, para. 34 *reprinted in* 186 I.C.M. 908, 979 (concluding that the conflict was international even under an “effective control” test, and that in any case the test “is not a necessary element for a finding of an agency relationship.”).

Or, as the commentary to the ILC rules on state responsibility put it, “The Tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in [*Tadic*] concerned not responsibility but the applicable rules of international humanitarian law.” Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Comm’n at its 53d sess. (2001), at 106-07, in Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10, chp.IV.E.2)*. Indeed, the provisions on attribution in the ILC rules do not address the characterization of an armed conflict as international or internal.

30. *Cf.* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905 (2002) (drawing on state responsibility doctrine in the course of analyzing the modern law of self-defense).

31. Prosecutor v. Tadic, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, para. 115.

involving state responsibility, the ICTY declared “unpersuasive” a significant component of a leading World Court decision on state responsibility in connection with the use of military force! To be sure, ICJ decisions are binding only on the parties,³² and a robust dialogue between international institutions is generally welcome.³³ Still, the ICTY’s boldness is striking, all the more so given that some of its criticism of *Nicaragua* seems overdrawn. The Appeals Chamber attacked the *Nicaragua* test on the grounds that the requisite standard of control should “vary” according to the circumstances of the case.³⁴ But the *Nicaragua* decision does not advocate a single, rigid standard; it speaks variously of “control and dependency,” a certain “degree of control,” and “effective control.” The Appeals Chamber nonetheless plunged ahead, next criticizing the ICJ’s test as “at variance with international judicial and State practice” requiring only “a lower degree of control.”³⁵ Again, this criticism presupposes that *Nicaragua* fixed an “exclusive” and “all-embracing” test, as the Chamber insisted; in fact, *Nicaragua* might fairly be criticized for the opposite – for waffling on precisely what the test is.

Even as it pronounced on the validity and wisdom of Security Council Resolutions and World Court decisions, the young International Criminal Tribunal also adopted a generally broad view of its own jurisdiction. In his report accompanying the Tribunal’s Statute, the U.N. Secretary-General cautioned that because the Statute would apply retroactively, it should include only those provisions of humanitarian law that had “beyond any doubt” passed into customary international law, so as not to offend the principle *nullum crimen sine lege*.³⁶ But in the jurisdiction phase of *Tadic*, the Appeals Chamber held that Article 3 of the Statute – which covers “violations of the laws or customs of war” – applied not only to international armed conflict, but also to internal armed conflict.³⁷ Indeed, the Tribunal went further, holding that Article 3 operates as a residual

32. Statute of the International Court of Justice, 59 Stat. 1055, Art. 59 (1945).

33. See *Remarks of Richard Bilder*, 96 PROCEEDINGS OF THE AM. SOC. OF INT’L L. 369, 373 (Mar. 16, 2002) (suggesting that disagreement and discourse between international tribunals may be a “good thing”); cf. Bederman, *supra* note 25, at 819 (describing a “feedback loop” between the ILC and the ICJ).

34. See *Prosecutor v. Tadic*, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, para. 117.

35. *Id.*, para. 124.

36. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, 3 May 1993, para. 34; 32 I.L.M. 1163, 11702 (1993).

37. See *Prosecutor v. Tadic*, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *reprinted in* 35 I.L.M. 32, para. 137 (1996).

clause, covering “all serious violations” of humanitarian law not covered elsewhere in the Statute.³⁸ It is right and good that humanitarian law extend to internal conflict; but it is a more difficult question whether state practice has “beyond any doubt” extended that law to civil war. The ICTY cited no case of a war-crimes prosecution, under either the Hague Regulations or Additional Protocol II to the Geneva Conventions, arising out of a civil war. To be sure, Tadic was on notice that his conduct was criminal; but *ex post facto* doctrine is designed not only to give the accused notice, but also to prevent arbitrary use of power by government – to “ensure that the sovereign will govern impartially and that it will be perceived as doing so.”³⁹

In some of its early decisions on substantive criminal law, too, the Tribunal staked out an aggressive – or at least pro-prosecution – posture. In *Prosecutor v. Erdemovic* (1997), a 3-2 majority of the Appeals Chamber held (over vigorous dissent) that duress could not be a complete defense to homicides that constitute crimes against humanity or war crimes.⁴⁰ The majority acknowledged that national legal systems take different approaches to the question, and in particular that civil-law systems tend to permit a duress defense, but the court rested its conclusion on “our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.”⁴¹ Similarly, the ICTY has taken a relaxed view of the *mens rea* of complicity, holding that it suffices for the Prosecution to prove knowledge of the principal’s planned acts, not to show that the accomplice also shared the principal’s illicit purpose.⁴²

38. *Id.*, para. 92. In the same decision, interestingly, the Tribunal construed Article 2 – on grave breaches of the Geneva Convention – as applying only in international armed conflict. See Watson, *supra* note 23, at 709 (approving this holding); *but cf.* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 68-70 (1999) (suggesting that, rather than construing Article 3 too broadly, the Chamber interpreted Article 2 too narrowly).

39. *Dobbert v. Florida*, 432 U.S. 282, 307-08 (1977) (Stevens, J., dissenting); see also Watson, *supra* note 23, at 717-18; M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 290-91 (1993).

40. *Prosecutor v. Erdemovic*, Case No.: IT-96-22, Judgement, 7 Oct. 1997, para. 19; *Prosecutor v. Erdemovic*, Case No.: IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 Oct. 1997, paras. 32-89. For the dissenting opinions, see *Prosecutor v. Erdemovic*, Case No.: IT-96-22, Separate and Dissenting Opinion of Judge Cassese, 7 Oct. 1997; *id.*, Separate and Dissenting Opinion of Judge Stephen, 7 Oct. 1997.

41. See *Prosecutor v. Tadic*, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *reprinted in* 35 I.L.M. 32, para. 88.

42. See *Prosecutor v. Furundzija*, Case No.: IT-95-17/1, Judgement, 10 Dec. 1998,

Again, these decisions may be correct, but they all point toward an expansive view of the prosecution's (and the court's) powers.

Has the Tribunal's aggressiveness been justified? Certainly the Tribunal has managed to silence some of the critics who initially dismissed it as a cynical cover for the international community's failure to take effective action in the former Yugoslavia.⁴³ The ICTY's fulsome, self-assured jurisprudence might have helped establish itself as a serious international institution. But the ICTY's bluster might have also damaged its credibility. Despite the busy proceedings in the Hague, violations of international humanitarian law proceeded apace in the former Yugoslavia, leading some to argue that the ICTY has not deterred crime.⁴⁴ Consider also the experience of an institution like the European Court of Human Rights, which adopted a cautious approach to its own jurisdiction and authority in its early years. In its formative years, the European Court did not automatically jump to find a state in violation of the European Convention on Human Rights in any given case, and the Court gained respect because of its perceived willingness to hear both sides.⁴⁵ As a result, the European Court is now "unique among international bodies because it routinely imposes sanctions on governments for violating the human rights of their nationals."⁴⁶

There are signs that the ICTY's jurisprudence is changing, that it is starting to resemble that of its more restrained colleague in Strasbourg. In

paras. 236-49; *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1, Judgement, 24 Mar. 2000, para. 162; *Prosecutor v. Kunarac*, Case No.: IT-96-23, Judgement, 22 Feb. 2001, para. 392; *Prosecutor v. Vasiljevic*, Case No.: IT-98-32, Judgement, 29 Nov. 2002, para. 71.

43. Cf. David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 7-8 (Fall 2002) (asserting that "the ICTY's achievements have exceeded the boldest hopes of its creators" and that its "rise to international significance has defied [its] critics").

44. See, e.g., Paul Williams, *Why the Tribunal has Failed to Deter International Crime*, Remarks at The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade; Col. Michael Newton, *Should the United States Join the International Criminal Court*, 9 U.C. DAVIS J. INT'L L. & POL. 35, 42 (2002) ("As far as I saw, the ICTY existence and its jurisdiction had no deterrent effect whatsoever on Milosevic").

45. Cf. Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 220 (1993) (asserting that the European Court has "earned acceptance" as the "authoritative interpreter of binding legal rules"); *id.* at 223-24 (urging a cautious approach to expansion of the human rights regime to the new democracies of Central Europe). Cf. Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39, 44-45 (2000) (commenting on the European Court's "increasing" legitimacy).

46. FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 481 (1996).

general, the ICTY seems to have grown more sensitive to the rights of the accused – rights that are guaranteed in human rights law. One example is the Tribunal’s greater willingness to permit provisional release of defendants pending trial. Initially the Tribunal was very reluctant to permit release, fearing that the accused would flee. The Trial Chamber’s original version of Rule 65(B), the rule governing provisional release, placed a heavy burden on the defendant to justify release to demonstrate that the defendant would not flee, posed no danger to others, and – most notoriously – that there were “exceptional circumstances” justifying provisional release. Under this standard, only four defendants obtained provisional release.⁴⁷ In 1999 the Tribunal’s Rules Committee amended this rule by removing the requirement that the defendant show “exceptional-circumstances.”⁴⁸ This change followed the death of two defendants who had been in custody while awaiting trial. According to Judge Wald, the judges of the ICTY became concerned about the “depressive effects” of prolonged pretrial detention.⁴⁹ Those effects could be especially troubling at the ICTY, whose trials have been notoriously long and drawn-out. The new, more relaxed rule on provisional release seems more consistent with human rights law, which holds that “it shall not be the general rule that persons awaiting trial shall be detained in custody.”⁵⁰ Thanks to the rule change, the Tribunal’s practice on pretrial release has relaxed – a little. At this writing, eleven defendants are on release, awaiting trial.

The Tribunal’s growing receptivity to plea-bargaining is another

47. See *Prosecutor v. Kordic and Cerkez*, Case No.: IT-95-14/2-T, Order on Motion of the Accused Mario Cerkez for Provisional Release, 14 Sept. 1999; *Prosecutor v. Kupreskic*, Case No.: IT-95-16-T, Decision on the Motion of Defense Counsel for Drago Josipovic, 9 May 1999; *Prosecutor v. Simic*, Case No.: IT-95-9-PT, Decision on Provisional Release of the Accused, 26 Mar. 1998; *Prosecutor v. Dukic*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Trial 24 Apr. 1996.

48. See generally Matthew M. DeFrank, Note, *ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, 80 TEX. L. REV. 1429, 1430-31 (2002).

49. Patricia Wald & Jenny Martinez, *Provisional Release at the ICTY: A Work in Progress*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 233 (Richard May et al. eds., 2001).

50. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(3), 999 U.N.T.S. 171, 175. The Covenant adds, however, that release “may be subject to guarantees to appear for trial.” *Id.* Cf. also *id.*, Art. 14(2) at 176 (“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty by law”); *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (declaring a presumption of innocence).

“signpost on the road”⁵¹ to a more balanced jurisprudence. The Statute of the Tribunal contains no provision explicitly authorizing plea-bargaining, and the ICTY initially omitted any authorization for plea-bargaining from its own rules.⁵² In this, as in other things, the early ICTY leaned more toward civil-law than common-law practice. But the ICTY slowly has come to embrace plea-bargaining as a necessary component of a court with a heavy workload and a complex body of governing law.⁵³ The ICTY has been willing not just to entertain guilty pleas, but also to convict in accordance with plea agreements between the prosecution and the defense, a practice recently formalized in new Rule 62-ter.⁵⁴

Overall, the development of plea-bargaining at the ICTY has been a good thing. Plea bargaining has encouraged defendants to cooperate with the Tribunal on cases against other defendants, and has not resulted in outrageously lenient sentences.⁵⁵ There is justifiable concern that the ICTY’s process for plea-bargaining needs improvement to ensure that

51. *Allegheny Coll. v. Nat’l Chautauqua County Bank of Jamestown*, 159 N.E. 173, 175 (N.Y. 1927) (Cardozo, J.) (speaking of “signposts on the road” to the adoption of the doctrine of promissory estoppel).

52. *See Prosecutor v. Erdemovic*, Case No.: IT-96-22-T, Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 Oct. 1997, para. 10.

53. *See, e.g., Prosecutor v. Erdemovic*, Case No.: IT-96-22-T, Sentencing Judgement, 5 Mar. 1998, paras. 8-11 (convicting a defendant on the basis of a guilty plea); *Prosecutor v. Jelusic*, Case No.: IT-95-10, Judgement, 14 Dec. 1999, paras. 127, 138 (convicting in accordance with a guilty plea, but according the plea relatively little weight in sentencing); *Prosecutor v. Jelusic*, Case No.: IT-95-10, Judgement, 5 July 2001 (affirming most but not all findings of guilt below, and affirming the 40-year sentence); *Prosecutor v. Todorovic*, Case No.: IT-95-9/1, Sentencing Judgement, 31 July 2001, paras. 7-17 (convicting a defendant in accordance with a plea agreement); *Prosecutor v. Sikirica*, Case No.: IT-95-8, Sentencing Judgement, 13 Nov. 2001, paras. 17-39 (convicting in accordance with plea agreements); *Prosecutor v. Simic*, Case No.: IT-95-9/2-S, Sentencing Judgement, 17 Oct. 2002, paras. 9-23 (convicting in accordance with a plea agreement).

ICTY Rule 62-bis permits (but does not require) the Trial Chamber to convict based on a “voluntary,” unequivocal guilty plea that is supported by a “sufficient factual basis.” *ICTY Rules of Procedure and Evidence*, U.N. Doc.: IT/32/Rev.24, 11 and 12 July 2002, Rule 62-bis. *See generally* Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 107-26 (2002) (tracing the development of the ICTY’s practice in accepting guilty pleas); Michael Bohlander, *Plea Bargaining Before the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 151 (Richard May et al. eds., 2001).

54. Rule 62-ter, entitled “Plea Agreement Procedure,” provides that the prosecution and defense “may” agree that the accused will plead guilty and that the prosecutor “shall” apply to amend the indictment, or recommend (or not object to) a sentence or sentencing range. Section (B) of the rule also provides that the Trial Chamber “shall not be bound” by any such agreement.

55. *See* Coombs, *supra* note 53, at 147-48.

guilty pleas are made knowingly and without coercion,⁵⁶ but the Tribunal's requirement of full disclosure of evidence to the defense – like the requirement that the trial court find that the plea is voluntary and supported by evidence – ameliorates this concern to a fair extent.⁵⁷

The Tribunal has also moved toward a more “common-law style” in another area: the consideration and exclusion of evidence. The ICTY has from time to time claimed that it adheres neither to the civil-law approach, which favors admissibility of all relevant evidence, including hearsay, and the common-law approach, which imposes stricter limits on the introduction of evidence in general and hearsay in particular. As one Trial Chamber put it,

neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.⁵⁸

In practice, as Sean Murphy has observed, “the trial chambers have shown little tendency to exclude evidence, including hearsay evidence.”⁵⁹

As with plea-bargaining, the Tribunal's approach to evidence is changing. Whereas the *Tadic* trial mired itself in hours of oral testimony about the history of the former Yugoslavia, the ICTY is now more apt to rely on written summaries of such testimony by using techniques such as judicial notice and written stipulation.⁶⁰ While some ICTY trials continue to take several years, generally ICTY proceedings are becoming more efficient. Since ICTY judges serve as the triers of fact, it is unlikely that the ICTY will ever exclude evidence as ruthlessly as common-law judges

56. See Sienho Yee, *The Erdemovic Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263, 268-69 (1997).

57. See Coombs, *supra* note 53, at 147.

58. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 80 (1999) (citing Prosecutor v. Blaskic, Case No.: IT-95-14-T, Trial Chamber, Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability (Jan. 1998)).

59. Murphy, *supra* note 58, at 80.

60. See ICTY Rule 94 (judicial notice) & 94-bis (written agreement of the parties); Murphy, *supra* note 58, at 81.

do, but at least there are indications that the ICTY is sensitive to the need to streamline its proceedings. As the ICTY has acknowledged, the ICTY statute, like human rights law generally, requires that the accused “be tried without undue delay.”⁶¹

It is harder to generalize about the direction of the ICTY’s substantive jurisprudence. The Tribunal has not recently had occasion to pass on the validity of any Security Council resolutions, but it still seems quite willing to take on the ICJ. Presented with a chance to reconsider its holding that *Nicaragua* is “unpersuasive,” the Appeals Chamber in *Prosecutor v. Aleksovski* (2000) reaffirmed its earlier decision, finding no “coherent reason” to alter its view.⁶² More recently, in the *Celebici* case (2001), the Appeals Chamber acknowledged that it “cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern.”⁶³ Nonetheless, the Appeals Chamber once again sustained its earlier holding that the ICJ was wrong in *Nicaragua*,⁶⁴ and the Chamber rejected any notion that the ICTY occupies a lower rung on the ladder of international law than the ICJ:

[T]his Tribunal is an autonomous international judicial body, and although the ICJ is the “principal judicial organ” within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.⁶⁵

Thus the Tribunal has not lost all its *chutzpah*. In the end, this aspect of the Tribunal’s jurisprudence is welcome. To be sure, international law already suffers from a surfeit of conflicting rules and institutions. But it’s hard to see any practical downside to the ICTY’s declaration of judicial

61. Statute of the International Criminal Tribunal, Art. 21(4)(c); International Covenant on Civil and Political Rights, Art. 14(3)(c). See *Prosecutor v. Kovacevic*, No.: IT-97-24, Trial Chamber, Decision on Prosecutor’s Request to File an Amended Indictment, 5 Mar. 1998, paras. 8, 12 (refusing prosecutor’s request to file an amended indictment, partly on speedy trial grounds).

62. *Prosecutor v. Aleksovski*, No.: IT-95-14/1, Appeals Chamber, Judgement, 24 Mar. 2000, para. 134 (reaffirming the “overall control” test of *Tadic*). See also *Prosecutor v. Kordic*, No.: IT-95-14/2, Trial Chamber, Judgement, 26 Feb. 2001, paras. 112-13 (applying the “overall control” test).

63. *Prosecutor v. Delalic*, No.: IT-96-21, Appeals Chamber, Judgement, 20 Feb. 2001 para. 24 (quoting Separate Opinion of Judge Shahabuddeen, appended to Decision, *Le Procureur v. Laurent Semanza*, ICTR, Case No.: ICTR-97-20-A, App. Ch., 31 May 2000, para. 25).

64. See *id.*, paras. 10-27.

65. *Id.*, para. 24 (footnotes omitted).

independence, and there's an obvious upside: the enrichment of international legal discourse. I have argued elsewhere against the notion that the ICJ should enjoy judicial supremacy along the lines of a domestic constitutional court. Instead I have argued for a "Jeffersonian" model of judicial review, in which the Court's decisions can rest alongside other, competing views.⁶⁶ The ICTY's approach to *Nicaragua* is consistent with this approach. If the ICTY is wrong about *Nicaragua*, its opinion will be rejected by other international tribunals, such as the International Criminal Court and the ICJ itself, and in the fullness of time the issue will sort itself out. And if the ICTY is right, then so much the better.

*

Thus the ICTY heads into its second decade with a judicial style that is gradually growing more balanced. It has loosened its restrictions on pretrial detention, embraced plea-bargaining, placed some restraints on the presentation of evidence, and sped up its trial process. At the same time, it has provided generally fair trials, and those trials have resulted in an impressive array of convictions for crimes of staggering violence, including crimes of sexual violence. On the whole, the ICTY has had a pretty good first ten years.

At this symposium on "ICTY at Ten," so graciously hosted by the New England School of Law, I wondered aloud whether one day we might be celebrating a fiftieth birthday for the ICTY. Yes, Tribunal officials have said that the Tribunal will wrap up its work in a few more years, but the ICTY's Statute is not time-limited; it covers international crimes committed in the former Yugoslavia "since" 1991.⁶⁷ Still, there is a new International Criminal Court preparing to take the reins, and for now an uneasy peace stretches across the former Yugoslavia. We all certainly hope that there will be no new mass atrocities for the Tribunal to adjudicate, and thus that the Tribunal will eventually run out of things to adjudicate. Accordingly, we find ourselves in the peculiar position of hoping for the demise of the thing whose birthday we now celebrate.

But I don't want to end on that rather discordant note. Consider this instead: the Tribunal was only two years old when it passed judgment on its creator, the U.N. Security Council. At age four, the Tribunal took on its aging cousin, the International Court of Justice. Imagine what kind of trouble the Tribunal might dig up in its teenage years!

66. See Watson, *supra* note 19, at 39-43.

67. See Statute of the International Criminal Tribunal, Art. 1.
