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International Criminal Courts and Fair Trials: Difficulties and Prospects

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International Criminal Courts and Fair Trials: Difficulties and Prospects

Jacob Katz Cogan[†]

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I think we have to distinguish between the theoretical and the practical. I believe that when [Chief Prosecutor] Justice Arbour starts her investigation [into the events in Kosovo], she will because we will allow her to. It's not Milosevic that has allowed Justice Arbour her visa to go to Kosovo to carry out her investigations. If her court, as we want, is to be allowed access, it will be because of NATO.

- Jamie Shea, NATO Spokesperson, May 16, 1999, responding to a question regarding the International Criminal Tribunal for the Former Yugoslavia's jurisdiction over NATO actions in Kosovo.¹

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1. Press Conference given by Jamie Shea, NATO Spokesperson, and Major General Walter Jertz, SHAPE Spokesperson (May 16, 1999), available at <http://www.nato.int/kosovo/press/p990516b.htm>.

I. INTRODUCTION

There has been relatively little interest in the rights of the accused before international criminal courts.² This can be explained, in part, by the unsavory background of a large number of the persons accused and the severity of the crimes alleged, as well as by overwhelming concern for the rights of the victims.³ It also can be explained by the reversal, in the international context, of the typical left/right domestic political alignment on prosecutorial prerogatives.⁴ Proponents of the creation of a permanent international institution devoted to the prosecution of genocide, war crimes, and crimes against humanity come mostly from the political left, the domain of the so-called “soft-on-crime” liberals who tend to think more about the rights of the accused.⁵ In their bid for an effective court, they have, contrary to type, taken a position in favor of a strong prosecutor—a stance in tension with the rights of the accused. On the other hand, the opponents of international criminal tribunals, or at least the International Criminal Court (ICC), usually come from the political right, hardly the haven of the Alan Dershowitzes of the world. Their background makes them, in general, less sensitive to defendants’ rights, and their goal, in any case, is preventative, not ameliorative. Lack of interest in the rights of the accused can also be ascribed to the attraction, for advocates, detractors, the media, and academics, of other important questions raised by international criminal law. For example, significant disagreement exists about whether the international criminal process (or a trial at all) is the best means to achieve justice for these sorts of crimes;⁶ whether the United

2. These courts are, presently, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). I speak here, as well, of the future International Criminal Court (ICC). I do not discuss the possible future tribunals for Cambodia and Sierra Leone.

3. See, e.g., Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 INT’L LAW. 7 (2000); Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 77 (Herman A.M. von Hebel et al. eds., 1999) [hereinafter REFLECTIONS ON THE ICC].

4. See Henri Astier, *Rights of the Despised*, AM. PROSPECT, Aug. 14, 2000, at 30. *But cf.* Bruce Broomhall, Lawyers Committee for Human Rights, Letter to the Editor, AM. PROSPECT, Sept. 11, 2000, at 6.

5. NGOs have been unusually silent with regard to the rights of defendants before international courts. Some have considered the issue, often under the rubric of making these courts effective. See *Pre-Trial Rights in the Rules of Procedure and Evidence*, INT’L CRIM. COURT BRIEFING SERIES (Lawyers Comm. for Hum. Rts., New York, N.Y.), Feb. 1999; AMNESTY INT’L, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: TRIALS AND TRIBULATIONS, ¶ 1.2 (1998); LAWYERS COMM. FOR HUM. RTS., FAIRNESS TO DEFENDANTS AT THE INTERNATIONAL CRIMINAL COURT: PROPOSALS TO STRENGTHEN THE DRAFT STATUTE AND ITS PROTECTION OF DEFENDANTS’ RIGHTS (1996); see also LAWYERS COMM. FOR HUM. RTS., WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE (2000). As a consequence, the main advocate for the rights of the accused has been the International Criminal Defence Attorneys Association. E.g., Elise Groulx, Presentation on the Rights of the Accused Before the ICTY (Nov. 7-8, 1998), available at <http://www.hri.ca/partners/aiad-icdaa/reports/belgrade.htm>.

6. See, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365 (1999); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000).

States should sign⁷ and ratify⁸ the Rome Statute of the International Criminal Court,⁹ whether the future permanent court should have jurisdiction over nationals of non-States-Parties;¹⁰ and how the substantive criminal law of the future court and the current ad hoc tribunals should be defined.¹¹ Finally, the absence of interest in defendants' rights can be attributed to the probable assumption that any international criminal tribunal created by the efforts of so many thoughtful people, modeled on Western legal systems, and run by upstanding individuals, will, of course, adhere to the highest standards of propriety and fairness.¹² For these reasons, the question "Can international criminal courts provide defendants with fair trials?" is one that has barely been posed, let alone answered.¹³

7. The United States signed the Rome Statute on December 31, 2000, the last day possible for doing so. See Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

8. See, e.g., Written Statement of Lee A. Casey & David B. Rivkin, Jr. before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, (July 23, 1998), available at 1998 WL 12762551 [hereinafter Casey & Rivkin, Foreign Relations Statement]; Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855 (1999); COUNCIL ON FOREIGN RELATIONS, TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS AS PRESIDENTIAL SPEECHES (1999) available at <http://www.cfr.org/public/pubs/CriminalCourtCPI.html>; Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 119 (Sarah B. Sewall & Carl Kaysen eds., 2000) [hereinafter THE UNITED STATES AND THE ICC]; Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995); Scott W. Andreasen, Note, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697 (2000).

9. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

10. See, e.g., Casey & Rivkin, Foreign Relations Statement, *supra* note 8; Eve La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction*, 46 NETH. INT'L L. REV. 1 (1999); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 219 (Dinah Shelton ed., 2000); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States*, in THE UNITED STATES AND THE ICC, *supra* note 8, at 213.

11. See, e.g., MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR (1999); 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); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000); Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?*, 19 N.Y. L. SCH. J. INT'L & COMP. L. 413 (2000); Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335 (2000); Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EUR. J. INT'L L. 172 (1999).

12. Of course, the discussion in this Article should not be taken as a negative commentary on the motivations or capabilities of the advocates of, or current or future participants in, the international criminal tribunals.

13. On the right to a fair trial generally in international law, see David Harris, *The Right to Fair Trial in Criminal Proceedings as a Human Right*, 16 INT'L & COMP. L.Q. 352 (1967). There are a few pieces that focus on the general question of fair trials in connection with the ad hoc tribunals and the future ICC. E.g., James Sloan, *The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look*, 9 LEIDEN J. INT'L L. 479 (1996); Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. ARMED CONFLICT L. 45 (1998); Michail Wladimiroff, *Rights of Suspects and Accused*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 415 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Vincent M. Creta, Comment, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of*

Once raised, however, the centrality of the question to the enterprise of international criminal justice cannot be doubted, and rarely is. If trials are unfair, or perceived to be unfair, international criminal courts—the two ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the future permanent International Criminal Court (ICC)—might quickly lose their legitimacy. Worse still, the entire enterprise of justice for these types of heinous crimes, whether in international courts, domestic courts, or otherwise, might be dealt a serious blow. As Richard Goldstone, first Chief Prosecutor for the ad hoc tribunals, has commented, “Whether there are convictions or whether there are acquittals will not be the yardstick [of the ICTY]. The measure is going to be the fairness of the proceedings”¹⁴

Yet, there are additional, sometimes countervailing, considerations that make the concept of fair trials particularly complex for international criminal courts. One of these is accountability. The extreme character of the crimes alleged before international criminal courts makes the case for accountability stronger than in domestic prosecutions. Added to the heightened influence of accountability is the enduring pertinence of state sovereignty. While the tribunals mark an historic encroachment on sovereignty, there remain strong and legitimate interests in maintaining many of the powers and prerogatives of states. These state interests (national security, most obviously) are often in tension with fair trial standards. In turn, the absence of a strong community of “watchdog” observers for fair trial proceedings serves to underpin these powerful interests. Thus, the realm of international criminal justice is distinguished from domestic criminal justice not simply because accountability and sovereignty weigh heavier in this context, but also because of the absence of an effective counterweight to check these interests. So while the idea of fair trials is hardly controversial in and of itself, the application of this idea to international crimes in international settings is more complex.

The fair trial question can be approached in at least two ways.¹⁵ First, are the substantive rights accorded to the accused adequate? This approach focuses on the rights delineated in the tribunals’ statutes, rules of procedure and evidence, and case law—for example, the right to confront witnesses or

Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 20 HOUS. J. INT’L L. 381 (1998); Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT’L LEGAL PERSP. 111 (1998). On how increasing international law-enforcement cooperation may have an impact on the rights of the accused in national courts, see Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT’L & COMP. L. 555 (2000); and Robert J. Currie, *Human Rights and International Mutual Legal Assistance: Resolving the Tension*, 11 CRIM. L. F. 143 (2000).

14. Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT’L L. 519 n.37 (1997) (quoting Chief Prosecutor Richard Goldstone). See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., ¶ 106, U.N. Doc. S/25704 (1993), 32 I.L.M. 1163, 1185 [hereinafter Secretary-General’s Report] (“It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”).

15. This categorization does not include the accusation, made by some, that the ad hoc tribunals, particularly the ICTY, are inherently political and unfair. For an example of this point of view, see Michael Mandel, *Milosevic Has a Point*, GLOBE & MAIL (Toronto), July 6, 2001, at A15.

the right to counsel.¹⁶ The answer to this aspect of the fair trial question is complicated by the unique structures of these courts, which are cobbled together from the civil law and common law legal systems.¹⁷ Furthermore, there are inherent difficulties in prosecuting these types of crimes, which, according to some,¹⁸ might call for extraordinary trial procedures, at least from the perspective of domestic legal norms.¹⁹

A second approach to the problem of fair trials asks, instead, whether these international courts have the independence and coercive powers necessary to ensure fair trials, regardless of the sufficiency of the paper rights accorded the accused in the tribunals' statutes. For example, can these courts make certain that the accused is able to obtain the evidence and witnesses necessary for a serious defense?²⁰ Or do the courts' judges have the independence necessary to withstand political pressure from the states on which they depend?²¹ In other words, despite the good intentions of the architects of these statutes, and the rights they formalistically contain, might these courts still lack certain essential capacities that criminal courts require in order to fulfill their functions satisfactorily?

It is this second crucial, but often overlooked, aspect of the fair trial problem that I would like to take up here. A review of tribunal case law and past practice indicates that international criminal tribunals, as presently

16. Some of these issues are noted briefly in José E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2061-68 (1998). Useful commentary on fair trial rights in the Rome Statute appears in William A. Schabas, *Article 67: Rights of the Accused*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 845 (Otto Triffterer ed., 1999).

17. See Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 848-50 (2000); Panel Discussion: *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 251-56 (1999) (comments of Christopher L. Blakesley).

18. See, e.g., *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1985-93 (2001).

19. There have been scattered articles dealing with particular substantive aspects of the fair trial right in the context of international criminal law. On confrontation, see Natasha A. Affolder, *Tadic, the Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445 (1998); Christine M. Chinkin, Editorial Comment, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997); Monroe Leigh, Editorial Comment, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996); Monroe Leigh, Editorial Comment, *Witness Anonymity is Inconsistent with Due Process*, 91 AM. J. INT'L L. 80 (1997); and Sara Stapleton, Note, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L L. & POL. 535 (1999). On the right to counsel, see Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21 (2000). On proceedings in absentia, see Daniel J. Brown, *The International Criminal Court and Trials in Absentia*, 24 BROOK. J. INT'L L. 763 (1999); and Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998). On the privilege against self-incrimination, see Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998). On the admission of evidence, including hearsay, and the standard of proof beyond a reasonable doubt, see Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725 (1999). On search and seizure, see George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323 (2001). On fairness and speedy trials, see Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569 (2000). For case studies of the fair trial right in national legal systems, see *THE RIGHT TO A FAIR TRIAL* (David Weissbrodt & Rüdiger Wolfrum eds., 1997).

20. See *infra* Part IV.

21. See *infra* Part V.

constituted, are limited in their ability to provide defendants with fair trials. Indeed, even if the statutory rights accorded the accused and the positive pronouncements made by these courts are consonant with fair trial standards,²² shortcomings persist because the courts lack the requisite power, or its functional equivalent, to make those substantive rights real. In short, the disjunction between authority and control, common to international institutions, is too great to allow for consistently fair criminal adjudication. Whether the structural limitations on the tribunals are fatal, or whether their detrimental effects can be abated, remains to be seen.

Part II of this Article identifies the basic fair trial rights at risk. Part III begins to explain why this may be so by describing how international criminal tribunals obtain the essentials of their existence through state cooperation. Parts IV and V explore how this cooperation regime has affected the ability of the ICTY and the ICTR to provide defendants with fair trials. Part VI evaluates whether the ICC is an improvement and outlines a number of possible ways to counter the fair-trial-limiting tendencies that plague international tribunals.

II. FAIR TRIAL STANDARDS

In order to know whether we should worry at all about fair trials in international criminal courts, we must first determine the standard by which these trials should be judged.²³ This is not as straightforward as one might think. Part of the difficulty results from the *sui generis* nature of these courts. They are not national courts, to which international conventions would more clearly apply. Nor do they replicate the rights or rules of any single legal system. The difficulties are compounded for the ad hoc tribunals. Their statutes contain no choice of law provisions, similar to article 38 of the Statute of the International Court of Justice or to those that appear in some national constitutions, such as South Africa's,²⁴ which detail the sources of law for judges to look to when interpreting fair trial rights. These difficulties give rise to tricky interpretive questions for lawyers, judges, and commentators.²⁵

Though panels of the ad hoc tribunals applied divergent approaches to the interpretation of fair trial rights early on,²⁶ they have recently opted for a

22. Cf. Decision as to Admissibility, *Naletilic v. Croatia*, Application no. 51891/99, European Court of Human Rights, May 4, 2000, ¶ 1(b) ("Involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence.").

23. For a general discussion, see CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 25-27, 42-44 (2001).

24. S. AFR. CONST. sec. 39.

25. See Claire Harris, *Precedent in the Practice of the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 341 (Richard May et al. eds., 2001) [hereinafter ESSAYS ON ICTY PROCEDURE AND EVIDENCE].

26. Compare Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Aug. 10, 1995, ¶¶ 18-30, available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm> (adopting the "object and purpose" approach of article 31 of the Vienna Convention on the Law of Treaties in an interpretation of article 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. The Trial Chamber categorically distinguished case law that interpreted parallel fair trial provisions in two international

technique that takes the practice of national courts and regional human rights tribunals as a baseline. This approach was endorsed in a decision of the *Delalic* trial chamber,²⁷ and elaborated in the *Kupreskic* trial chamber judgment.²⁸ And though the ICTY refuses to adopt a strict test, chambers, including the Appeals Chamber, have consistently looked to the practice of national and regional courts when interpreting international fair trial rights.

Article 21 of the Rome Statute of the International Criminal Court is an improvement in this regard, as it designates the “applicable law” to be utilized there.²⁹ First, judges are to look to the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence; then, “where appropriate, [to the] applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;” and finally, “[f]ailing [all] that, [to the] general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”³⁰ Judges “may also apply principles and rules of law as interpreted in [the Court’s] previous decisions.”³¹

Thus, the Rome Statute’s provisions and the practice of the international tribunals require these courts to aspire to the highest standards set by international human rights treaties, customary international law, and general principles of law.³² Policy considerations bolster this conclusion, as it would

human rights conventions, article 14 of the International Covenant on Civil and Political Rights, and article 6 of the European Convention on Human Rights), *with* Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Aug. 10, 1995, *available at* <http://www.un.org/icty/tadic/trialc2/decision-e/50810pmn.htm> (“[T]he general principle enunciated by the [European Court of Human Rights] . . . [provides] clear guidance as to what are internationally recognised standards regarding the rights of the accused.”).

27. Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through to “M,” *The Prosecution v. Delalic*, Case No. IT-96-21-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Apr. 28, 1997, ¶ 27, *available at* <http://www.un.org/icty/celebici/trialc2/decision-e/70428PM2.htm> (“[D]ecisions on the provisions of the International Covenant of Civil and Political Rights . . . and the European Convention on Human Rights . . . have been found to be authoritative and applicable.”).

28. Judgement, *The Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Jan. 14, 2000, ¶¶ 537-542, *available at* <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>, *appeal dismissed in part and allowed in part on other grounds*, Appeal Judgement, *The Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 23, 2001, *available at* <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>.

29. Rome Statute, *supra* note 9, art. 21.

30. *Id.* art. 21(1). It is unclear whether domestic case law can be considered under the Article 21(1)(c) rubric “general principles of law derived by the Court from national laws of legal systems of the world.”

31. *Id.* art. 21(2). Article 21 also provides that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.” *Id.* art. 21(3).

32. *Accord* Decision on Preliminary Motions, *The Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Nov. 8, 2001, ¶ 38, *available at* <http://www.un.org/icty/milosevic/decision-e/011108e.htm>.

be inconceivable that an international tribunal (especially one trying such serious crimes) would be held less stringently to human rights norms than national legal systems.

This is of some importance for the determination of what constitutes a fair trial in the situations described herein, because the courts' statutes, not surprisingly, contain lacunae and provisions that are susceptible to differing interpretations and applications. Thus, while the statutes of all three courts require "fair trials," and specify certain rights of the accused as well,³³ it is not always evident from the texts what a fair trial entails or how those rights should be applied. The Rome Statute, for instance, guarantees to the accused the right "to have adequate time and facilities for the preparation of the defence" and "to obtain the attendance and examination of witnesses on his or her behalf."³⁴ No mention is made, specifically, of the right to procure evidence, though the word "facilities" has been interpreted by one commentator to mean "documents, records, etc. necessary for preparation of the defence,"³⁵ and the Statute does make provision for the accused to request the Pre-Trial Chamber to issue orders and other measures to ensure cooperation "necessary to assist the person in the preparation of his or her defence."³⁶ No mention is made, either, of the principle of "equality of arms," though this, too, is assumed to be incorporated into the Rome Statute's guarantee of a fair trial,³⁷ in part because the ICTY has recognized it in its own decisions. Thus, the Appeals Chamber explained in the *Aleksovski* case, citing a European Court of Human Rights decision, that "each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."³⁸ We know, as well, from the tribunals' statutes and case law, that judicial independence is a crucial component of a fair trial before international criminal courts.³⁹

33. See Statute 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, Art. 21, *annexed to* Secretary-General's Report, *supra* note 14, 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, annex, Art. 20, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute]; Rome Statute, *supra* note 9, art. 67.

34. Rome Statute, *supra* note 9, art. 67(1)(b), (e). These provisions mirror those in the ICTY and ICTR Statutes.

35. Schabas, *supra* note 16, at 855 (quoting MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 256 (1993)).

36. Rome Statute, *supra* note 9, art. 57(3)(b).

37. See Schabas, *supra* note 16, at 852.

38. Decision on Prosecutor's Appeal on Admissibility of Evidence, *The Prosecutor v. Aleksovski*, Case No. I-95-14/1-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Feb. 16, 1999, ¶ 24, *available at* <http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm> (citing *Dombo Beheer B.V. v. The Netherlands*, 18 E.H.R.R. 213, 230 (1993)); see also *Foucher v. France*, 25 E.H.R.R. 234, 247 (1997) ("[A]ccording to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent"); *Bulut v. Austria*, 24 E.H.R.R. 84, 103-04 (1996) (same).

39. See *Judgement, The Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, July 21, 2000, ¶¶ 177-191, *available at* <http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf>.

In model domestic judicial systems, these three procedural/structural rights—the right to prepare a defense, equality of arms, and judicial independence—are all more or less taken for granted. As will become evident, in international criminal courts at present, such an assumption would be unwarranted.

III. THE COOPERATION REGIME

Why these fair trial rights may be at risk can be appreciated by recognizing one fact: international criminal courts are dependent on other organizations—states, most importantly—to give them things. These things—money, evidence, access to evidence, defendants, witnesses, witness protection, court personnel, prison facilities, and the enforcement of orders and judgments—are all necessary for the courts' success, and, indeed, without them, the courts could not operate or exist.⁴⁰

Though by now the two ad hoc tribunals to varying degrees have all of the staples and thus have the look and feel of courts, international justice requires more than just the basics.⁴¹ It is not enough that the ICTY and the ICTR, for example, have modern courtrooms, first-class prosecutors, and websites with all the works. They must also be able to get the necessities of criminal justice (evidence, witnesses, etc.) when and where they need them, and they must do so in ways that do not compromise their integrity. The same will be true of the future ICC.⁴²

40. See, e.g., KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* (2000); STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 216-26 (1997); Irene Gartner, *The Rules of Procedure and Evidence on Co-operation and Enforcement*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 423 (Horst Fischer et al. eds., 2001) [hereinafter *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES*]; Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (1999); Göran Sluiter, *Co-operation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES*, supra, at 681; Bert Swart & Göran Sluiter, *The International Criminal Court and International Criminal Cooperation*, in *REFLECTIONS ON THE ICC*, supra note 3, at 91. See generally DAVID MCCLEAN, *INTERNATIONAL JUDICIAL ASSISTANCE* (1992); M. Cherif Bassiouni, *Policy Considerations on Inter-state Cooperation in Criminal Matters*, in 2 *INTERNATIONAL CRIMINAL LAW* 3 (M. Cherif Bassiouni ed., 2d ed. 1999).

41. This is not to say that the ICTY and the ICTR are on the same footing; they are not. Individuals, NGOs, and states have taken a greater interest in the ICTY, for a variety of reasons. This has led, most obviously, to a marked difference in the quality of the personnel and resources available to the two ad hoc tribunals. See Steven Edwards, *Rwanda Tribunal Coming Undone: "Concern for Fairness": Night-and-Day Contrast with Balkan War-Crimes Inquiry*, NAT'L POST (Toronto), Mar. 5, 2001, at A1.

42. For discussions and critiques of the cooperation regime instituted in the Rome Statute, see Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM. RTS. Q. 404, 424-26 (2000); Hans-Peter Kaul & Claus Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT'L HUMANITARIAN L. 143, 157-70 (1999); Leila Nadya Sadat & S. Richard Carden, *The International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 444-47 (2000); and Swart & Sluiter, supra note 40, at 681. For the negotiating history and a review of the relevant provisions of the Rome Statute, see Claus Kreß et al., *Part 9: International Cooperation and Judicial Assistance*, in *COMMENTARY ON THE ROME STATUTE*, supra note 16, at 1045-68; and *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 270-94, 305-17 (Roy S. Lee ed., 1999).

This is a difficult proposition given the position of these courts within the structure of the international system. The tribunals must rely on the kindness of strangers—"international cooperation" and "judicial assistance" are the terms of art—for all their needs. "We depend on the goodwill of the parties," noted Christian Chartier, then-ICTY spokesperson.⁴³ When an international court's jurisdiction is consensual, as in the case of the International Court of Justice and similar tribunals, cooperation and judicial assistance problems are significantly reduced, though not eliminated.⁴⁴ International criminal tribunals, in contrast, deal, by definition, with non-consensual parties (be they the person under indictment, the accused's country of origin, or third-parties that have information relevant to the case),⁴⁵ and, in spite of various statutory obligations,⁴⁶ those parties are likely to be less inclined to cooperate willingly or fully, for the best or for the worst of reasons.⁴⁷

It is not just the recalcitrance of interested states that hampers international criminal courts; the very statutes and rules that created these courts also restrict their operation. Take, for example, the ICTY Statute. Article 29 provides that "States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."⁴⁸ This article is binding on states, the ICTY being a creation of the Security Council pursuant to Chapter VII of the U.N. Charter. But the ICTY's rules curtail the Article 29 obligation by creating loopholes for national security information (Rule 54bis) and materials provided to the court on a confidential basis (Rule 70).⁴⁹ Thus, states can restrict and tailor their cooperation while upholding their Charter obligations. The same "give-with-one-hand-and-take-with-the-other" structure pervades the Rome Statute and its Rules.⁵⁰ Indeed, it was only

43. Quoted in Mark Rice-Oxley, *Tribunal Depends on the Kindness of Foes*, NAT'L L.J., June 3, 1996, at A10.

44. Cf. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 32 (Apr. 9) ("[Certain documents] were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined to answer certain questions relating to them. It is not therefore possible to know the real content of these naval orders.").

45. This is true even if, in the case of the International Criminal Court, the state is a state party to the Rome Statute. On defiance of the ICTY, see Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in *THE UNITED STATES AND THE ICC*, *supra* note 8, at 51, 56-57.

46. See *infra* notes 48-50.

47. For an example of domestic legal impediments to cooperation, see *In re Ntakirutimana*, No. CIV. A. L-98-43, 1998 WL 655708 (S.D. Tex. 1998), *aff'd sub nom. Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000); and *In re Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997). See also Göran Sluiter, *To Cooperate or Not to Cooperate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal*, 11 LEIDEN J. INT'L L. 383 (1998). For a discussion of implementing legislation and international cooperation, see Bruce Broomhall, *The International Criminal Court: Overview, and Cooperation with States*, in *ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION* 44 (1999); and Göran Sluiter, *Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation*, 45 NETH. INT'L L. REV. 87 (1998).

48. ICTY Statute, *supra* note 33, art. 29; accord ICTR Statute, *supra* note 33, art. 28.

49. International Criminal Tribunal for the Former Yugoslavia: Rules of Procedure and Evidence, Rules 54bis, 70, U.N. Doc. IT/32/Rev.21 (2001); accord International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, Rules 56, 70, U.N. Doc. ITR/3/Rev.10 (2001).

50. See Rome Statute, *supra* note 9, pt. 9; Finalized Draft Text of the Rules of Procedure and

with these enfeebling concessions that states were willing to accede to the “binding obligation” to cooperate with the ad hoc tribunals and the future ICC. It is the Catch-22 that is at the heart of international criminal justice.

For the post-World War II criminal tribunals, cooperation was less of an issue because the Allies’ victory and political will secured access to the relevant evidence and witnesses.⁵¹ Contemporary tribunals differ in this critical respect.⁵² The importance of international cooperation for the continued existence of international criminal courts is evident in the debate over U.S. ratification of the Rome Statute. Advocates of the ICC know that it is crucial that the United States, with its diplomatic, intelligence, and military resources, be willing to assist the Court, even if it refuses to ratify the Statute. Anti-Court activists, for the same reason, have pushed legislation that would prohibit the United States from giving such assistance.⁵³ Without cooperation, particularly U.S. cooperation, international criminal courts, in the words of Judge Antonio Cassese, “turn out to be utterly impotent.”⁵⁴

Commentators are well aware of the difficulties the cooperation regime creates for effective prosecutions; less appreciated is how the same problems affect the rights of the accused. Discussed below are two types of examples drawn from the experiences of the ad hoc tribunals that involve the fair trial rights noted above: restrictions on the ability of the accused to mount a defense, and political influence of states on the work of these courts.

IV. DIFFICULTIES: LIMITATIONS ON THE DEFENSE

In several ways, the cooperation regime limits the ability of the accused to gain access to the materials that might be necessary to put on a reasonable defense. These limitations, which do not weigh equally on the prosecution,

Evidence, ch. 11, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

51. See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 204 (2000); ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* 57-58, 60 (1987); JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 450 (1999); MINOW, *supra* note 6, at 48; PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951*, at 41, 45 (1979); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 *INTERNATIONAL CRIMINAL LAW* 3, 6-7 (M. Cherif Bassiouni ed., 2d ed. 1999); cf. Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 *HARV. HUM. RTS. J.* 281, 293 (1994) (book review) (“[T]hose who want to imitate Nuremberg in Yugoslavia have deeply mistaken what the Nuremberg trial was all about.”).

52. Accord James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 *VAND. J. TRANSNAT'L L.* 405 (2001).

53. See An Act Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 2002, Pub. L. No. 107-77, § 630 (2001); American Servicemembers’ Protection Act of 2001, H.R. 1794/S. 857, 107th Cong. §§ 4-7 (2001). *But cf.* American Citizens’ Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong. § 7 (2001) (“Notwithstanding any other law, while the United States is not a party to the Rome Statute, the United States may provide support and assistance, as appropriate, on a case-by-case basis to the International Criminal Court for the prosecution of accused war criminals, particularly those accused of crimes against United States servicemembers, United States citizens, or citizens of countries friendly to, or allied with, the United States when the President determines that doing so would serve important United States interests.”).

54. Antonio Cassese, *Reflections on International Criminal Justice*, 61 *MOD. L. REV.* 1, 10 (1998).

skew international criminal trials against the defendant in ways that can infringe upon the fundamental fairness of the proceedings.

A. *Evidence Gathering: Blaskic*

Take evidence gathering and the case of Tihomir Blaskic.⁵⁵ Blaskic is a Bosnian Croat who was a colonel and then a general in the Croatian Defense Council (HVO), the Bosnian Croat army, during the Bosnian war. In the spring of 1993, Croat forces in central Bosnia attempted to rid the area of non-Croats, and in what came to be called ethnic cleansing, massacred hundreds of Muslim civilians in the Lasva Valley—most infamously in the village of Ahmici. Blaskic was the commander of the HVO's Central Bosnia Operative Zone at the time. Subsequently, in 1995, he was indicted by the ICTY, under the theory of command responsibility, of crimes against humanity, grave breaches of the Geneva Conventions of 1949, and war crimes. Blaskic surrendered himself to the Tribunal in 1996, and, after a long trial, he was convicted and sentenced to forty-five years imprisonment on March 3, 2000.⁵⁶ Days later, Croatian authorities announced that they had found documents that would exonerate him.⁵⁷

That these new, perhaps exculpating, documents appeared when they did, or that they appeared at all, was simply fortuitous—the lucky result of one man's demise. Under the presidency of Franjo Tudjman, Croatia had spurned repeated requests for cooperation from the ICTY. Indeed, the ICTY's most important judicial decision on state cooperation resulted from Tudjman's refusal to accede to a subpoena during the *Blaskic* trial itself, which might have revealed these documents.⁵⁸ That changed with Tudjman's death in December 1999 and the election of a new coalition government, headed by the Social Democratic Party and the Croatian Social Liberal Party, early in 2000.⁵⁹ That spring, just as the *Blaskic* verdict was handed down, Croatian authorities began searching the archives of the Croatian Information Service

55. My preliminary thoughts on this issue, up through the trial and sentencing of Tihomir Blaskic, appear in Cogan, *supra* note 42, at 404. The discussion here extends the story into the appeals stage of the *Blaskic* case.

56. See Judgement, *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Mar. 3, 2000, available at <http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf>.

57. Ivica Racan, the Croatian prime minister, said: "A few days ago we came upon extensive documents related to the war in Bosnia which shed new light on the events raised at Blaskic's trial before the tribunal in The Hague." *ICTY Expects Croatia to Cooperate*, GLOBAL NEWS WIRE, Mar. 8, 2000, available at LEXIS, News Library, GNW File.

58. See *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 29, 1997, available at <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html> [hereinafter *Blaskic Subpoena Decision*]. For a discussion, see Cogan, *supra* note 42, at 415-23; Peter Malanczuk, *A Note on the Judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on the Issuance of Subpoenae Duces Tecum in the Blaskic Case*, 1 Y.B. INT'L HUMANITARIAN L. 229 (1998); and Yves Nouvel, *Précisions sur le pouvoir du Tribunal pour l'ex-Yugoslavie d'ordonner la production des preuves et la comparution des témoins: L'Arrêt de la Chambre d'appel du 29 octobre 1997 dans l'affaire Blaskic*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 157 (1998).

59. See *Croatia Vows to Cooperate with Tribunal*, L.A. TIMES, Apr. 16, 2000, at A14; *Croatian Parliament Backs Cooperation with UN War Crimes Tribunal*, AGENCE FRANCE-PRESSE, Apr. 15, 2000, available at 2000 WL 2774533; see also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 19-22 (2001).

and Tudjman's presidential palace. There they found an archive of war that stretched back years and years. "We have [until now] tried unsuccessfully to gain access to government archives," Anto Nobile, one of Blaskic's attorneys, noted at the time.⁶⁰ Croatia soon handed over many, but by no means all, of the documents to the Tribunal, including transcripts of taped conversations Tudjman had with his top generals about the events in the Lasva Valley.⁶¹

According to Blaskic's defenders, the documents show that he was framed by Tudjman and other Croatian political elites for the crimes committed in Ahmici so as to divert suspicion from the real culprits—the Croatian political operatives who gave the orders, the Bosnian Croat political leadership who supervised the killings and other crimes, and the Bosnian Croat "military police" who committed the atrocities.⁶² In other words, if all of this is true, then Blaskic neither gave the orders to commit the massacre nor failed to give orders to prevent the slaughter that took place in Ahmici, and thus should not be held responsible for those events, as he was at trial.⁶³ Blaskic's appeal is pending,⁶⁴ and it may be that the Appeals Chamber reviewing the Trial Chamber judgment in light of the new evidence will exonerate Blaskic, reduce his sentence, or order that he be re-tried.⁶⁵

Even if his appeal fails, Blaskic's case demonstrates the inherent constraints on the accused in putting on a defense before international

60. Eugene Brcic, *New War Crime Case Evidence Found*, AP ONLINE, Mar. 6, 2000, available at 2000 WL 15786528.

61. See *Constitution Watch: Croatia*, E. EUR. CON. REV., Summer 2000, at 10, 10-12. In January 2001, the Croatian government announced its intention to seal the unreleased tapes and transcripts of Tudjman's conversations with his aides for thirty years. Carla Del Ponte, the Chief Prosecutor of the ICTY, had sought uninhibited access to the tapes because they might reveal evidence relevant to ongoing and future investigations, including, potentially, investigations that would implicate top Croatian officials, some now considered war heroes, and others still active in politics and in the military, of committing or covering-up war crimes. The Croatian government did say that it would allow access to the tapes on a case-by-case basis. See *UN Court Requests Controversial Tapes*, AP WORLDSTREAM, Jan. 8, 2001; Eugene Brcic, *Croatia to Seal Tudjman Tapes*, AP ONLINE, Jan. 11, 2001, available at 2001 WL 3651585; see also *Croatia's PM Admits Problems in Cooperation with ICTY*, AGENCE FRANCE-PRESSE, Dec. 11, 2000, available at 2000 WL 24779139.

62. See Chris Stephen, *British Officers "Clear" Bosnian War Criminal*, SCOTLAND ON SUNDAY (Edinburgh), Apr. 9, 2000, available at 2000 WL 4011654; *Del Ponte in Croatia amid Fresh Claims over War Crimes Suspects*, AGENCE FRANCE-PRESSE, May 24, 2000, available at 2000 WL 2800630; Paul Lashmar, Cabell Bruce & John Cookson, *The Tudjman Tapes: Secret Recordings Link Dead Dictator to Bosnia Crimes*, INDEPENDENT (London), Nov. 1, 2000, at 16.

63. One of the politicians who apparently was in the direct chain of command was Dario Kordic, vice-president of the Bosnian Croat state during the war. Kordic was convicted recently in The Hague as a co-perpetrator, rather than under the theory of command responsibility. See *Judgement, The Prosecutor v. Kordic*, Case No. IT-95-14/2, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Feb. 26, 2001, ¶¶ 829, 834, 840-41, available at <http://www.un.org/icty/kordic/trial/judgement/kor-tj010226e.pdf>; see also Marlise Simons, *UN Tribunal Convicts Bosnian Croat Leader; Tudjman Ally is Handed 25-Year Sentence*, N.Y. TIMES, Feb. 27, 2001, at 5. Croatia is arrested and has issued arrest warrants for the persons who are now suspected of committing the Ahmici massacre. See *Snjezana Vukic, Croatia Arrests War Crime Suspects*, AP ONLINE, Sept. 12, 2000, available at 2000 WL 26674877.

64. Because the new documents must be translated, and because there are so many of them, the Appeals Chamber has suspended the usual briefing schedule. No argument date has yet been set. See *Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Findings, The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Sept. 26, 2000, available at <http://www.un.org/icty/blaskic/appeal/decision-e/00926PN313780.htm>.

65. See *Kupreskic*, supra note 28, pt. X.

criminal courts. Evidence necessary to prove innocence or to assert a legal defense may be beyond the reach of the court, either because of the court's inability to successfully coerce the evidence-holder or because the evidence-holder deliberately seeks to influence the outcome of the trial by manipulating the release of probative information.⁶⁶

B. *Evidence Gathering: Todorovic*

The *Todorovic* case provides another example of the difficulties of cooperation in the area of evidence gathering. Stevan Todorovic is a Bosnian Serb from Donja Slatina in the municipality of Bosanski Samac in northern Bosnia.⁶⁷ According to Tribunal prosecutors, Todorovic was appointed the Chief of Police for Bosanski Samac after Serb forces occupied that area in April 1992.⁶⁸ A 1995 ICTY indictment alleged that, in this capacity, Todorovic, together with four others charged in the same indictment, "committed, planned, instigated, ordered or otherwise aided and abetted a campaign of persecutions and 'ethnic cleansing' and committed other serious violations of international humanitarian law directed against Bosnian Croat, Bosnian Muslim and other non-Serb civilians residing in the Bosanski Samac and Odzak municipalities in the territory of Bosnia and Herzegovina."⁶⁹ In particular, Todorovic was charged with twenty-seven counts of war crimes, crimes against humanity, and grave breaches of the Geneva Conventions of 1949, for acts, by his own hand or by virtue of his superior authority, of persecution (including detention and forced deportation), murder, beating, torture, and sexual assault, which allegedly took place from April 1992 through December 1993.⁷⁰ Todorovic was arrested by the multinational "stabilization force" in Bosnia (SFOR) at the Tuzla Air Force Base on September 27, 1998, and transferred to The Hague for trial.

Ever since, Todorovic has claimed that he had been kidnapped from his home in Serbia by bounty hunters hired by SFOR (perhaps even in accord with the ICTY's Office of the Prosecutor)⁷¹ and then taken across the border into Bosnia where SFOR arrested him.⁷² This, he said, was an illegal form of

66. *Accord* Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 LAW & CONTEMP. PROBS. 153, 161 (2001).

67. *See* Second Amended Indictment, *The Prosecutor v. Simic*, Case No. IT-95-9, International Criminal Tribunal for the Former Yugoslavia, ¶ 17, available at <http://www.un.org/icty/indictment/english/sim-2ai981211e.htm>.

68. *Id.*

69. *Id.* ¶ 13.

70. *Id.* ¶¶ 29-47.

71. Todorovic's testimony in regards to his kidnaping was given on November 24, 1999, and a transcript thereof is available. *See* <http://www.un.org/icty/transe9/991124MH.htm>. In December 2000, a Serbian court convicted nine Serbs of abducting Todorovic in exchange for \$22,700. *See* Katarina Kratovac, *Nine Serbs Convicted of Kidnapping*, AP ONLINE, Dec. 11, 2000, available at 2000 WL 30321027. The nine men's sentences ranged from six months to eight-and-a-half years. *See Nine Who Handed Over Bosnian Warcrimes Suspect Sent to Jail*, AGENCE FRANCE-PRESSE, Dec. 11, 2000, available at 2000 WL 24779222.

72. Dragan Nikolic, another ICTY defendant, has made a similar claim, which is being litigated presently. *See* Mirko Klarin, *The Tribunal's "Illegal Detention,"* IWPR TRIBUNAL UPDATE 222, May 21-26, 2001, available at http://www.iwpr.net/index.pl?archive/tri/tri_222_1_eng.txt; Misha Savic, *Lawyer Disputes Bosnian Serb Arrest*, AP ONLINE, May 6, 2000, available at 2000 WL 19888475; Jerome Socolovsky, *War Crime Suspects Claiming Illegal Abductions: Eichmann Case*

apprehension under international law, and on October 21, 1999, he filed a "Motion for an order directing the Prosecutor to forthwith return [him] to the country of refuge."⁷³ On November 24, 1999, Todorovic filed a "notice of Motion for Judicial Assistance," which sought information, including documents and testimony, from SFOR and other military forces operating in Bosnia, which he hoped to use as evidence in support of his October 21 motion.⁷⁴ Also for the same purpose, Todorovic, on December 6, 1999, submitted a motion to compel the Prosecutor to produce certain relevant documents. Three months later, on March 7, 2000, the Trial Chamber, hoping to avoid ruling on Todorovic's politically delicate request for assistance from SFOR, granted the much less controversial December 6 motion, and the Tribunal's Appeals Chamber affirmed this ruling.⁷⁵ The Office of the Prosecutor, however, lacked nearly all of the documents requested; additionally, SFOR refused to hand over any information voluntarily. Briefs were then submitted on Todorovic's still-pending request for documents from SFOR, and oral argument was held July 25, 2000.⁷⁶ On October 18, 2000, the Trial Chamber granted Todorovic's motion for judicial assistance⁷⁷ and

Studied, SAN ANTONIO EXPRESS-NEWS, Aug. 5, 2000, at 23A.

73. Whether such a scheme does violate international law and whether the accused's return to his country of origin would be an appropriate remedy for such a violation are difficult issues and have not been decided by the ICTY or the ICTR. There are some decisions, such as the *Eichmann* and *Alvarez-Machain* cases, on point. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Attorney-General v. Eichmann*, 45 P.M. 3 (1965), 36 I.L.R. 5, 233 (D.C. Jm. 1961), *aff'd*, 16 P.D. 2003, 36 I.L.R. 277 (S. Ct. 1962) (Isr.). One ICTY Trial Chamber has decided that surreptitiously "luring" a person to a location where he was then arrested did not violate the statute. See *Decision on the Motion for Release by the Accused Slavko Dokmanovic*, *The Prosecutor v. Dokmanovic*, Case No. IT-1995-13a-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 22, 1997, ¶ 88. The Appeals Chamber denied Dokmanovic leave to appeal this decision.

74. These motions were made before, in March 1999, and were rejected, without prejudice, by the Trial Chamber because Todorovic had failed to offer prima facie evidence of his abduction. See *Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorovic*, *The Prosecutor v. Simic*, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Mar. 25, 1999, available at <http://www.un.org/icty/simic/trialc3/decision-e/90325MS56368.htm>; see also *Transcript of Proceedings*, *The Prosecutor v. Simic*, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Mar. 4, 1999, available at <http://www.un.org/icty/transe9/990304MH.htm>. Subsequently, the Appeals Chamber affirmed the Trial Chamber's interpretation of the burden of proof on this issue. See *Decision on Appeal by Stevan Todorovic Against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III*, *The Prosecutor v. Todorovic*, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 13, 1999, available at <http://www.un.org/icty/simic/appeal/decision-e/910137239576.htm>.

75. See *Order on Defence Requests for Judicial Assistance for the Production of Information*, *The Prosecutor v. Simic*, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Mar. 7, 2000, available at <http://www.un.org/icty/simic/trialc3/order-e/00307PN511789.htm>; *Decision on Application for Leave to Appeal Against Trial Chamber Decision of 7 March 2000*, *The Prosecutor v. Simic*, Case No. IT-95-9, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, May 3, 2000, available at <http://www.un.org/icty/simic/appeal/decision-e/00503DE312854.htm>.

76. For a transcript of this argument, see *Transcript of the Argument*, *The Prosecutor v. Simic*, July 25, 2000, at 746, available at <http://www.un.org/icty/transe9/000725MH.htm>.

77. See *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others*, *The Prosecutor v. Simic*, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 18, 2000, available at <http://www.un.org/icty/simic/trialc3/decision-e/01018EV513778.htm>. The Trial Chamber's decision was based on an application of the *Blaskic Subpoena Decision*, *supra* note 58, and analogous decisions of other ICTY trial chambers. See *Decision on Defence Motion to Issue Subpoena to United Nations Secretariat*, *The Prosecutor v. Kovacevic*, Case

ordered SFOR, the North Atlantic Council, and the states participating in SFOR to provide documents related to Todorovic's apprehension. The Trial Chamber also issued a subpoena to U.S. General Eric Shinseki, who was the commanding general of the Tuzla base when Todorovic was apprehended, requiring him to testify about Todorovic's arrest.⁷⁸

The importance of the Trial Chamber's decision for its ability to conduct fair trials was spelled out in Judge Patrick Robinson's separate opinion:

No legal system, whether international or domestic, that is based on the rule of law, can countenance the prospect of a person being deprived of his liberty, while its tribunals or courts remain powerless to require the detaining or arresting authority to produce, in proceedings challenging the legality of the arrest, material relevant to the detention or arrest; in such a situation, legitimate questions may be raised about the independence of those judicial bodies.⁷⁹

Judge Robinson's logic, however, failed to convince the ICTY's Prosecutor and the states subject to the Trial Chamber's orders. On October 25, 2000, the Prosecutor filed an appeal, and on November 2, Canada, Denmark, Germany, Italy, the Netherlands, NATO, Norway, the United Kingdom, and the United States filed requests for review of the Trial Chamber's decision. A few days later, on November 6, France did the same. On November 8, the ICTY's Appeals Chamber stayed the Trial Chamber's orders and scheduled dates for written submissions and oral argument, the latter of which was eventually postponed until January 10, 2001.⁸⁰ The United States, in its legal brief, asserted that the Tribunal did not have the ability to summon General Shinseki and that, in any case, "compelling operation security concerns" precluded disclosure.⁸¹ The brief also told the judges, not so subtly, that their decision "will be of utmost significance to the future of the tribunal, and its relationship with those engaged in the apprehension of persons indicted for war crimes."⁸²

Before the Appeals Chamber could hear the appeal, Todorovic, on December 13, 2000, formally entered into a plea bargain with tribunal prosecutors.⁸³ According to the plea, prosecutors agreed to withdraw twenty-

No. IT-97-24, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, July 1, 1998, available at <http://www.un.org/icty/kovacevic/trialc2/decision-e/80701SP2.htm>; Decision on Ex Parte Application for the Issuance of an Order to the European Community Monitoring Mission, The Prosecutor v. Kordic, Case No. IT-95-14/2, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, May 3, 2000, available at <http://www.un.org/icty/kordic/trialc/decision-e/00503PNS13632.htm>; Decision Refusing Defence Motion for Subpoena, The Prosecutor v. Kovacevic, Case No. IT-97-24, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, June 23, 1998, available at <http://www.un.org/icty/kovacevic/trialc2/decision-e/80623SP2.htm>.

78. See Jerome Socolovsky, *Tribunal Subpoenas NATO Gen.*, AP ONLINE, Oct. 20, 2000, available at 2000 WL 28614085.

79. Separate Opinion of Judge Robinson, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, The Prosecutor v. Simic, Case No. IT-95-9, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 18, 2000, ¶ 7, available at <http://www.un.org/icty/simic/trialc3/decision-e/01018EVT13779.htm>.

80. See Decision and Scheduling Order, The Prosecutor v. Simic, Case No. IT-95-9, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 18, 2000, available at <http://www.un.org/icty/simic/appeal/decision-e/01108JA314063.htm>.

81. See Jerome Socolovsky, *U.S. Opposes Tribunal's Subpoena*, AP ONLINE, Dec. 6, 2000, available at 2000 WL 30319246.

82. *Id.* (quoting the U.S. brief).

83. See Jerome Socolovsky, *Bosnian Serb Suspect Pleads Guilty*, AP ONLINE, Dec. 13, 2000,

six of the twenty-seven counts filed and Todorovic agreed to plead guilty to the remaining count—that of persecution, a crime against humanity—and to withdraw all of his outstanding motions, including those for judicial assistance.⁸⁴ Prosecutors also agreed to recommend a sentence of no more than twelve-years imprisonment, instead of the life sentence allowable under the Tribunal's statute.⁸⁵ Deputy Chief Prosecutor Graham Blewitt said, rather unconvincingly, that “[a]bsolutely nothing has been sacrificed.”⁸⁶ But Blewitt acknowledged that there had been a recent decline in the number of arrests by SFOR and that “[he] would not be surprised if [the *Todorovic* case] had something to do with it.”⁸⁷ Unlike in *Blaskic*, the detrimental consequences of a defendant's inability to secure evidence did not fully materialize in the *Todorovic* case, but the lesson is just as valid.

C. Evidence Gathering: Lockerbie

Blaskic and *Todorovic* demonstrate the impact of non-cooperation on the possibility of conducting fair trials for international criminal courts. Though in a Scottish court in The Netherlands, not in an international court, strictly speaking, the recent *Lockerbie* trial presents a variation of the difficulties of evidence gathering: *partial* cooperation. In *Lockerbie*, a Libyan Central Intelligence Agency double agent named Abdul Majid Giaka was the Crown's star witness.⁸⁸ He promised to link the two accused to the bomb that blew up Pan Am 103. For ten years, the CIA refused to release classified cables regarding its relationship with Giaka. In June 2000, a month after the trial began, the CIA allowed the prosecution to see twenty-five of these cables, but the defense only received redacted copies.⁸⁹ In August, the defense learned of the discrepancy and demanded that it, too, receive the unedited versions.⁹⁰ The

available at 2000 WL 30832710. The plea agreement was made at the end of November and had been kept confidential.

84. *Id.*

85. *Id.*

86. *Id.* An ICTY Trial Chamber accepted the guilty plea at a hearing on January 19, 2001. See Press Release, Todorovic Case: Guilty Plea Accepted by Trial Chamber, XI/P.I.S./556-e, International Criminal Tribunal for the Former Yugoslavia, Jan. 19, 2001, available at <http://www.un.org/icty/pressreal/p556-e.htm>. On February 26, 2001, this same Trial Chamber accepted the prosecution's motion to withdraw the remaining counts against Todorovic and Todorovic's motion to withdraw all pending motions filed by the defense. See Sentencing Judgement, The Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, July 31, 2001, ¶ 8, available at <http://www.un.org/icty/todorovic/judgement/tod-tj010731e.pdf>. On July 31, 2001, he was sentenced to ten years imprisonment. *Id.* ¶ 117.

87. *Todorovic Case: In a Sensational New Twist, Stevan Todorovic Pleads Guilty to Persecution Charges*, IWPR TRIBUNAL UPDATE, Dec. 11-16, 2000, available at http://www.iwpr.net/index.pl?archive/tri/tri_203_1_eng.txt (quoting Graham Blewitt).

88. The facts recounted here are based on Herve Clerc, *CIA Accused of Withholding Information from Lockerbie Trial*, AGENCE FRANCE-PRESSE, Sept. 21, 2000, available at 2000 WL 24716350; *Double Agent to Face Court*, HERALD (Glasgow), Sept. 22, 2000, at 12; Peter Ford, *Doubts About Key Lockerbie Witness*, CHRISTIAN SCI. MONITOR, Sept. 5, 2000, at 8; Gerard Seenan, *Doubts over Crucial Lockerbie Witness: CIA Cables Threaten Prosecution Case that Relies on Evidence from Libyan Double Agent Who Worked with Accused*, GUARDIAN (London), Aug. 31, 2000, at 11.

89. Apparently, the Crown wanted the cables so that it could refresh Giaka's recollection when he took the witness stand.

90. The defense based its request on decisions from the European Court of Human Rights requiring that the defendant and the prosecution have “equality of arms.” See *supra* notes 36-38 and accompanying text.

prosecution said that the blacked-out portions of the cables were of no relevance and that, in any event, national security concerns prevented their full release. But the Scottish court granted the defense's request and, for the first time in its history, the CIA provided a foreign court with classified documents. The unexpurgated cables showed that Giaka's handlers had serious doubts about his veracity and that it was only after the CIA threatened to take him off the payroll that he revealed any information about the Lockerbie bombing. With this information in hand, defense counsel requested all other U.S. classified documents that pertained to Giaka, and the court adjourned for the first three weeks of September to allow the CIA to decide whether it would provide the additional materials. The CIA provided an additional 36 cables, some of which cast doubt on the prosecution's allegations. The defense then made an additional request for any CIA materials relevant to the bombing, but the court rejected this bid. William Taylor, counsel for one of the accused, noted that "[it] is alarming for the prospects of this trial being construed by third parties as a fair trial when external sources [namely, the CIA] have dissembled in relation to certain evidence."⁹¹ His co-counsel, Richard Keen, referring to the defense's theory that the Pan Am 103 bombing was committed by Palestinian terrorists and not the two Libyans on trial, noted that "[t]he CIA had a very material part in the investigation of this disaster, it does have evidence and production of that evidence to date has . . . been tailored [to implicate the two accused]."⁹² On January 31, 2001, the Scottish court found one of the two defendants guilty and the other not guilty.⁹³ We will not know whether the CIA's partial cooperation with the Scottish tribunal had an impact on the verdicts. It is predictable, though, that by virtue of its mission, what the CIA knows will likely be of some importance to many international criminal trials, and consequently, that this issue will recur.⁹⁴

D. *Witness Protection*

What is true of evidence gathering applies equally to the procurement of witness testimony. One of these similarities is the danger of state manipulation of witnesses. In January 2000, for example, Milan Vujin, one of Dusko Tadic's attorneys, was found in contempt of court for directing witness testimony so as not to reveal the culpability of Bosnian Serb and Yugoslav higher-ups.⁹⁵ This lent credence to the belief that some were attempting to manipulate the proceedings in The Hague.⁹⁶ Another similarity is the potential unequal access to information. Tadic's inability to gain access to witnesses in

91. *Double Agent to Face Court*, *supra* note 88.

92. *Id.*

93. See Donald G. McNeil Jr., *Verdict's Reasoning*, N.Y. TIMES, Feb. 2, 2001, at A9.

94. See, e.g., Roy Gutman, *What Did the CIA Know?*, NEWSWEEK, Aug. 27, 2001, at 30 ("The information the United States possesses is relevant to establishing General Gotovina's innocence.") (quoting Luka Misetic, attorney for indicted Croatian General Ante Gotovina).

95. See *Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, The Prosecutor v. Tadic, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia*, Jan. 31, 2000, available at <http://www.un.org/icty/tadic/appeal/vujin-e/index.htm>.

96. See Jerome Socolovsky, *Belgrade Lawyer Found in Contempt*, AP ONLINE, Jan. 31, 2000, available at 2000 WL 12386401.

the Republika Srpska, which refused to cooperate with the defense, compared with the Prosecutor's ability to bring in its witnesses, who were mainly persons now residing in Western Europe and North America, served as one of the grounds of the appeal of his conviction. According to counsel for Tadic, "the lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence. . . . [And accordingly] there was no 'equality of arms' between the Prosecution and the Defence at trial . . . [T]he effect of this lack of cooperation was serious enough to frustrate [Tadic's] right to a fair trial."⁹⁷ Though the Appeals Chamber recognized the problem, stating that "[it could] conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State,"⁹⁸ it rejected Tadic's appeal.⁹⁹ The same problems exist in Rwanda, where defense counsel have complained for some time about unequal access to and improper governmental tampering with witnesses.¹⁰⁰

There are additional complications, still, when it comes to witnesses. Prosecutors and defense counsel not only need to gain access to witnesses, as in *Tadic* and *Todorovic*, they need also be able to provide witnesses—persons who often still live in territory marked by violence—with necessary protection, especially anonymity. For this, again, international criminal courts depend on states. What happens when a court gives such protection, but is unable to enforce it?

In November 2000, for instance, two newspapers in Croatia published excerpts from testimony of a witness in the *Blaskic* case who had been given protective measures, thereby violating the ICTY's orders. On December 1, the *Blaskic* Trial Chamber issued an "Order for the Immediate Cessation of Violations of Protective Measures for Witnesses," which required that "the publication of statements or testimonies of the witness concerned, and generally, of any protected witness, shall cease immediately."¹⁰¹ Failure to do so, the Court pronounced, "shall expose [the publication's] author(s) and those responsible to be found in contempt of the Tribunal."¹⁰² Without a police force of its own,¹⁰³ or any authority to conduct investigations in Croatia, the

97. See *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, July 15, 1999, ¶ 29, available at <http://www.un.org/icty/tadic/appeal/judgement/> [hereinafter *Tadic Appeal*]; see also Opening Statement of Michail Wladimiroff, Counsel for Dusko Tadic, *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, May 7, 1996, at 54-59, 63-65, available at <http://www.un.org/icty/transel/960507IT.htm>; MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 176 (1997); *War Crimes Tribunals: The Record and the Prospects*: *The Prosecutor v. Dusko Tadic*, 13 AM. U. INT'L L. REV. 1441 (1998) (comments of Michail Wladimiroff).

98. *Tadic Appeal*, *supra* note 97, ¶¶ 55-56.

99. *Id.* ¶ 56.

100. See Isabel Vincent, *Canadian Lawyers Say Hands Tied in Arusha*, NAT'L POST, July 28, 2001, at B1.

101. See *Order for the Immediate Cessation of Violations of Protective Measures for Witnesses*, *The Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Dec. 1, 2000, available at <http://www.un.org/icty/blaskic/trialc1/order-e/01201PMO14337.htm> [hereinafter *Blaskic Order*].

102. *Id.*

103. See Major Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 215 (2001).

Court requested that the authorities in Croatia “take immediately all measures necessary to bring the publication of the Statements to an end and to provide the Chamber with all and any information regarding the sources or authors of the unauthorised disclosure of the Statements.”¹⁰⁴ The Court also asked the Croatian authorities to provide it with any information “regarding the identity of those potentially responsible for the illegal disclosure of the Statements and violations of the related orders and decisions of the Chamber regarding the protection of witnesses.”¹⁰⁵ Though, in this case, the Croatian authorities might be inclined to enforce the Tribunal’s order—the protected witness allegedly is the current President of Croatia, Stjepan Mesic—it is easy to imagine cases where the local authorities would be less interested, or where the local government is simply dysfunctional and unable to comply.¹⁰⁶ With witnesses’ lives at stake (a number have been killed or threatened),¹⁰⁷ the incapacity of international criminal courts to guarantee the efficacy of their protective orders has potential negative effects on the ability of defendants to present witnesses at trial.

E. *Enforcement*

Finally, what if Croatia fails to enforce the *Blaskic* Trial Chamber’s order against the two newspapers, as it did when this same Trial Chamber issued a binding order against Croatia during the *Blaskic* trial?¹⁰⁸ What methods does the Court then have to enforce its own orders? A variety of methods are possible (for example, condemnation by the Security Council or individual states, financial incentives or disincentives, diplomatic and economic sanctions, and the use of force),¹⁰⁹ but here too the tribunals must rely on states.¹¹⁰ And in doing so, they must, as Justice Goldstone has noted, “only rely on the media and public opinion to increase pressure . . . on those parties to act in a manner consistent with justice and morality.”¹¹¹ Sometimes states find it in their interest to exert influence on noncooperating states and this will often have an effect. Croatia’s recent move toward cooperation with the ICTY, for example, is attributable in significant part to its eagerness to become integrated into the European economy; so too is Yugoslavia’s thus far

104. *Blaskic Order*, *supra* note 101.

105. *Id.*

106. For a recount of the leaks, see *Newspapers Risk Contempt of Court Charges: Croatian Newspapers Warned to Halt Publication of Mesic Statements*, IWPR TRIBUNAL UPDATE, Dec. 4-9, 2000, available at http://www.iwpr.net/index.pl?archive/tri/tri_202_4_eng.txt.

107. See, e.g., Carlotta Gall, *A Croat’s Killing Prods Action on War Atrocities*, N.Y. TIMES, Sept. 17, 2000, at 3.

108. See *supra* note 58 and accompanying text.

109. These are discussed in Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 933-37 (2000) [hereinafter *Tools for Enforcing International Criminal Justice*]; see also Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 79 (1995).

110. For a discussion of remedies for noncompliance in the context of an order to produce documents in the *Blaskic* case, see Cogan, *supra* note 42, at 421 n.92.

111. Cedric Thornberry, *Saving the War Crimes Tribunal*, FOREIGN POL’Y, Fall 1996, at 83 (quoting Justice Richard Goldstone).

more limited cooperation following the fall of Milosevic.¹¹² Still, what happens when the states that are relied upon to enforce ICTY orders (such as the United States) are themselves the noncompliant parties, as might have been the case if *Todorovic* had not been settled? Who enforces orders against the enforcers? In these situations, international criminal courts will likely do what other international tribunals often do: avoid issuing an order that risks noncompliance so that the court can retain the semblance of authority.¹¹³

F. *Cooperation's Limits*

As is apparent, the cooperation regime that undergirds international criminal courts significantly and systematically affects the ability of defendants to provide for their own defense.¹¹⁴ Defendants are limited by the structure of these courts in their ability to procure evidence and witnesses and to have orders issued on their behalf enforced, despite statutory and judicially imposed obligations on states. Moreover, defendants' opportunities for getting evidence, witnesses, and orders enforced are substantially less than those of the prosecutor, who has all the powers of her office, and often the sympathies of governments, on her side.¹¹⁵ All these difficulties pose potentially pernicious obstacles to the provision of fair trials.

112. See Peter Finn, *In Croatia, Law vs. Patriotism: Thousands Rally for Ex-General Accused of War Crimes*, WASH. POST, Feb. 6, 2001, at A21; Steven Erlanger & Carlotta Gall, *Milosevic Arrest Came with Pledge for a Fair Trial*, N.Y. TIMES, Apr. 2, 2001, at A1.

113. See W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 641-43 (1971).

114. The problems faced by these courts in obtaining evidence from reluctant third-party states are not unique. They occur (with increasing frequency as states extend extraterritorially the jurisdiction of their criminal laws) whenever domestic courts prosecute persons for crimes involving acts committed in foreign states in the absence of mutual legal assistance treaties. See *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript*, 21 MICH. J. INT'L L. 655 (2000); see also Bruce Zagaris, *Uncle Sam Extends Reach for Evidence Worldwide*, CRM. JUSTICE, Winter 2001, at 4. Thus, before the adoption of the Treaty on Mutual Assistance in Criminal Matters between Switzerland and the United States, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019 (entered into force Jan. 23, 1977), U.S. prosecutors had a difficult time procuring information covered by Switzerland's bank secrecy laws. See Lee Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 233, 237 (1984); see also Roger M. Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984). For the United States, the most recent example of this problem is the embassy bombings case, in which the acts took place in Kenya and Tanzania, neither of which have such treaties with the United States. Still, domestic courts (at least those from systems used as models for the ICTY, ICTR, and ICC) have significant advantages over international courts when they try to obtain information from third-party states. They also have advantages when they seek to obtain evidence from their own national security agencies. In the United States, for instance, the Classified Information Procedures Act, 18 U.S.C. §§ 1-16, provides pre-trial mechanisms for determining the relevance and means of disclosure of classified material. Even so, "greymail" cases (most infamously in the case of Oliver North) demonstrate the difficulty of providing fair trials under these circumstances. See Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1667-69 (1991); Christopher M. Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information*, 120 MIL. L. REV. 83 (1988); Richard P. Salgado, Note, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427 (1988). These sorts of cases, however, are the exception in domestic systems, whereas they are the norm for international criminal tribunals.

115. See Sebastian Rotella, *U.S. Lawman's Trip to "Heart of Darkness,"* L.A. TIMES, Aug. 12, 2001, at A1 (describing the crucial assistance of U.S. intelligence agencies in the *Krstic* case before the ICTY); Wladimiroff, *Rights of Suspects and Accused*, *supra* note 13, at 443-46. The Office of the Prosecutor has a significant advantage in financial resources as well. A number of defendants have

V. DIFFICULTIES: OUTSIDE INFLUENCE

One might object at this point and say that, yes, it is more difficult for defendants to put on an adequate defense in international criminal courts, but it is not impossible. Indeed, whether these challenges are debilitatingly difficult (or much more difficult for the accused than for the prosecutor) is a matter for trial judges to decide on a case-by-case basis. These sorts of determinations, the argument might continue, are made all the time in domestic courts. This was essentially the judgment of the Scottish court in *Lockerbie* and the ICTY Appeals Chamber in *Tadic*.¹¹⁶ The plea bargain in *Todorovic*, it could also be argued, was made in the shadow of a possible trial court decision granting Todorovic's motion for release if the evidence he sought could not have been produced. In other words, in all of these cases the system worked as it should have, and the promise of fair trials was kept, not broken. The *Blaskic* case, assuming the newly discovered evidence is exculpatory, may just be an exception and does not demonstrate the categorical inability of these courts to guarantee fair trials.

Even if this is so, there are additional reasons to worry about fair trials that pertain to these courts' dependence on states for financing and judicial assistance, some examples of which we have already seen. In *Blaskic*, it seems apparent that the Croatian government refused to cooperate with the ICTY in order to affect the outcome of that trial. Similarly, the U.S. government resisted cooperating in *Lockerbie*, and perhaps in *Todorovic* as well. But state influence on judicial proceedings works not only at the individual case level. Such influence can also wend its way, more generally, into the manner in which these tribunals operate and make decisions. As the following examples from the ICTY and ICTR will suggest, this influence potentially impinges on their impartiality.

A. *Financing and the Institutional Desire to Self-Perpetuate*

A good example is financing. International justice is not cheap and international criminal courts are dependent on states or international organizations for their funding. Both ad hoc tribunals receive their funding from the United Nations; the future International Criminal Court will collect

recently argued that they receive inadequate funding to do their own investigations and that this violates the principle of equality of arms. Thus, in a May 2, 2001 motion, counsel for Radoslav Brdanin argued that "[t]he Tribunal has not provided and is not prepared to provide sufficient resources to enable the defendant to properly and legally defend against the indictment in this case." Motion to Dismiss the Indictment, The Prosecutor v. Brdanin, Case No. IT-99-36-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, May 2, 2001, available at <http://www.intcrimlaw.com/Section%20IV/Motion%20to%20Dismiss%20-%20resources.pdf>. On May 16, 2001, the pre-trial Judge, David Hunt dismissed the motion, though he noted that "if it is demonstrated that the absence of such resources is likely to result in a miscarriage of justice," the Trial Chamber "has the inherent power and the obligation to stay the proceedings until the necessary resources are provided." Decision on Second Motion by Brdanin to Dismiss the Indictment, The Prosecutor v. Brdanin, Case No. IT-99-36-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, May 16, 2001, available at <http://www.un.org/icty/brdjanin/trialc/decision-e/10516DC215720.htm>. There have been similar complaints as to the funding of defense counsel. See Vincent, *supra* note 100, at B1.

116. *Tadic Appeal*, *supra* note 97, ¶¶ 55-56.

its allocation from assessments on the States Parties, or from the United Nations in the case of a Security Council referral.¹¹⁷

There are at least two possible pitfalls here. One is that these courts simply will not have the money to be effective because contributing states will be in arrears.¹¹⁸ Another is that states will use their monetary leverage to influence the tribunals' work.¹¹⁹ One need only look at the recent fracas over the U.S. dues owed the United Nations, in which the United States successfully conditioned its payment on U.N. reform, to appreciate how this might work.¹²⁰

Money's potential influence on international criminal courts is also related to these courts' institutional motivation to continue to exist. As Martin Bell, a former BBC correspondent and independent Member of Parliament, recently remarked, "I remain to be convinced that [Tihomir Blaskic] had a fair trial. . . . My concern has always been that there is a political pressure to deliver guilty verdicts, that if they come up with acquittal after acquittal people will say what is the point of this court?"¹²¹ Bell's concern that international criminal courts have an inherent bias against defendants is a serious, if sensitive, matter. After all, these courts, unlike general jurisdiction domestic criminal courts, were set up for a specific purpose: to prosecute violators of international humanitarian law. It is perhaps this that led the ICTY's first president, Judge Antonio Cassese, to straddle the line between impartiality and prejudgment when he advocated the expulsion of Yugoslavia from the Atlanta Olympics for its failure to arrest Radovan Karadzic and Ratko Mladic, stating "It would be much better to arrest them now We must stop their political and military activities."¹²² Thus, despite the best inclinations of those involved, including judges, it is not too difficult to imagine that these courts could have an institutional bias against defendants because their continued existence depends on producing convictions.¹²³

117. See Rome Statute, *supra* note 9, art. 115.

118. For a discussion of how monetary shortfalls have affected the ICTY, see Scharf, *Tools for Enforcing International Criminal Justice*, *supra* note 109, at 933-37. Cf. Jenny S. Martinez, *Troubles at the Tribunal*, WASH. POST, July 3, 2001, at A19 (noting that, even with plenty of money, the ICTY has come "dangerously close to being in the embarrassing position of violating international human rights norms on speedy trials").

119. Though domestic courts are also funded by governments (their own), the same worries do not apply to the same extent, at least in the national systems to which the international tribunals aspire. In these legal systems, the concept of separation of powers allows courts to maintain their independence. As yet, this does not apply in the international context.

120. See Barbara Crossette, *After Long Fight, U.N. Agrees to Cut Dues Paid by U.S.*, N.Y. TIMES, Dec. 23, 2000, at A1.

121. Chris Stephen, *British Officers "Clear" Bosnian War Criminal*, SCOTLAND ON SUNDAY (Edinburgh), Apr. 9, 2000, available at 2000 WL 4011654.

122. Alison Smale, *Strong Demands to Arrest Bosnian Serb Leaders*, ASSOCIATED PRESS POL. SERV., June 13, 1996, available at 1996 WL 5388766. For criticisms of Cassese, see Geoffrey Robertson, *War Crimes Deserve a Fair Trial*, TIMES (London), June 25, 1996, at 20; and Thornberry, *supra* note 111, at 84. For a defense, see Olivia Q. Swaak-Goldman, *The ICTY and the Right to a Fair Trial: A Critique of the Critics*, 10 LEIDEN J. INT'L L. 215, 215-17 (1997).

123. Cf. *Developments in the Law*, *supra* note 18, at 1995 (noting that the ICTY "is by nature mission-oriented, and missionaries, judges, prosecutors, and administrators, tend to form a sense of camaraderie and community"). Judges might also be influenced by their method of appointment. The judges of the two ad hoc tribunals are elected by the U.N. General Assembly for four-year, renewable terms. See S/RES/1329 (2000), amending S/RES/827 (1993), S/RES/995 (1994). The possibility of reelection can make judges more susceptible to political influence. In contrast, judges appointed to the

B. *Cooperation Revisited*

Another type of influence takes the form of political meddling. The most egregious recent example is the case of Jean-Bosco Barayagwiza, who is accused of six counts of violations of international humanitarian law stemming from his acts during the Rwandan genocide.¹²⁴ Barayagwiza was a leader of the radical Hutu political party Coalition for the Defense of the Republic, which advocated "Hutu Power," and one of the founders of *Radiotélévision libre des milles collines*, which incited hatred against the country's Tutsi population.¹²⁵ Once the extremists took control of the Rwandan government in early 1994, he became the director of political affairs in the Rwandan Foreign Ministry.¹²⁶ Barayagwiza, in short, is accused of being one of the architects of the propaganda machine that instigated the murder of more than 800,000 Rwandans.¹²⁷

It is Barayagwiza's prolonged pre-trial detention, however, rather than his alleged criminal acts, that has made headlines. On April 15, 1996, Barayagwiza, together with a number of other Rwandans, was arrested in Cameroon pursuant to international arrest warrants issued by Rwanda and Belgium, and, the next day, the ICTR Prosecutor also requested that he be held pending the Tribunal's decision as to whether to request his transfer to Arusha, Tanzania for prosecution.¹²⁸ On May 16, 1996, the ICTR Prosecutor notified Cameroon that it was no longer interested in Barayagwiza's transfer. Extradition proceedings continued from that date until February 17, 1997, when Cameroon's courts denied Rwanda's extradition request and ordered Barayagwiza's release. That same day, however, the ICTR Prosecutor again asked that he be held pending a decision on a transfer request. This time, on February 24, the Prosecutor decided to follow through on this request. An order for this was soon issued by the Cameroon courts on March 4, but Barayagwiza was not sent to Arusha until November 19, 1997. On February 23, 1998, he pleaded not guilty to all counts lodged against him. The next day, February 24, 1998, Barayagwiza filed an "extremely urgent motion" that sought to throw out his arrest because, inter alia, he had been illegally detained. The Court's Trial Chamber denied the motion,¹²⁹ but on November 3, 1999, the Appeals Chamber reversed the lower court, found for Barayagwiza, and ordered that he be returned to Cameroon because the length

ICC will serve a nine-year, nonrenewable term, making them, at least in this way, less susceptible. See Rome Statute, *supra* note 9, art. 36.

124. Amended Indictment, *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, International Criminal Tribunal for Rwanda, Apr. 11, 2000.

125. *Id.*

126. *Id.*

127. On the media and the Rwandan genocide, see, for example, Frank Chalk, *Hate Radio in Rwanda*, in *THE PATH OF A GENOCIDE: THE RWANDA CRISIS FROM UGANDA TO ZAIRE 93* (Howard Adelman & Astri Suhrke eds., 1999); and ARTICLE 19, *BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA & STATE-SPONSORED VIOLENCE IN RWANDA, 1990-1994* (1996).

128. This summary of the facts is based on the decisions of the court, see *infra* notes 130, 134, and William A. Schabas, Case Note, *Barayagwiza v. Prosecutor*, 94 AM. J. INT'L L. 563 (2000).

129. See Decision on the Extremely Urgent Motion by the Defense for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, Trial Chamber, International Criminal Tribunal for Rwanda, Nov. 17, 1998, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/RELEASE1198.htm>.

of his detention had been far beyond what international human rights standards allow.¹³⁰ The Court commented, “[n]othing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing [Barayagwiza] to stand trial in the face of such violations of his rights.”¹³¹

Livid, Rwanda suspended cooperation with the ICTR, thereby effectively halting all of the Tribunal’s investigations.¹³² Rwanda refused to grant a visa to the Tribunal’s chief prosecutor, and one of the ICTR’s trials had to be postponed because Rwanda refused to allow sixteen Rwandan witnesses to travel to the Court to testify.¹³³ Faced with the very real possibility that ICTR would disintegrate under her watch, Carla Del Ponte, the Chief Prosecutor, assured the Rwandan government that she would do everything in her power to convince the Appeals Chamber to reverse its decision. On November 19, 1999, she notified the Court of her intention to ask it to review or reconsider its ruling, and she submitted such a motion on December 1, citing new facts.¹³⁴ Shortly before the review hearing took place, Rwanda said it would resume its cooperation with the Tribunal.¹³⁵ Rwanda’s renewed cooperation, however, was conditional. At the hearing before the Appeals Chamber on February 22, 2000, the Attorney General of Rwanda, as *amicus curiae*, “openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review.”¹³⁶

On March 31, 2000, the Appeals Chamber reversed its earlier decision. Though Barayagwiza’s rights had been violated by prolonged pretrial detention, the panel concluded, the new facts brought to light by the Prosecutor in her review motion mitigated the severity of that violation so the remedy of release was no longer appropriate.¹³⁷ The judges denied that they had been coerced into changing their decision to release Barayagwiza,¹³⁸ but it is likely that Rwanda’s threats played a part in the outcome.¹³⁹

130. See Decision, *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, Appeals Chamber, International Criminal Tribunal for Rwanda, Nov. 3, 1999, ¶ 113, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm>.

131. *Id.* ¶ 112.

132. See Emmanuel Goujon, *Rwanda Suspends Cooperation with Genocide Court over Release*, AGENCE FRANCE-PRESSE, Nov. 6, 1999, available at 1999 WL 25139194.

133. See *Rwanda Bars U.N. Tribunal Prosecutor; Visa Refused After Court Freed Genocide Suspect*, WASH. POST, Nov. 23, 1999, at A24.

134. Decision on Prosecutor’s Request for Review or Reconsideration, *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Mar. 31, 2000, ¶¶ 6-7, 13, 15, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/dcs20000331.htm> [hereinafter *Barayagwiza Review Decision*].

135. See Hrvoje Hranjski, *Rwanda Renews U.N. Tribunal Ties*, AP ONLINE, Feb. 10, 2000, available at 2000 WL 12390478.

136. *Barayagwiza Review Decision*, *supra* note 134, ¶¶ 12, 34.

137. *Id.* ¶¶ 74-75.

138. See *id.* ¶ 34; Declaration of Judge Rafael Nieto-Navia, Decision on Prosecutor’s Request for Review or Reconsideration, *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Mar. 31, 2000, ¶ 7, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/separate31032000.htm>; Separate Opinion of Judge Shahabuddeen, Decision on Prosecutor’s Request for Review or Reconsideration, *Barayagwiza*

C. *Courts and Politics*

Dependency binds these ad hoc tribunals in clear ways. Though the choice between limiting the rights of the accused and facing the risk of losing the ability to conduct trials at all is seldom as clear or as public as in *Barayagwiza*, this bind must pervade decision-making, to some degree, in these tribunals. Defendants, therefore, are not only at a disadvantage in procuring the necessary materials for their defense.¹⁴⁰ They can also be at a disadvantage when a court needs to decide whether they have been accorded the rights they are due, whether they have received a fair trial, or, indeed, whether they are guilty or innocent.

VI. PROSPECTS

As we have seen, the cooperation regime, as experienced by the ad hoc tribunals, can be in tension with basic fair trial rights. Chief Prosecutor Del Ponte demonstrated this point most clearly, albeit unintentionally, when, at oral argument in the rehearing in *Barayagwiza*, she told the Appeals Chamber that:

Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. [Either Barayagwiza is tried by the Tribunal or sent to Rwanda to be tried there.] Otherwise I am afraid . . . [that we can] open [the door] of the prison [and let everyone go].¹⁴¹

To its credit, the Appeals Chamber resisted Del Ponte's conclusion, but the problem she identified exists for the tribunals just the same, and the more so for the defendant than for the Chief Prosecutor. In order for international criminal courts to better provide for fair trials, either the cooperation regime

v. The Prosecutor, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Mar. 31, 2000, ¶¶ 71-72, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/separate31032000.htm>; Declaration of Judge Lal Chand Vohrah, Decision (Prosecutor's Request for Review or Reconsideration), *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Mar. 31, 2000, ¶ 3, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/separate31032000.htm>.

139. Another rare public threat was made in March 1999 by the Belgian embassy in Tanzania when the ICTR refused to hand over Bernard Ntuyahaga, a former Rwandan army officer who was accused of participating in the murder of ten Belgian peacekeepers, after the Tribunal dropped charges against him. The Belgian government, in addition to threatening to review its cooperation with the Tribunal, tried to arrange a meeting with the U.N. Secretary-General to discuss the Tribunal's handling of the case. PAUL J. MAGNARELLA, *JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL* 68 (2000). Consider also the testimony of Nina Bang-Jensen, Executive Director of the Coalition for International Justice, before the U.S. Commission on Security and Cooperation in Europe. See *Accountability for War Crimes: Progress and Prospects: Hearing Before the Commission on Security and Cooperation in Europe*, 106th Cong., 1st Sess., May 11, 1999, at 25, available at <http://www.csce.gov/pdf.cfm?file=051199.pdf> ("[These tribunals] have to recognize . . . that even though they should make prosecutorial decisions independent of political considerations, and make their determinations in an unbiased legal and just way, they are wholly dependent on the cooperation of states in order to execute their orders. . . . [T]hey ultimately have to rely on political institutions. They have to go to countries for intelligence information, go to countries for apprehension.").

140. See *supra* Part IV.

141. Declaration of Judge Rafael Nieto-Navia, *supra* note 138, ¶ 2 (quoting Chief Prosecutor Del Ponte).

must be made to work, or additional procedures must be put in place to protect the accused.

In the case of the ad hoc tribunals, the cooperation regime's weakness does not result from the absence of tribunal authority or an authoritative enforcement mechanism. Both the ICTY and ICTR were created by the Security Council pursuant to its Chapter VII authority. States are thus under an obligation to cooperate with the tribunals, and the Security Council could conceivably decide to take measures against states that failed to comply with the tribunals' orders. Despite occasional pleas by the ICTY, however, the Security Council has failed to take such action.¹⁴² Individual states and regional organizations, though, have used various forms of persuasion to encourage states, in particular Yugoslavia and Croatia, to cooperate, and this has worked in a limited fashion. But, even backed by the enforcement authority of the Security Council and certain powerful states, the tribunals, as demonstrated, have not always been able to provide for defendants. In fact, the very reliance on such states may itself create fair trial problems.

If the experience of the ad hoc tribunals should make proponents of international justice wary of possibilities of fair trials, it is, therefore, worthwhile to ask if the future permanent International Criminal Court is an improvement on its predecessors. The answer is "no." In contrast to the ad hoc tribunals, the ICC is backed by the Rome Statute, not the U.N. Charter, and, thus, only those states that ratify the Rome Statute will be bound by the ICC's orders. Moreover, instead of the Security Council, only an Assembly of States Parties will normally have the formal authority to enforce the ICC's orders and keep states in compliance. As a result, it is safe to expect that the ICC will have greater difficulties providing defendants with fair trials than the ad hoc tribunals—except, perhaps, in extraordinary cases where there is international political consensus.

In the absence of an effective mechanism that will ensure the performance of a state's duties to cooperate with international criminal courts, these courts, themselves, will need to take affirmative steps to protect the accused. They should amend (or should have amended) their statutes and rules of procedure and evidence so that they are more sympathetic to the inherent difficulties faced by the accused in the formation of his or her defense.¹⁴³ Thus, the ad hoc tribunals should adopt a rule that gives defendants the same power as the prosecution to secure evidence and witnesses.¹⁴⁴ The tribunals and the future ICC should also adopt a rule that states that, when an order issued on behalf of the defendant for the production of evidence is met with noncompliance, the burden is on the prosecutor to show that the missing

142. For a review and discussion of Security Council enforcement of ICTY judicial orders, see Daryl A. Mundis, *Reporting Non-Compliance: Rule 7bis*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE*, *supra* note 25, at 421.

143. The procedures for amending the ICC Statute and Rules of Procedure and Evidence are stated in articles 51, 121-123 of the Rome Statute, *supra* note 9. The procedures for amending the Rules of the ICTY and ICTR appear in article 15 of the ICTY Statute, *supra* note 33, and article 14 of the ICTR Statute, *supra* note 33.

144. See Wladimiroff, *Rights of Suspects and Accused*, *supra* note 13, at 445. The Rome Statute is an improvement in this regard.

evidence was not material to a proper defense.¹⁴⁵ Though the adoption of such a presumption might, counterproductively, encourage states that had an interest in the accused being set free to resist a court's order, it would clarify for all to see the degree of importance of the evidence withheld. Moreover, this presumption would serve to encourage other states interested in a successful prosecution to exert more influence on the noncooperating state.

Furthermore, judges on these courts should do more to view the substantive rights of the accused through the prism of the structural limitations on these courts. Such a contextual approach would allow judges to expand the rights of the accused to take into account the difficulties inherent in international criminal defense. To this extent, the recent decision of the Appeals Chamber in *Kupreskic* on the reconsideration of factual findings where additional evidence has been admitted on appeal is a disappointment.¹⁴⁶ Though the Appeals Chamber recognized "the numerous practical difficulties that all parties at trial before the Tribunal face in locating all relevant witnesses and documentary evidence from distant countries, not always cooperative with the Tribunal," and noted the "real danger of a miscarriage of justice when a Trial Chamber is deprived of crucial evidence relating to the guilt or innocence of an accused that does not surface until the trial is completed,"¹⁴⁷ the Court adopted a standard that makes it difficult to overturn a verdict, even with the introduction of new and probative evidence.¹⁴⁸

These courts should also provide criminal defense attorneys with better resources, which might allow them to overcome some of the difficulties encountered in investigations.¹⁴⁹ There is already a movement to create a formal international defense bar, which will help professionalize the representation of the accused.¹⁵⁰ The courts themselves will also need to provide more money and, through their registries, provide more guidance (legal and investigative) to assist defense counsel.¹⁵¹ A more formal presence for the defense within the structure of these courts will also increase the likelihood of fair trials.¹⁵²

145. As is, the burden is on the accused. Article 72(7)(a)(iii) and (b)(ii) of the Rome Statute allows the Court to "make such inference in the trials of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances," but does not designate which party carries the burden. Rome Statute, *supra* note 9.

146. See Appeal Judgement, *The Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Oct. 23, 2001, available at <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>.

147. *Id.* ¶ 44.

148. *Id.* ¶ 75. To the Appeals Chamber's credit, it defended the right to a fair trial in other aspects of its decision, *id.* ¶ 100, and ultimately reversed the convictions of three of the defendants and revised downward the sentences of two others. *Id.* pt. X.

149. See *supra* note 115 and accompanying text; Howard Morrison, *The Quest for Justice: Will the Mighty Prosecution Steamroller Overwhelm the Push-Bike Resources of the Defence at the International Criminal Courts?*, COUNSEL (London), June 2001, at 14.

150. See INTERNATIONAL CRIMINAL DEFENCE BAR ATTORNEYS ASS'N, ICDA A ANNUAL REPORT 2000, at 12 (2001), available at <http://www.hri.ca/partners/aiad-icdaa/reports/Annual%20Report1.pdf>.

151. Rule 20 of the finalized draft text of the Rules of Procedure and Evidence of the International Criminal Court provide for the ICC Registry to give such support. The text is available at <http://www.un.org/law/icc/statute/rules/rulemain.htm>.

152. For a fuller argument, see Elise Groulx, *The Defence Pillar: Making the Defence a Full Partner in the International Criminal Justice System*, Nov. 3, 2000, available at <http://www.hri.ca/>

Finally, observer-participants (scholars, activists, and the press) should do better than they have as “watchdogs” on fair trials, sniffing out injustice to the internationally-accused and working to keep all the relevant actors on their toes. As Judge Cassese has noted, “it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community.”¹⁵³ The current watchdog-absent context¹⁵⁴ works to the detriment of defendants, allowing states to influence, and judges to be influenced. If court proponents truly want these courts’ decisions to be considered authoritative declarations of international human rights law, they would do well to speak more of the rights of the accused.

Those most interested in promoting the rights of the accused—defense counsel, the accused and their families, and some of the states that have nationals among the accused—have already done work along these lines. Unfortunately, however, the same tendencies that make fair trials difficult in these courts also decrease the possibility that these mitigating strategies will be adopted in a meaningful way.

VII. CONCLUSION

International criminal courts have it difficult. International actors withhold evidence. They restrict access to evidence. They refuse to allow witnesses to testify. They decline to enforce or abide by judicial orders. They silently coerce courts by threatening to withdraw support. To recognize all these obstacles is not necessarily to prejudge the ability of international criminal courts to hold persons accountable for violations of international humanitarian law.¹⁵⁵ It is simply to suggest that international criminal courts run the risk that fair trials can be a casualty of this pursuit, and that there is no reason to believe that this predicament will change when the permanent International Criminal Court comes into existence—in fact, just the opposite.¹⁵⁶

Because of the publicity it will garner, some say that the first true test of contemporary international criminal courts will be the trial of former Yugoslav President Slobodan Milosevic. Doubters wonder if states will be as willing to cooperate with the defense (assuming Milosevic mounts one) as with the prosecution.¹⁵⁷ They also question whether the Tribunal’s judges will

partners/aiad-icdaa/reports/defencepillar.htm.

153. Antonio Cassese, Foreword, INT’L REV. RED CROSS, No. 321, Nov.-Dec. 1997, at 602.

154. See *supra* notes 4-5 and accompanying text.

155. Such recognition should not be considered a reason to ignore the good that these tribunals achieve, nor to say that the statutory rights of the accused are deficient, nor to condemn the trials as victors’ justice, nor to condemn the enterprise of international prosecutions per se.

156. One might say that it will take time for these courts to reflect a level of excellence that has taken most domestic courts a long time to attain, and that it is unreasonable to expect perfection at this stage of the development of international criminal justice. To do so, the argument might continue, would be to impose an unattainable standard and, thereby, make the establishment of international criminal courts impossible. This, though, is a concession that these courts might not be able to provide fair trials; whether we might want to create such courts, in any event, is another (albeit related) question.

157. See, e.g., Aleksa Djilas, *The Politicized Tribunal*, IWPR TRIBUNAL UPDATE (July 16-21,

be brave enough to order the CIA and other intelligence services to reveal information that might be damaging to them and their governments. Will states, in other words, give Milosevic evidence that might inculcate or embarrass their own leaders?

This Article suggests that the Milosevic proceedings are not a true test: when states are interested in providing for fair trials, they will take place; and when sufficient publicity is focused on courts, judges will make sure that every procedural nicety and right is observed. There exists an excellent chance that Milosevic will receive a fair trial, and every indication from the pre-trial proceedings is evidence that this is the course that the trial will take. For this reason, Milosevic's trial is anomalous—a poor paradigm for how these courts have functioned in the past, and how they might operate in the future. The real challenge is not the trial of Slobodan Milosevic, but rather how to devise a method to ensure that every defendant standing before an international criminal court will receive the same fair treatment as Milosevic.