

Bringing Justice to an Embattled Region—Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina

By
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I. INTRODUCTION

*“If you want Peace, work for Justice.”
—Pope Paul VI*

In October 1992, the United Nations assembled a Commission of Experts to review, under the direction of Professor Cherif Bassiouni, evidence of violations of international humanitarian law in the former Yugoslavia, and to provide a detailed account of such evidence to the Secretary-General.¹ In the wake of continuing terror and death in Bosnia, and following several failed diplomatic efforts to end the war and prevent further atrocities, the United Nations (UN) Security Council was seeking a judicial solution to the alleged grave breaches of international humanitarian law occurring in the former Yugoslavia.

On February 22, 1993, based on the Commission’s findings, the Security Council passed Resolution 808, authorizing the establishment of a Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.² According to the Resolution, the Secretary-General was to report on the proposed Statute of the Tribunal.³ On May 25, 1993, the Security Council adopted

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1. See generally *Final Report of the United Nations Commission of Experts Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex, U.N. Doc. S/1994/674 (27 May 1994) [hereinafter *Final Report*].

2. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (22 Feb. 1993) [hereinafter *Resolution 808*].

3. *Id.* The report was to focus “on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of [the decision], taking into account suggestions put forward in this regard by Member States.” *Id.* ¶ 2.

the Statute by a unanimous vote,⁴ thus officially establishing 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 (hereinafter "the Tribunal"). The eleven judges of the Tribunal were elected by the General Assembly in September 1993 and took office on November 17, 1993.⁵ The Prosecutor took office on August 15, 1994.⁶

The Tribunal was the first international criminal tribunal ever established by the United Nations.⁷ Because many believed that the process of ratification by member states would be too slow given the urgency and severity of the crisis,⁸ the Tribunal was created by "order" of the Security Council.⁹ That is to say, the Tribunal was established under Chapter VII of the United Nations Charter,¹⁰ which provides the Security Council with the authority to respond to breaches of peace and acts of aggression.¹¹ Yet unlike the military tribunals of Nuremberg¹² and Tokyo,¹³ which were established by the victorious powers of World War II, the Yugoslav Tribunal is part of an international security regime that functions on behalf of the entire international community. Thus, the Tribunal's mandate is much broader than the "victors' justice" associated with a military tribunal.

On one level, the Tribunal was established to ensure that violations of international humanitarian law, as witnessed in the former Yugoslavia, would cease

4. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (25 May 1993) [hereinafter Resolution 827].

5. The elected judges were: Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer de Costil (France), Li Haope (China), Gabrielle Kirk McDonald (United States), Elizabeth Odio Benito (Costa Rica), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), and Lal Chand Vohrah (Malaysia). See *General Assembly Fills Remaining Three Vacancies for Judges on International War Crimes Tribunal*, U.N. GAOR, 47th Sess., 111th Resumed mtg., U.N. Doc. GA/8500 (17 Sept. 1993).

6. Judge Richard Goldstone of South Africa was selected by the United Nations Security Council.

7. After World War I, the Treaty of Versailles called for the creation of an international tribunal, but it was never created. See *Treaty of Peace Between the Allied and Associated Powers and Germany*, art. 227, in 2 *Bevans* 43, at 136-37 (28 June 1919).

8. See *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991*, 1994 U.N.Y.B. 83 [hereinafter 1994 Yearbook].

9. In its Resolution 808 (1993), the Security Council required the Secretary-General to provide for "the effective and expeditious implementation" of a tribunal. *Supra* note 2. Some Security Council members, as well as some Member States, felt that the Tribunal should be established by the General Assembly or by a multilateral treaty. See CHERIF BASSIOUNI & PETAR MANDRAS, *THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, (Transnational Publishers, Inc., 1946).

10. U.N. Charter, 59 Stat. 1031, T.S. No. 993 [hereinafter U.N. Charter].

11. "The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* art. 39.

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

13. See *Special Proclamation by the Supreme Commander for the Allied Powers*, Jan. 19, 1946, T.I.A.S. No. 1589, 4 *Bevans* 20; *Charter dated Jan. 19, 1949*, 4 *Bevans* 21; *amended Charter dated Apr. 26, 1946*, 4 *Bevans* 27 - 28.

and be effectively redressed.¹⁴ Moreover, by ensuring a judicial process that was swift, fair, and consistent, it was also hoped that the Tribunal would dissuade parties to the conflict from perpetrating further crimes and thus “contribute to the restoration and maintenance of peace.”¹⁵ Finally, many believed that, as a non-state judicial body, the Tribunal would set a standard for ethical conduct that might influence the behavior of nation states in the future.¹⁶

II.

CONCURRENT JURISDICTION

In a departure from the model established at Nuremberg and Tokyo,¹⁷ the Tribunal recognizes the right of national courts to decide cases according to the principle of universal jurisdiction.¹⁸ Rather than adjudicating violations of international humanitarian law only by an international judge in an international proceeding, the Tribunal encourages countries from the former Yugoslavia to initiate domestic prosecution of arrested war criminal suspects.¹⁹ Under its Statute, the Tribunal recognizes that domestic “national” courts have *concurrent jurisdiction* over violations of international humanitarian law.²⁰ A suspect may therefore be indicted by either the Tribunal or by a national court. The Tribunal does not monopolize the original jurisdiction of crimes committed in the former Yugoslavia,²¹ nor was it ever intended to have exclusive jurisdiction over conflicts arising therein.²² Although the Tribunal has *primacy* over national courts and may request that such courts defer to the competence of the Tribunal,²³ it does not deprive national courts of the right to conduct war crimes trials.

There are several reasons why the drafters of the Tribunal’s Statute sought concurrent jurisdiction. First, they wanted national courts to assume responsibil-

14. *Resolution 827, supra* note 4, Preamble.

15. *Id.*

16. *See id.*

17. The Nuremberg and Tokyo tribunals were created to *substitute* proceedings in the national courts. *See* London Agreement, *supra* note 12.

18. “The ‘universality principle’ recognizes that certain activities, universally dangerous to states and their subjects, require authority in all community members to punish such acts wherever they may occur, even absent a link between the state and the parties or acts in question.” BURGENTHAL & MAIER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* (2d ed. 1990).

19. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 72* (Transnational Publishers, Inc., 1995).

20. “The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.” *Statute of the International Tribunal*, art 9(1), U.N. SCOR, 48th Sess., Supp. Apr.-June, 1993 at 134; 32 I.L.M. 1192 (July 1993), U.N. Doc. S/25704, Annex 1 (1995) [hereinafter *Statute*].

21. *See Report of the Secretary-General*, ¶ 64, U.N. SCOR, 48th Sess., Supp. Apr.-June 1993, at 117, U.N. Doc. S/25704 (1995).

22. *See* BASSIOUNI & MANDRAS, *supra* note 9, at 229.

23. “The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present statute and the Rules of Procedure and Evidence of the International Tribunal.” *Statute, supra* note 20, art. 9(2).

ity over trials because they are often better suited to do so.²⁴ Second, national trials would minimize the costs to the UN.²⁵ Third, by allowing national courts to exercise prosecutorial discretion, national prosecutions could potentially play a role in the peace process.²⁶ Finally, unlike the Nuremberg and Tokyo tribunals, the Yugoslav Tribunal would have no means to apprehend suspects, except to rely on member states whose officials can physically bring accused persons before the Tribunal.²⁷

A more troublesome issue remains on the question of deciding which suspects are to be tried by national courts, and which ones by the Tribunal. Although it was never intended that the Tribunal would handle all cases that arise in the former Yugoslavia,²⁸ a well-established method for selecting cases has yet to emerge.²⁹ Scholars have argued for a regime of "stratified-concurrent jurisdiction"³⁰ whereby the Tribunal prosecutes the "key players" while national governments focus on other defendants.³¹ With its recent dismissal of fourteen "sound" indictments, the Tribunal seems to have accepted this approach.³²

Even so, national courts may be in no position to conduct war crimes trials. Indeed, a state can ostensibly be immobilized in a post-conflict environment, and national courts may in this context be unable to render justice impartially. This is currently the case in Bosnia-Herzegovina.³³ As a consequence, the Tribunal has been careful to preserve its right to primacy over national trials which deal with international, as distinguished from ordinary, crimes.³⁴

III.

JUDICIAL INCAPACITY AND FEAR OF ARBITRARY ARREST IN BOSNIA-HERZEGOVINA

The importance of the primacy doctrine was evident early on in Bosnia-Herzegovina. The Bosnian war formally ended in December 1995 when the governments of Serbia, Croatia, and Bosnia-Herzegovina signed the General

24. See BASSIOUNI & MANDRAS, *supra* note 9, at 313.

25. *Id.*

26. *Id.*

27. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA – THE INTERNATIONAL TRIBUNAL, NATIONAL COURTS AND CONCURRENT JURISDICTION: A GUIDE TO APPLICABLE INTERNATIONAL LAW, NATIONAL LEGISLATION, AND ITS RELATION TO INTERNATIONAL HUMAN RIGHTS STANDARDS (May 1995).

28. *Id.*

29. *Id.*

30. See Madeline H. Morris, Remarks at the Brussels Conference (July 20-21, 1996) (on file with the author).

31. *Id.*

32. See ICTY Press Release, Office of the Prosecutor, CC/PIU/314-E (May 8, 1998).

33. It can be easily argued that it was the complete failure of the judicial system to stem the atrocities in the former Yugoslavia that prompted the creation of the Tribunal. See *Resolution 827*, *supra* note 4.

34. See *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, Tadic Case, IT-94-1-T (ICTY Oct. 2, 1995) at para. 83.

Framework Agreement for Peace in Bosnia-Herzegovina³⁵ (hereinafter "Dayton Accords"). The Dayton Accords recognize the sovereign Republic of Bosnia-Herzegovina, as comprised of two autonomous entities: the Federation of Bosnia-Herzegovina³⁶ and the Republika Srpska.³⁷ The structure of the governmental bodies of the state of Bosnia-Herzegovina is premised on proportional representation among the Bosniac, Croat, and Serb groups.³⁸ The three political parties³⁹ that dominate decision-making in Bosnia-Herzegovina are also constructed along these ethnic lines, and each promotes a strong nationalist agenda.⁴⁰

Since the end of the war in 1995, Bosnian Serbs, Muslims, and Croats have each waged, within their respective territories, an intense campaign to bring individuals suspected of committing war crimes to justice. Each of the three parties has maintained exhaustive, if not accurate, files on persons among the "other" group whom they "know" to be war criminals. They are eager to prosecute alleged war criminals, and consistently maintain their right to prosecute such individuals under the jurisdiction of their own national legal systems. The Tribunal recognizes this right.⁴¹

Yet, problems remain with the capacity of the national courts to prosecute persons accused of violating international humanitarian law. The Bosnian court system (both in the Federation and the Republika Srpska), cannot at this time guarantee a fair and politically unbiased judicial process. In Bosnia-Herzegovina, judges are still beholden to the political parties who elect them. There is no input from the legal community in the selection of judges, nor is there a non-political body that evaluates a candidate's qualifications. These same constraints exist for the judiciary in the Republika Srpska and are, in fact, exacerbated by the Republika Srpska's complete lack of a functioning democratic judiciary. Judges at every level have little or no independence from the political

35. UNITED NATIONS, GENERAL ASSEMBLY, SECURITY COUNSEL, GENERAL FRAMEWORK AGREEMENT FOR PEACE IN BOSNIA-HERZEGOVINA, U.N. Doc. A/50/790 - S/1995/999 (November 29, 1995) [hereinafter Dayton Accords].

36. The Federation is based upon the relationships among the Federation government, eight smaller cantonal governments (four Muslim-dominated cantons, two Croat-dominated cantons, and two mixed cantons), and smaller municipal governments. See Mark Ellis, *Bosnia-Herzegovina*, in WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES at 76 (Congressional Quarterly 1998).

37. The Republika Srpska has its own unicameral National Assembly. Together with the Federation, these entities make up the State of Bosnia-Herzegovina. *Id.*

38. See generally CONSTITUTION OF BOSNIA - HERZEGOVINA, §§ 5-6, contained in Dayton Accords, *supra* note 35, at 59, reprinted in 35 I.L.M. 75, 117 (1996).

39. Although there are more than fifty-five political parties in Bosnia-Herzegovina, only three play a central role in Bosnian politics: the Croatian Democratic Union (HDZ) of Bosnia-Herzegovina, structured under the Croatian HDZ party led by Croatian President Franjo Tudjman; the Muslim Party of Democratic Action (SDA), led by Alija Izetbegovic; and Radovan Karadzic's Serbian Democratic Party of Bosnia-Herzegovina (SDSBIH). See Ellis, *supra* note 36, at 81.

40. The SDA is a party that has chosen Islam as the vehicle to strengthen Bosniac nationalism. The HDZBIH continues to push for an independent Herzeg-Bosna and ultimately supports a "Greater Croatia." The SDSBIH has been the primary advocate for an independent Republika Srpska, or reunification of Republika Srpska with Serbia. See *id.*

41. See *Statute*, *supra* note 20, art. 9, at 135.

parties, and the judiciary is even more politicized than its counterpart in the Federation.

Another problem with the Bosnian court system is that once judges are selected, they are often forced to supplement their meager salaries with "outside" work. Not only does this take away from time that should be devoted to judicial duties, but outside work places judges in a position where they may be forced to compromise their independent decision-making. In cases where a judge relies on other income, and ethical conflict of interest guidelines are vague or nonexistent, judges could be manipulated in their case adjudication. In addition, many of the cantonal and municipal judges are young and untrained. There is a desperate need for continuing legal education for judges.

Aside from the lack of an independent judiciary, other obstacles stand in the way of the successful prosecution of war criminals within the national courts. Generally speaking, computers, modern caseload management, and network systems are all but nonexistent within the court systems of Bosnia-Herzegovina. Also, there is a lack of cooperation between the Federation and the Republika Srpska on judicial matters, a lack of procedural laws to effectively prosecute and defend alleged war criminals, a lack of qualified defense attorneys, and an inability to monitor trials or subpoena witnesses.⁴²

In spite of these obstacles, Bosnia's three main ethnic groups continued to escalate the race among each other to seek out, indict, or arrest citizens of the other ethnic groups for violating international humanitarian law. The turning point in this race came on February 6, 1996, when Bosnian authorities arrested two senior Serb officers, General Djordje Djukic and Colonel Aleksa Krstanovic. The two had misread a signpost and inadvertently strayed into Federation territory near Sarajevo.⁴³

Judge Richard Goldstone, Tribunal Prosecutor at the time, requested that both men be transferred to The Hague to determine if they should stand trial. Djukic, who had served as Chief of Logistical Operations for the Bosnian Serb forces, was subsequently indicted.⁴⁴ Though most within the Federation supported the Tribunal, they had little confidence that it could bring to justice more than a few of the thousands of individuals accused of atrocities. The Djukic arrest prompted new optimism among Bosnian Muslims that the international community would finally act to apprehend indicted war criminals.⁴⁵ Among Bosnian Serbs, the reaction was quite different. The arrests were viewed as an affront to all Serbs, and threatened to re-ignite the Bosnian war.⁴⁶

The arrests also underlined a more fundamental problem. The fear of arrest by local authorities was interfering with a basic provision of the Dayton Ac-

42. See Mark S. Ellis, *Bringing War Criminals to Justice*, THE UNIVERSITY OF DAYTON CENTER FOR INTERNATIONAL PROGRESS, at 28 (1997).

43. Mike Corder, *Yugoslavia—War Crimes*, ASSOCIATED PRESS, March 3, 1996.

44. *Analysis and Opinion from the Balkan Institute*, THE BALKAN MONITOR, April 5, 1996, at 3.

45. Interview with Sven Alkalaj, Bosnian Ambassador to the United States.

46. These views were expressed to the author during a visit to Sarajevo in March, 1996. See also Chris Hedges, *Serbs Decry Arrests of Suspected War Criminals*, N.Y. TIMES, Feb. 7, 1996.

cords, which granted freedom of movement to all citizens in the territory of Bosnia-Herzegovina.⁴⁷

IV. THE ROME AGREEMENT

Politically, the ramifications of the Djukic and Krsmanovic arrests were significant. It was clear that rules needed to be established to ensure that arrests were based on legal grounds rather than political retaliation. On February 18, 1996, the international community convened a meeting in Rome among the signatories to the Dayton Accords. At this meeting, the parties⁴⁸ agreed to create a mechanism to enhance cooperation with the Tribunal.⁴⁹ In particular, they agreed to follow a set of guidelines when issuing an order, warrant or indictment against any individual suspected of violating international humanitarian law, as provided in Article IX of the Dayton Accords.⁵⁰ Henceforth, this provision of the Rome Agreement became known as the "Rules of the Road."⁵¹

Signed on February 18, 1996,⁵² the Rules of the Road provision states, in part, that:

Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decisions by the Tribunal and will be effective immediately upon such action.⁵³

Thus, according to the Rome Agreement, authorities within Bosnia-Herzegovina, Croatia, and Serbia can only arrest and detain persons under two circumstances: (1) if an individual has already been indicted by the Tribunal for serious violations of international humanitarian law, or (2) if an indictment by one of the three parties has already been reviewed by the Tribunal and found to be consistent with international legal standards.⁵⁴

It is important to note that the Tribunal was not enthusiastic about taking on the role of reviewing the files. In fact, during the negotiations of the Rules of the Road provision of the Rome Agreement, a number of people questioned whether the Office of the Prosecutor (OTP), had actually agreed that the Rules

47. See *Dayton Accords*, *supra* note 35, Annex 4; CONSTITUTION OF BOSNIA AND HERZEGOVINA, *supra* note 38, Art. II, § 4.

48. The parties included President Izetbegovic of Bosnia-Herzegovina; President Franjo Tudjman of Croatia; and President Slobodan Milosevic of Serbia.

49. See Office of the High Representative, Agreed Measures, February 18, 1996 [hereinafter Rome Agreement] at § 5, *Office of the High Representative website* (visited Sept. 8, 1999) <<http://www.ohr.int/docu/d960218a.html>>.

50. *Id.*

51. The term "Rules of the Road" was coined by then Secretary of State, Warren Christopher.

52. See Rome Agreement, *supra* note 49.

53. *Id.* § 5.

54. See Memorandum from the Office of the High Representative [hereinafter OHR Memo] [on file with the author].

of the Road provision was within the Tribunal's mandate.⁵⁵ There was also the real concern that the OTP simply did not have the resources to undertake this type of activity. The OTP knew that the Rules of the Road would require additional financial and personal resources, both of which the Tribunal did not possess. In addition, the OTP wanted to focus its efforts on the potential indictments within its own jurisdiction, not create a monitoring and authorization procedure for the parties' own prosecutorial exercises. After considerable pressure from the United States and other nations supportive of the Tribunal, the OTP reluctantly agreed to review the cases submitted to its office.⁵⁶

Unfortunately, the initial reluctance by the OTP to embrace actively the Rules of the Road has persisted to the present day. Although the Tribunal's outgoing Chief Prosecutor Justice Louise Arbour has stated publicly that adherence to these provisions exemplifies the positive cooperation between local authorities,⁵⁷ the OTP has made it clear that it wants "sufficient resources" for a "workable long-term solution" for the Rules of the Road project.⁵⁸

V.

AUTHORITY AND COMPLIANCE

On November 30, 1996, representatives of the Members of the Presidency of Bosnia-Herzegovina⁵⁹ met in Sarajevo to elaborate the conditions precedent to detaining alleged war criminals, as set forth in the Rome Agreement.⁶⁰ The parties agreed that on January 1, 1997, all case files involving persons suspected of committing serious violations of humanitarian law, including persons already detained on suspicion of war crimes or convicted of war crimes, were to be turned over to the Tribunal.⁶¹ After January 1, 1997, the arrest or detention of persons suspected of war crimes will occur only *after* the Tribunal has reviewed the case file and established that there was sufficient evidence for prosecution in accordance with "international standards."⁶²

Under the Rules of the Road Procedures, the parties are also obligated to provide the OTP with an immediate *estimate* of the number of cases they *expect* to submit for review, and a projected timeline for when the cases will be submitted.⁶³ Two of the three parties to the Rome Agreement have simply ignored their obligations. Only Bosnia has provided a detailed list of anticipated cases to

55. See Memorandum from Bill Stuebner to CEELI/CIJ (January 1, 1998) [hereinafter Stuebner Memo].

56. *Id.*

57. See Memorandum from Alain Norman to Mark Ellis 1, 2 (May 22, 1998) [hereinafter May 22nd Norman Memo].

58. See Memorandum from the OTP to CEELI/CIJ 1 (July 6, 1998) [hereinafter Blewitt Memo].

59. Jusuf Pusina, Martin Raguz and Nenad Radovic were the appointed representatives.

60. "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996" [hereinafter Rules of the Road Procedures].

61. *Id.* § 3.

62. *Id.* § 1, quoting Rome Agreement, *supra* note 49, § 5.

63. *Id.* § 3.

the OTP for review.⁶⁴ As of September 1998, Croatia and Serbia have yet to submit files. Indeed, the failure of both Croatia and Serbia to cooperate with the Tribunal represents the most problematic aspect of enforcing the Rules of the Road Procedures. Despite signing the Rome Agreement, neither party considers itself bound by the Rules of the Road.⁶⁵

Yet, the obligation to comply arises out of several unambiguous and unequivocal mandates. First among them is Chapter VII of the UN Charter, which creates a binding obligation on all member states to implement decisions of the UN.⁶⁶ The Yugoslav successor states are also obliged to cooperate with the Tribunal pursuant to United Nations Security Council Resolution 827 (1993) which reads, in part, that:

all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber. . . .⁶⁷

Furthermore, Article 29 of the Tribunal's Statute provides that:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons; and
 - (e) the surrender or the transfer of the accused to the International Tribunal.⁶⁸

VI.

SUBSTANTIVE LAW TO BE APPLIED

Under the Rules of the Road, only files providing evidence of a *serious violation of international humanitarian law*, as defined by the Tribunal's Statute, can be reviewed by the OTP. The term "international humanitarian law" means the rules applicable in armed conflict found in international agreements which have been agreed to by the parties in the conflict and are generally recognized principles of international law.⁶⁹ A "serious violation" means "any viola-

64. By April 1997, the Federation of Bosnia-Herzegovina had submitted to the Tribunal eight cases of persons who were currently detained on war crimes charges. In six cases, the OTP found sufficient evidence and ordered that the suspects remain in custody. In one case, insufficient evidence was found and the suspect was released. In one case, the OTP requested additional information. Discussion between Bosnian officials and the author in January 1998. See also OHR Memo, *supra* note 54.

65. This opinion was expressed to the author by the Embassy of Croatia in Washington, D.C., in April 1997.

66. See U.N. Charter, *supra* note 10.

67. Resolution 827, *supra* note 4, § 4.

68. Statute, *supra* note 20, art. 29.

69. MORRIS & SCHARF, *supra* note 19, at 54.

tion of the law of international armed conflict, sufficiently serious and committed with the requisite intent to be regarded as a crime."⁷⁰ In this context, the Tribunal's Statute contains four articles on the applicable substantive law.

Article 2 of the Tribunal's Statute provides that the Tribunal has jurisdiction over grave breaches of the Geneva Conventions of 1949.⁷¹ "Grave breaches" are major violations of international humanitarian law punishable by any State under the principle of universal jurisdiction.⁷² The State parties to the current conflict are bound by the Geneva Conventions by treaty obligation, which was ratified by the Socialist Federal Republic of Yugoslavia, and bound by the rules of state succession among the former republics of Yugoslavia.⁷³ Parties to the Conventions are required to apprehend persons alleged to have committed (or ordered the commission of) grave breaches of the Conventions and to bring them to justice.⁷⁴ Thus, the Tribunal can prosecute persons who commit (or order to be committed) certain acts against persons and property protected under the provisions of the relevant Geneva Conventions.⁷⁵ These acts include: willfully killing; inflicting torture or inhumane treatment, which includes biological experimentation; willfully causing great suffering or serious injury to body or health; unlawfully and wantonly destroying or appropriating property not justified by military necessity; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; willfully depriving a prisoner of war or a civilian of the right to a fair and regular trial; unlawfully deporting, transferring or confining a civilian; and taking civilian hostages.⁷⁶ Article 2 of the Statute is relevant only to international conflict.⁷⁷

Article 3 of the Tribunal's Statute provides the Tribunal with Jurisdiction over violation of the laws of customs of war.⁷⁸ Recognizing that the right to engage in war is not unlimited and that certain methods of war are prohibited, Article 3 codifies certain provisions contained in the 1907 Hague Convention.⁷⁹ Violations of laws or customs of war include the following acts: use of poisonous weapons or other weapons calculated to cause unnecessary suffering; wan-

70. U.N. Secretary-General letter to the President of the Security Council, U.N. Doc. S/2527 (10 February 1993).

71. Article 2 of the *Statute* essentially incorporates Article 147 of Geneva Convention IV.

72. See *Final Report*, *supra* note 1, ¶ 45.

73. See BASSIOUNI & MANDRAS, *supra* note 9, at 489.

74. Convention (IV) Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287.

75. See *Statute*, *supra* note 20, art. 2.

76. *Id.*

77. In the Tadic case, the Trial Chamber ruled that "the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal." *Decision on the Defense Motion on the Jurisdiction of the Tribunal*, Tadic Case, IT-94-1-T (ICTY Aug. 10, 1993) at para. 53. The Appeals Chamber reversed the Trial Chamber and ruled that the provisions of the Geneva Conventions, as contained in Article 2, "apply to persons or objects protected only to the extent that they are caught up in an international armed conflict." *Decision on the Defense Motion on the Jurisdiction of the Tribunal*, Tadic case, IT-94-1-T (ICTY Oct. 2, 1995) at para. 81.

78. See *Statute*, *supra* note 20, art. 3.

79. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, § II, Chapter I [hereinafter 1907 Hague Convention].

ton destruction of cities, towns or villages, or devastation not justified by military necessity; attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction, or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and plunder of public or private property.⁸⁰

The 1949 Geneva Conventions reiterate many of the rules found in the 1907 Hague Convention.⁸¹ However, Article 3 confers on the Tribunal jurisdiction over violations not covered in Article 2, 4 or 5 of the Tribunal's Statute.⁸² In essence, Article 3 is a "catch-all" clause to ensure that no serious violation of international human rights will go unpunished.⁸³ Thus, the Tribunal may prosecute persons for war crimes not expressly listed in Article 3 of the Statute, but they must be limited to war crimes which constitute, beyond any doubt, a breach of customary law.⁸⁴ Like the grave breaches provisions of the 1949 Geneva Conventions, the 1907 Hague Convention (and thus, Article 3 of the Tribunal's Statute), applies to only international conflicts.

Article 4 of the Tribunal's Statute deals with genocide.⁸⁵ Article 4 of the Statute reproduces Articles 2 and 3 of the Genocide Convention without change.⁸⁶ Genocide is a crime under international law regardless of whether it occurs in a time of peace or a time of war.⁸⁷ Genocide includes acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁸⁸ While the term is not used in Article 4, the policy of ethnic cleansing also includes acts which constitute genocide.⁸⁹ Individual acts which constitute genocide include: killing; causing serious bodily or mental harm; deliberately inflicting such poor living conditions as to bring about, in whole or in part, the group's physical destruction; imposing measures to prevent births within the group; and forcibly transferring children of the group to another group.⁹⁰ Each of these acts, alone or in combination, can constitute the crime of genocide.

Under the Tribunal's Statute, it is not necessary to *actually* commit genocide. *Conspiracy* to commit genocide, direct and public *incitement* to commit

80. *Statute, supra* note 20, art. 3.

81. See MORRIS & SCHARF, *supra* note 19, at 63.

82. *Statute, supra* note 20.

83. The Statute's Article 3 provides a list of punishable violations, but notes that this list is not exclusive: "[s]uch violations shall include, *but not be limited to* . . ." *Statute, supra* note 20, art. 3 [emphasis added].

84. See MORRIS & SCHARF, *supra* note 19, at 72.

85. See *Statute, supra* note 20, art. 4.

86. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

87. See *Statute, supra* note 20, art. 4.

88. See *id.*

89. See *Statute, supra* note 20, arts. 2, 3, and 5; see also *Indictment of Radovan Karadzic and Ratko Mladic, The Srebrenica Case, IT-95-18-I, (ICTY Nov. 14, 1995), counts 1-2 (charging defendants with the crime of genocide based on their direction of ethnic cleansing campaign within Srebrenica).*

90. See *Statute, supra* note 20, art. 4.

genocide, *attempt* to commit genocide, and *complicity* in genocide are all punishable under the Statute.⁹¹

Article 5 of the Tribunal's Statute provides the Tribunal with jurisdiction over crimes against humanity. The following acts, when committed during armed conflict, whether that conflict is international or internal in character, and directed against any civilian population, are considered crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts.⁹²

Crimes against humanity are distinguished from war crimes against individuals in the sense that crimes against humanity must be widespread or demonstrate a systematic character.⁹³ In addition, crimes against humanity are generally considered to be very grave crimes that "shock the collective conscience."⁹⁴ As the Tribunal observed in the *Erdemovic* case:

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must therefore demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.⁹⁵

VII.

RULES OF THE ROAD GUIDELINES AND PROCEDURES

The detailed process for implementing the Rules of the Road is found in the "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996"⁹⁶ [hereinafter "Rules of the Road Procedures"]. Each local authority determines how to proceed with a case prior to its submission to the Tribunal. In Bosnia-Herzegovina, a criminal case often begins with a complaint made to the police. The police then undertake a preliminary investigation and prepare for the prosecutor a "criminal report" on the allegations.⁹⁷ If the evidence is deemed insufficient, the prosecutor will request the Investigating Judge (Magistrate) to open a more extensive investigation. The Investigating Magistrate may collect new and old statements and order scientific tests to deter-

91. *Statute*, *supra* note 20, art. 4.

92. *Id.* art 5.

93. See *Decision of Trial I – Review of Indictment Pursuant to Rule 61*, Vukovar Hospital Case IT-95-13-R61 (ICTY April 3, 1996) at para. 30. See also Secretary-General's Report, *supra* note 1, ¶¶ 74 – 84, (indicating that a single act could qualify as a crime against humanity, so long as there is a link with widespread or systematic attack against a civilian population).

94. See *Sentencing Judgment*, Erdemovic case IT-96-22-T (ICTY Nov. 29, 1996), at para. 27.

95. *Id.* para. 28.

96. See Rules of the Road Procedures, *supra* note 60.

97. A criminal report is generally a police report given to the prosecutor, containing the following information: the alleged suspect's summary of crimes and citation of relevant code problems; description/statement of the criminal act(s); and attachment of all relevant documents.

mine whether the file should be returned to the prosecutor for a decision on whether to indict. Because the suspect has not been indicted, this proceeding is still regarded as a preliminary proceeding. Although the file *may* be sent to the OTP for review prior to the actual indictment, this clearly is not the most desirable route.⁹⁸ One scholar familiar with the process has argued that to ensure that a file is legally sound, it is better to have completed the indictment.⁹⁹

If an indictment includes violations of international humanitarian law, the court that has jurisdiction over the case is *required* to submit a request for review to the OTP within 24 hours.¹⁰⁰ The OTP will not undertake a review if the guilt or innocence of the suspect has already been determined by a national court.¹⁰¹ Nor will the OTP review a case file in which the suspect has been charged with a common crime under the national penal code (*e.g.*, murder).¹⁰²

The OTP does not review the relevance of any charges based on domestic law. The OTP's own guidelines pay deference to local authorities in describing how a suspect will be charged:

Responsibility and control of the cases will remain at all times with the authorities of the party concerned, and the cases will be subject to the *law of the territory concerned*. The Prosecutor of the International Tribunal will not seek to make any recommendations to the parties as to what future action they should take under that law in an individual case [emphasis added].¹⁰³

If a charge is based on domestic law but also constitutes a violation of international law under the Tribunal's jurisdiction, the domestic charge will be reviewed through the Rules of the Road process under the applicable provision of international law.¹⁰⁴

Files are to be submitted confidentially, in writing, to the OTP through the Tribunal in The Hague, or to one of the OTP liaison offices in Zagreb, Sarajevo, or Belgrade.¹⁰⁵ Submitting a list of suspects' names, without accompanying case files, is not sufficient for Tribunal review, and does not constitute submission of cases to the Tribunal.¹⁰⁶ Thus far, files submitted by the Federation have been sent from Bosnia to the Bosnian representative in The Hague.¹⁰⁷ The facts disclosed in the file must constitute a serious violation of international law, as defined within the Tribunal's Statute.¹⁰⁸ Any case that does not fall within

98. When the OTP receives a file that is in the preliminary stage (*i.e.*, pre-indictment), there is often insufficient evidence accompanying the file. See Report from Ken Bresler, CEELI/CIJ Legal Specialist to CEELI/CIJ Washington, D.C., September 23, 1997 [hereinafter *Bresler Report*] [on file with the author].

99. See *id.* para. 2.

100. Rules of the Road Procedures, *supra* note 60, § 4.

101. *Id.* § 14.

102. *Id.*

103. *Id.* § 15.

104. Because of the problems experienced by Bosnian prosecutors in compiling files based on the Rules of the Road Procedures, CEELI/CIJ has completed a draft manual entitled, "Rules of the Road: Users' Manual for Preparing Cases for Submission to the International Criminal Tribunal for the Former Yugoslavia" May 22, 1998 [hereinafter *Manual*] [on file with the author].

105. Rules of the Road Procedures, *supra* note 60, § 4.

106. See OHR Memo, *supra* note 54.

107. Discussions with Alain Norman, CEELI/CIJ Legal Specialist to The Hague.

108. Rules of the Road Procedures, *supra* note 60, § 9.

the Tribunal's jurisdiction is returned to the submitting party.¹⁰⁹ Summaries of the file and all key documents contained in the file are to be translated into English.¹¹⁰ The OTP may also require additional evidence from the party making the request,¹¹¹ although to date, this has not occurred.

A file must contain copies of all witness statements, protocols, and other evidentiary documents, including a copy of the order, warrant, or indictment for each suspect; copies of all witness statements; a summary of the personal history of the suspect, including details of physical description and present whereabouts and the length of time, if any, he or she has spent in custody; a summary of the procedural steps, if any, already taken in the case, including the basis under national law for any investigation, warrant, or arrest and details of any criminal proceedings, including cases against the co-accused which have also been submitted for review; a summary of the circumstances of the crime; a summary of the available evidence; and the name, address, and contact details of the person in charge of the case.¹¹²

It is possible for the file to contain allegations against two or more persons. In this case, there must be sufficient evidence supporting the allegations against *each* suspect.¹¹³ Evidence contained in the file must have been obtained by methods consistent with internationally protected human rights (*i.e.*, not by torture), and which do not cast substantial doubt on its reliability.¹¹⁴

Once received by the OTP, the files are kept in strict confidence. The files are kept in locked and secured areas and access is restricted.

VIII.

THE ROLE OF THE OTP UNDER THE RULES OF THE ROAD

When reviewing a case file, the OTP must determine whether there is credible and reliable evidence, available from at least one direct source, on two essential matters:

- (a) whether a serious violation of international humanitarian law within the Tribunal's jurisdiction has been committed; and (b) whether the person against whom the allegations are made is the person responsible for this violation.¹¹⁵

In the process of reviewing a case, the OTP focuses solely on the file and its supporting evidence. The OTP does not debate the merits of a particular case, nor enter into any correspondence, except regarding points of clarifications and requests for additional information from the party who submitted it.¹¹⁶

109. *Id.*

110. *Id.* § 5. The fact is that none of the files submitted so far has been translated first by the parties (discussions between CEELI/CIJ legal specialists and the author).

111. *Rules of the Road Procedures, supra note 60, § 7.*

112. *Id.* § 5. The file submitted is actually a copy. The original is kept by the party who created the file.

113. *Id.* § 10.

114. *Id.* § 11.

115. *Id.* §§ 9, 10, 13.

116. *Id.* § 20.

The OTP will inform the requesting party (in writing) whether, consistent with international legal standards, sufficient evidence has been provided to show reasonable grounds for believing that the suspect has committed a serious violation of international humanitarian law.¹¹⁷ The OTP will also inform the party whether it intends to take steps under the Tribunal's Rules to secure the arrest or detention of the suspect, or to request the national courts to defer to the competence of the Tribunal.¹¹⁸ The OTP needs only to find reasonable grounds for *one* charge to justify the detention of the suspect.¹¹⁹

In ascertaining whether the proposed warrant or indictment is consistent with international legal standards, the OTP employs the same criteria formulated and used for the prosecution of cases before the Tribunal.¹²⁰ Under Rule 47(A) of the Tribunal's Rules,¹²¹ an indictment may be presented to the court if the prosecutor is "satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal."

A prosecutor shall prepare an indictment "upon a determination that a *prima facie* case exists,"¹²² and a trial judge will determine if "a *prima facie* case [in fact] exists."¹²³ For the purpose of reviewing an indictment, a *prima facie* case "is understood to be a credible case which would (if not contradicted by the Defense), be sufficient basis to convict the accused of the charge."¹²⁴ In determining whether a *prima facie* case exists, the OTP makes several assumptions, including the following:

1. The OTP accepts the available evidence as unchallenged and most favorable to the national prosecution;
2. The OTP accepts the national prosecution evidence without regard to questions of admissibility or credibility unless the material is so obviously incredible and unreliable as not to constitute evidence;
3. The OTP draws all available inferences in favor of the national prosecution; *and*
4. The OTP accepts all reasonable national prosecution hypotheses, even if potential alternative hypotheses consistent with the innocence of the accused also exist.¹²⁵

117. *Id.* § 7(a).

118. *Id.* § 7(b).

119. Although this "one-charge" rule has been adopted by the OTP, the UNHCR has stated that *all* charges must be approved by the OTP. See OHR Memo, *supra* note 54.

120. See Rules of the Road Procedures, *supra* note 60, § 12.

121. See INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF FORMER YUGOSLAVIA SINCE 1991, RULES OF PROCEDURE AND EVIDENCE, U.N. Doc. IT/32/Rev. 9 (1996) [hereinafter Rules].

122. See *Statute*, *supra* note 20, art. 18(4).

123. See *id.* art. 19(1).

124. *Confirmation of the Indictment*, Kordic et al. (Lasva River Valley) Case IT-94-14-1 (ICTY Nov. 10, 1995).

125. Discussion between the author and representatives of OTP in January 1997.

For the prosecutor, "sufficient evidence" is not synonymous with "conclusive evidence" or "evidence beyond a reasonable doubt."¹²⁶ The evidence must provide "reasonable grounds," as determined by a reasonable or ordinary prudent person, to believe the suspect committed a crime within the jurisdiction of the Tribunal.¹²⁷ Thus, the facts must raise a "clear suspicion" that the suspect is guilty of the crime. To ascertain the truth of his suspicions, the OTP must act with "caution," impartiality and diligence as would a reasonable, prudent prosecutor.¹²⁸

It is important to note that in reviewing the files, the OTP acts in an "advisory capacity only," and does not make any recommendation to the parties as to what future actions should be taken on any individual case.¹²⁹ The role of the OTP is really a limited one – it simply reviews the files and determines whether the evidence contained in the file is sufficient by international legal standards to justify the arrest or indictment of the suspect. In effect, the OTP acts as a "clerk" to the national prosecutor. The OTP neither interviews witnesses nor hears representations from the party, nor does it issue reasoned opinions.¹³⁰ Moreover, the OTP does not determine whether the national police and national prosecutor have observed "international legal standards" in preparing a case, or whether provisions of the domestic criminal law are consistent with "international legal standards."

Unless the OTP decides to transfer the case within the Tribunal's jurisdiction, responsibility and control of the cases being reviewed remain with the authorities of the party concerned.¹³¹ The cases will also remain subject to the law of the territory concerned.¹³² The OTP may request additional information from the party about availability of evidence that would be needed to prove complex elements of a crime that has been shown to have occurred.¹³³

Communications between the OTP and the prosecutor are confidential, with the exception being that the results of OTP reviews are provided to the Office of the High Representative.¹³⁴ These results are not released to the other parties to the Agreement. Consequently, the response issued by the OTP after reviewing a file is straightforward and quite limited. Under Rules of the Road procedures, the OTP will deliver one of seven standard findings to the requesting party.¹³⁵ These include:

126. *Confirmation of the Rajic Indictment*, Rajic (Stupni Do) Case IT-95-12-I (ICTY Aug. 29, 1995).

127. *Id.*

128. *Id.*

129. Rules of the Road Procedures, *supra* note 60, § 15.

130. *Id.* § 20.

131. *Id.* § 15.

132. *Id.*

133. *Id.* § 19.

134. The Office of the High Representative is responsible for overseeing the implementation of the Dayton Accords. Mr. Carl Bildt from Sweden was the first representative; he was replaced by Mr. Carlos Westendorp, formerly the Spanish Ambassador to the United Nations.

135. Rules of the Road Procedures, *supra* note 60, § 16. The copy of the file is not returned; the only response is in the form of a letter.

The first response indicates that the evidence contained in the file is sufficient according to international legal standards.¹³⁶ Unless the Tribunal assumes jurisdiction over the proceeding, the national courts can initiate or continue criminal proceedings, including prosecution.

The second response indicates that the evidence contained in the file is *not* sufficient according to international legal standards.¹³⁷ This usually occurs because the file fails *both* to identify clearly the individual to be charged and to specify the nature of the charges.¹³⁸ It could also mean that the charges were not proportional to the crime. For instance, if evidence showed that a military commander caused the shelling of a *single* house and the national court indicted him or her for crimes against humanity, the charge would be excessive, despite the strong evidence regarding the commander's actions. Under this scenario, arrest or detention of the person is prohibited.

The third response is to request further information from the submitting party.¹³⁹ This usually means that supporting information such as witness statements and evidentiary documents has not been provided. There may be an indictment, but it is not accompanied by supporting information. Before the OTP makes a final determination, the local authority may submit, as requested, new evidence or information.¹⁴⁰ In addition, any new evidence obtained by the local authorities during the review process that is relevant to the case can be submitted to the OTP.¹⁴¹ Even after a file has been reviewed and returned, the local authorities may *resubmit* the file and request reconsideration by the OTP based on new evidence that supports the allegation made in an active case file.¹⁴²

The fourth response indicates the Tribunal's intention to seek deferral of the case from the national court to the jurisdiction of the Tribunal.¹⁴³

136. *Id.* app. B § A, which reads: "I return this case, the Prosecutor having taken the view that for the purposes of determining whether criminal proceedings should be continued/initiated at this stage, the evidence is *sufficient* by international standards to provide reasonable grounds for believing that the person who is the subject of the report, namely . . . has committed a serious violation of international humanitarian law."

137. *Id.* app. B § B, which reads: "I return this case, the prosecutor having taken the view for the purposes of determining whether criminal proceedings should be continued/initiated at this stage, the evidence is *insufficient* by international standards to provide reasonable grounds for believing that the person who is the subject of the report, namely . . . has committed a serious violation of international humanitarian law."

138. Memorandum from Alain Norman to Mark Ellis (Apr. 29, 1998) [hereinafter April 29th Norman Memo] [on file with the author].

139. *See* Rules of Road Procedures, *supra* note 60, app. B § C, which reads: "I refer to the case against . . . (NAME) . . . submitted to the Prosecutor for review on . . . (date). The Prosecutor is unable to form a view on the sufficiency of evidence without the following *further information*: I shall therefore be obliged if you will make this information available to the Prosecutor as soon as possible."

140. *See id.* § 19.

141. *See* Manual, *supra* note 104, at 10.

142. Rules of the Road Procedures, *supra* note 60, § 20.

143. *Id.* app. B § D, which reads: "I refer to the case against . . . (NAME) . . . submitted to the Prosecutor for review on . . . (date). In all the circumstances, the Prosecutor considers that this is a case which should be prosecuted before the International Criminal Tribunal, and in relation to the national investigation and criminal proceedings, he *intends to seek deferral* to the competence of the International Tribunal. A formal application for deferral is currently being prepared, and will be

The fifth response indicates that the facts presented in the file do not reveal a crime within the jurisdiction of the Tribunal.¹⁴⁴

The sixth response indicates that the suspect may be an important *witness* in proceedings before the Tribunal and should therefore be detained by the party for that purpose.¹⁴⁵

The final response indicates the OTP's opinion that there is insufficient evidence to continue proceedings on charge "A," but sufficient evidence to initiate new proceedings on charge "B."¹⁴⁶

Once a file is returned to the "submitting" party, questions arise concerning the degree to which local authorities are constrained by OTP decisions. While the OTP maintains that its decision is only advisory, the Office of the High Representative ("OHR") maintains otherwise. The OTP Guidelines state:

In these cases, the Prosecutor of the International Tribunal acts in an *advisory capacity only*, and does not take decisions. Responsibility and control of the cases will remain at all times with the authorities of the party concerned . . . the Prosecutor of the International Tribunal will not seek to make any recommendations to the parties as to what future action they should take under that law in an individual case.¹⁴⁷ [emphasis added].

Nevertheless, the OHR, which has primary responsibility for implementing the Dayton Agreement,¹⁴⁸ maintains that OTP decisions are *binding* and that local authorities may proceed with the arrest and trial of a suspect *only* if the OTP concurs based on its review of the file. The lack of clarity regarding the authority of OTP findings became apparent when local authorities chose to proceed with a case even though the OTP determined that there were insufficient

presented to a Trial Chamber in due course. In the meantime, the Prosecutor requests, under Rule 40 of the Tribunal's Rules of Procedure and Evidence, that the national authorities take all necessary measures to prevent the escape of . . . (NAME) . . . injury to or intimidation of victims or witnesses, or the destruction of evidence."

144. *Id.* app. B § E, which reads: "I return this case, the Prosecutor having taken the view that the facts do not reveal a crime within the jurisdiction of the International Tribunal, and that the case therefore does not fall within the category of cases upon which he can properly advise."

145. *Id.* app. B § F, which reads in part: "I return this case, the Prosecutor having taken the view that for the purposes of determining whether criminal proceedings should be continued/initiated at this stage, the evidence is *sufficient* by international standards to provide reasonable grounds for believing that the person who is the subject of the report, namely . . . (NAME) . . . may have committed a serious violation of international humanitarian law." While the Prosecutor is content that the case should continue to be dealt with by the national courts, he does consider that . . . (NAME) . . . may be an important *witness* in proceedings before the International Tribunal, and requests that he be informed of any anticipated change in the status of . . . (NAME) . . . as a detained person.

146. *Id.* app. B § G, which reads in part: "I return this case, the Prosecutor having taken the view that for the purposes of determining whether criminal proceedings should be continued/initiated at this stage, the evidence is *insufficient* by international standards to provide reasonable grounds for believing that the person who is the subject of the report, namely . . . (NAME) . . . may have committed the serious violation of international humanitarian law with which he has been charged, namely . . . (CRIME X) . . . However, the Prosecutor does consider that the evidence is *sufficient* by international standards to justify proceedings for . . . (CRIME Y)."

147. Rules of the Road Procedures, *supra* note 60, § 15.

148. Dayton Accords, *supra* note 35, Annex 10.

grounds to do so.¹⁴⁹ It was only at this point that the OHR, in a statement to the press, made its position known. The OHR noted:

[In trying the case] . . . the responsible authorities breached their legal obligations to prosecute only those crimes where the Tribunal has found sufficient evidence under international standards.¹⁵⁰

Representatives of the OHR also state that the relevant authorities in Bosnia-Herzegovina, including the Human Rights Chamber of Bosnia-Herzegovina, have unequivocally supported the position that the OTP's response is legally binding.¹⁵¹ The OHR believes that although the OTP's decision is not a binding decision of the Tribunal, under its own Rules, it is binding to the three parties who signed the Rome Agreement and agreed to adhere to the decisions of the OTP.¹⁵² Furthermore, since it is the OHR that ultimately has authority over the implementation of the Rome Agreement, it has concluded that the OTP's decisions will be binding.¹⁵³

IX.

COMMITTING RESOURCES TO IMPLEMENT THE RULES OF THE ROAD

Since early in the conflict, the government of Bosnia-Herzegovina had been documenting atrocities committed in the country. In 1993, shortly after the Tribunal was created, Bosnian officials began forwarding "hundreds"¹⁵⁴ of investigative files to The Hague in anticipation that the Tribunal would initiate indictments. Yet, these files were disorganized and often incomplete in part because the war was still raging in Bosnia-Herzegovina, but also because the Tribunal, still in its infancy, was unable to provide clear guidance regarding file preparation. In addition, a shortage of resources left the Tribunal ill-equipped to review case files simply to determine whether or not they met the required evidentiary standards. This problem became manifest in the Tribunal's early reluctance to shoulder the burden of implementing the Rules of the Road, and later in the fact that "Rules of the Road files" were given a low priority within the OTP's administrative structure.¹⁵⁵

In 1997, the United States Department of State asked the American Bar Association Central and East European Law Initiative (CEELI)¹⁵⁶ to assist the

149. The case was against Veselin Cancar and decided by the Sarajevo Cantonal Court. The OTP found that the evidence was insufficient by international standards for Mr. Cancar to be charged with serious violations of international humanitarian law. However, Mr. Cancar was subsequently charged, tried, and convicted of the very crimes for which the OTP found a lack of evidence to prosecute. See OHR Press Statement (January 28, 1998) [on file with the author].

150. *Id.*

151. Memorandum from Peggy L. Hicks, the Office of the High Representative, to CEELI (May 25, 1998) [hereinafter Hicks Memo].

152. *Id.*

153. *Id.*

154. The exact number of files submitted is not known.

155. Discussion with CEELI/CJ Legal Specialists.

156. For a description of CEELI, see *supra* note *.

Tribunal in reviewing the Rules of the Road files.¹⁵⁷ In June 1997, through its Coalition for International Justice (CIJ),¹⁵⁸ CEELI sent a team of three American attorneys¹⁵⁹ to The Hague to assist the OTP in reviewing files. CEELI/CIJ has since deployed two additional teams of attorneys to review the files.¹⁶⁰

The CEELI/CIJ attorneys reviewed selected files and gave preliminary recommendations based on whether or not previously-issued orders, warrants, or indictments met international legal standards. It is important to note that the role of the CEELI/CIJ attorneys was to conduct a *preliminary* review of the files, much like a clerk would do for a judge. The final review and decision regarding the appropriate course of action remained with the OTP.

X.

THE FILES

When the first team of CEELI/CIJ legal specialists arrived in The Hague in June 1997, there were approximately 400 "original files" to review.¹⁶¹ Under the Rules of the Road, the OTP had identified 348 dossiers on named individuals and 17 "crime folders." Already, the OTP had begun review of 44 files. The OTP completed its review and informed the parties who submitted the files of its decisions. The first team of CEELI/CIJ legal specialists started its review with approximately 153 of the original files. There are, however, an unknown number of additional files that have yet to be categorized.¹⁶² This has turned out to be one of the more perplexing issues facing the Rules of the Road project. Because the files were not adequately categorized, the actual number of files is still a mystery. For instance, one member of the OTP estimates that there is actually a backlog of over 1,000 files. Based on a preliminary review, the number of files ranges from 400 to 500, with the total number of suspects estimated at between 600 to 700.¹⁶³

The number of files notwithstanding, the file content seems to be fairly similar. The bulk of charges reviewed to date focuses on relatively low-level military and paramilitary soldiers, and the facts are rather straightforward. The files describe atrocities and human rights violations that occurred in a particular village, region, or concentration camp. Typically, the files are composed of

157. The meeting took place between Ambassador William Montgomery and Mark S. Ellis, Executive Director of CEELI. Ambassador Montgomery was then the Special Advisor to the President and Secretary of State on Implementation of the Bosnian Peace Settlement.

158. CIJ is a tax exempt 501(c)(3) organization created by CEELI to assist the Tribunal.

159. The three attorneys were Michael Johnson, Scott Gordon, and Kenneth Bresler.

160. The second team included attorneys T. Gregory Motta, Susan Axelrod, and Mark Summers, who were sent to The Hague in October, 1997. The third team included T. Gregory Motta, Thomas Marjenson, Diane Giaculone, and Mark Summers. They arrived in The Hague in May, 1998, for a two-month stay.

161. 1,000 suspects were suspected to be identified in the current and future files. See April 29th Norman Memo, *supra* note 138.

162. Memorandum from Diane Giaculone, CEELI/CIJ Legal Specialist, to CEELI/CIJ Washington (June 4, 1997) [hereinafter Giaculone Memo] [on file with the author].

163. *Id.*

“exit interviews.”¹⁶⁴ For instance, files may include witness statements accusing a soldier of committing violations of international humanitarian law.¹⁶⁵ These statements are generally from volunteer investigators and are written in a “narrative stream of consciousness.” As a result, many files list names, but do not identify the basis of the witnesses’ knowledge, nor do they provide corroborating physical evidence of the suspect’s alleged acts.¹⁶⁶

Although the files vary in size (generally 25 to 100 pages in length),¹⁶⁷ they tend to focus on single individuals.¹⁶⁸ Several relate to more than one named individual and/or to one or more apparent crimes. For instance, during the most recent review, 11 out of 59 files contained more than one suspect.¹⁶⁹ These tend to be the largest files. They involve discrete criminal offenses committed by multiple persons. Many files contain little or no information. Others contain information about persons not covered under the Rules of the Road mandate. That is, a Rules of the Road file on Mr. X also contains witness statements referring to acts by Mr. Y, who was not originally identified as a Rules of the Road suspect.¹⁷⁰

A number of files contain accusations against political figures, such as parliamentary or party leaders.¹⁷¹ These individuals tend not to have a formal military background, but are alleged to have committed crimes against humanity (*i.e.*, “waging an unjust war”).¹⁷² These files tend to focus on the more complicated legal basis of command responsibility.¹⁷³

Several files target military personnel, including former leaders of the Yugoslav National Army, who assumed command positions in the Republika Srpska Army.¹⁷⁴ These files are quite extensive – some exceed several thousand pages – and tend to focus on atrocities that occurred in a specified geographic location.¹⁷⁵ Among the files of this type, little, if any, direct evidence is offered of the commander’s personal involvement in specific war crimes. Evidence

164. Memorandum from Thomas Gregory Motta, CEELI/CIJ Legal Specialist, to CEELI/CIJ Washington (November 30, 1997) [hereinafter Motta Memorandum].

165. Typically, the witnesses would identify two or three soldiers who shot a civilian during a siege, or a concentration camp soldier who executed a prisoner. *See id.*

166. An example would be where witnesses responded to a questionnaire asking who participated in ethnic cleansing. A witness’ statement would note that “suspect X, my neighbor, participated in mass killings.” However, there would be no other statements or evidence explaining the meaning of “participated.” Another example is where a witness’ statement noted that “I recognized suspect X as among those who were present at the massacre.” But, there was no mention of exactly in what capacity X was there. Bresler Report, *supra* note 98.

167. *Id.*

168. *See* Giaculone Memo, *supra* note 162.

169. *See* May 22nd Norman Memo, *supra* note 57.

170. *See* Bresler Report, *supra* note 98.

171. *See* Motta Memorandum, *supra* note 164.

172. *Id.*

173. *See* Memorandum from Thomas S. Marjenson to CEELI/CIJ (July 8, 1998) [hereinafter Marjenson Memo].

174. *See* Motta Memorandum, *supra* note 164.

175. *Id.* In the most recent review of files, four out of the 59 files were “regional” files that covered a large number of persons. *See* May 22nd Norman Memo, *supra* note 57.

tends to be circumstantial, consistent with the theory of *respondeat superior*.¹⁷⁶ For instance, a file may present a very clear case for the systematic destruction of religious and cultural institutions, in violation of Article 3 of the Statute,¹⁷⁷ without actually providing direct evidence that the commander of the brigade ordered, or even personally witnessed, the destruction of such institutions.¹⁷⁸

XI.

FUTURE STEPS

Recognizing the importance of the procedural guidelines established by the Rules of the Road Procedures, the Clinton Administration announced that it would provide additional funding in support of the Rules of the Road Project.¹⁷⁹ New funding has thus far supported a third Rules of the Road team, including six legal specialists and six language assistants. Once again, CEELI/CIJ provided the legal specialists,¹⁸⁰ and agreed, based on discussions with the U.S. Department of Justice, to deploy a fourth team of specialists in the fall of 1998.

The OTP has clearly stated that it has neither the personnel nor the time to effectively manage the Rules of the Road review process.¹⁸¹ Indeed, because the OTP has been unable to organize effectively all the files, there continue to be gaps in the files, missing files, and even a duplication of effort in reviewing the same materials twice.¹⁸² Recognizing the contribution of the first two Rules of the Road teams, the OTP has determined that an appropriate long-term solution for completing the review process would be to hire an "Information Manager" to assist in managing the organization and flow of case files.¹⁸³ Indeed, the OTP has stated that without additional funding to reduce, or at least supplement, the short-term "bridging" arrangements provided by CEELI/CIJ with a permanent "Rules of the Road Unit," the OTP would consider terminating its involvement with the Rules of the Road.¹⁸⁴ To be sure, an immediate review of the status of the Rules of the Road files to determine their exact number, the location of the files within the Tribunal, and how they are being logged by the Tribunal, if at

176. See May 22nd Norman Memo, *supra* note 57. The theory of *respondeat superior* is reflected in Article 7(3) of the Statute, which reads, in part: "[Acts] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." *Statute, supra* note 20.

177. See *Statute, supra* note 20, art. 3.

178. See Motta Memorandum, *supra* note 164.

179. U.S. DEPARTMENT OF STATE PRESS RELEASE 98/165 (Mar. 13, 1998) [on file with the author].

180. The attorneys who arrived in The Hague in May 1998 for a two-month stay included T. Gregory Motta, Thomas Marjenson, Diane Giaculone, and Mark Summers. Three additional legal specialists were to be provided by the Air National Guard; however, logistical issues prevented the Guard from participating. It is expected that they will assist with future legal specialist teams.

181. See May 22nd Norman Memo, *supra* note 57.

182. *Id.*

183. The option was presented by an OTP representative during a meeting on March 12, 1998, with CEELI/CIJ representative Alain Norman [hereinafter May-Norman Memo] [on file with the author].

184. See Blewitt Memo, *supra* note 58.

all, should be the highest priority for the OTP. Yet, whether a full-time person is required for this task is debatable. The OTP views the secondment of CEELI/CIJ legal specialists as a "bridging" arrangement "to enable work on files to continue while sufficient resources are sought for a workable long-term solution."¹⁸⁵ Still, it is likely that the CEELI/CIJ legal specialists could themselves accomplish the task.

The OTP must also be more diligent in finalizing the review of the files and returning them without delay to the parties who submitted them. According to Bosnian officials, the Bosnian Government sent files to the OTP for *priority* review.¹⁸⁶ The CEELI/CIJ legal specialists completed the preliminary review of the files within a short timeframe. However, the OTP delayed the final review of the files for a considerable amount of time. This resulted in increased animosity toward the Tribunal by the Bosnian Government.¹⁸⁷

Another challenge facing the Tribunal is the need for greater public understanding about the Rules of the Road proceedings, particularly in the regions of the Former Yugoslavia. There is a general lack of understanding about the purpose, objective, and procedural requirements associated with the Rules of the Road.¹⁸⁸ Talks are currently underway among representatives of the U.S. State Department, the Tribunal, the OSCE, and CEELI/CIJ to create a public information and training program in Bosnia-Herzegovina. The proposed project would consist of a series of roundtable discussions, held with local judges and law enforcement officials throughout Bosnia-Herzegovina, about how to strengthen Rules of the Road implementation.

The roundtables will be based on a "Rules of the Road Manual," which is to be created by CEELI/CIJ in cooperation with the OTP.¹⁸⁹ The Manual will present the relevant rules and guidelines for submitting case files to the Tribunal. It is hoped that such a manual will enhance the accuracy and efficiency of file preparation and review, and will further expedite decisions regarding Rules of the Road files. The OTP, however, has been reluctant to implement this project until it receives funding for a full-time coordinator.¹⁹⁰

Efforts to bring attention to and strengthen the Rules of the Road process may also be relevant to the proposed International Criminal Court (ICC). Member states of the United Nations have recently adopted a statute that would, upon adoption by the Parties to the Treaty, establish a permanent international court that would try individuals who commit the most egregious human rights violations.¹⁹¹ Negotiations on a draft statute for the ICC have been ongoing for two

185. *Id.*

186. Discussion between the author and the Bosnian Ambassador to the United States in June 1998.

187. *Id.*

188. This perception was particularly evident during a series of meetings held in 1997 in Bosnia-Herzegovina between the author and members of the Bosnian legal community.

189. See Manual, *supra* note 104.

190. Blewitt Memo, *supra* note 58.

191. Member states met in Rome, Italy, between June 15 and July 17, 1998, to negotiate a treaty to establish an International Criminal Court (ICC).

years. Since December, 1995, when the UN General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), member states have worked to produce a final Statute for the ICC.¹⁹²

The draft statute for the ICC is premised on the principle that it will *complement* – not replace – national courts.¹⁹³ This concept of “complementarity” means that a case will be inadmissible before the ICC if and when it is being investigated or prosecuted by a state that has jurisdiction. The ICC may secure primary jurisdiction only if the ICC (through one of its judges) determines that the state in question is “unwilling or unable genuinely” to carry out the investigation or prosecution.¹⁹⁴ Even if a state decides not to prosecute, so long as it conducted a proper investigation, the ICC will not be able to intervene.¹⁹⁵ Ostensibly this means that the ICC will be able to intervene only when the national judicial system has collapsed. This is an exceedingly high level of “proof” for the ICC to meet, and there is a real concern that the ICC will not hear many cases.

There is nothing in the current draft ICC Statute to deter a national court from aggressively pursuing a war crimes case, even if its national legal system is incapable of providing a fair trial. It is possible that a national court would be *only too willing* to initiate proceedings in which the individual accused becomes a scapegoat for what might have been a more widely-based crime. And it is not inconceivable that a scenario similar to that which developed among the warring parties in Bosnia-Herzegovina, and which led to the Rules of the Road agreement in the first place, could emerge once again. A Rules of the Road provision in the ICC Statute would prevent a state from unilaterally initiating a case against an individual from its nemesis party without prior approval from the ICC. This very basic and practical provision could assist in encouraging reconciliation and preventing renewed conflict.

XII.

CONCLUSION

“If we fail to achieve justice, or at the very least, strive for it, we will have broken faith with the victims of the past and with our humanity, and worse yet, we will have failed to deter future victimization.”

— Cherif Bassiouni

Ensuring accountability for violations of international humanitarian law is an essential element for national reconciliation. Victims of war crimes and human rights violations who do not believe that the alleged perpetrators will be brought to justice will find no peace. They will languish in a post-conflict envi-

192. See generally Rome Statute of the International Criminal Court, Report of the Preparatory Committee, A/Conf. 183/9/17 July 1998.

193. See *id.* at Preamble.

194. *Id.* art. 17.

195. *Id.*

ronment that lacks the very cornerstone of the rule of law – the notion of accountability.

For this reason, the Rules of the Road Project is fundamental to ensuring lasting peace in Bosnia-Herzegovina and the former Yugoslavia. It facilitates reconciliation through an accelerated process for bringing to justice those responsible for the atrocities in the region. It also ensures that the process is fair, which, in the end, may be the most important outcome of the Rules of the Road Project. The fact that Bosnia-Herzegovina currently lacks a sound legal system makes it improbable that a suspected war criminal would receive a fair trial in a Bosnian court. Thus, a mechanism designed to ensure that indictments are based on international standards will not only facilitate reconciliation, but will establish a basic tenet of the rule of law – fairness in criminal proceedings.