

POLITICAL CONSTRAINTS ON INTERNATIONAL CRIMINAL LAW

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“The relationship between law and politics is central for any analysis of the operation and evolution of an international criminal justice system.”¹

Abstract

The reawakening of international criminal law in the 1990s has progressed at an unprecedented rate. Two ad hoc international criminal tribunals and the long-awaited permanent International Criminal Court (ICC) were established in one short decade. This advancement of international criminal law was fuelled by admirable aspirations. However, this paper is a response to a perceived disconnection between aspirations and reality. As the focus of international criminal law moves from the ad hoc tribunals to the ICC, it is necessary to consider the political constraints which may hinder achievement of the core objectives of international criminal law.

One of the most significant constraints facing the international criminal justice system is its dependence on national systems in its operation and implementation. Given the lack of coercive authority of international courts and tribunals (caused in large part by the lack of an international police force or army), international criminal institutions are dependent on the states where crimes took place, as well as third party states, to ensure effective utilization of jurisdiction to prescribe and enforce. In the context of this discussion, a number of relevant areas will be examined. These include: (i) access to evidence; (ii) access to protection for both victims and witnesses; (iii) arrest levels; and (iv) dependence on international political bodies.

This article suggests that such dependence has politicized the international criminal justice system. The fundamental principle of state sovereignty is a primary factor in this politicization. Certain aspects of the impact of politics on the supranational criminal justice system are considered. First, the complicated politics of attaining the cooperation of states is mentioned including a discussion of the need to satisfy governments in order to gain cooperation. Further, this paper would argue that a serious constraint to the effectiveness of international criminal law is political interference, in the form of active state opposition to the efforts of a specific international court or tribunal.

The article concludes with an examination of some of the lessons to be learned from the experiences of the ad hoc Tribunals and the ICC to date. This part discusses first, methods to ensure cooperation, and secondly the Prosecutor, the Court, and the Appearance of Bias.

¹ Former President Jorda of the ICTY, Claude Jorda, ‘The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn from Them’ (2004) 2 *Journal of International Criminal Justice* 572, 574 (Hereinafter *Jorda*).

Introduction

International criminal law as we know it today originated in the post-World War II Military Tribunals at Nürnberg and Tokyo. Subsequently the nascent principle of international criminal justice lay dormant until the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) the following year. These ad hoc tribunals developed a very significant body of international criminal law and reinvigorated the proposal for a permanent international criminal court. This project was finalized at the 1998 Rome Conference and the International Criminal Court (ICC) ultimately came into existence in July 2002.² As the focus of international criminal law moves from the ad hoc tribunals to the ICC, its first trial having started in January 2009, it is an appropriate time to take a step back and consider the political constraints facing this new legal system.

The first part of this article discusses international criminal institutions' dependence on the states where crimes took place, as well as third party states and the international community, from the early investigation stages to the enforcement of sentences.³ The article will then suggest that such dependence has politicized the international criminal justice system. First, the complicated politics of obtaining the cooperation of states is mentioned, followed by a discussion of political interference. The article concludes by examining some of the lessons to be learned from the experiences of the ad hoc Tribunals and the ICC to date. This part discusses first, methods to ensure cooperation, and second, the prosecutor, the court, and the appearance of bias.

1. Lack of Coercive Authority

Unlike domestic systems, international courts and tribunals do not have detective divisions, police forces or armies at their disposal to investigate crimes and capture perpetrators and indictees.⁴ This difficulty applies equally to the ICC as it does to the ad hoc tribunals.⁵ This crucial distinction between national and international trials may be

² For an in-depth discussion of the evolution of international criminal law see: M. Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., New York 2003) 387–494, (Hereinafter *Bassiouni, Introduction to International Criminal Law*); Gerhard Werle, *Principles of International Criminal Law* (T.M.C. Asser Press, The Hague 2005) 1-24, (Hereinafter *Werle*).

³ UNGA 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (22 November 1999) UN Doc A/54/364 [187] (Hereinafter *Expert Group Report on ICTY and ICTR*); Pierre Hazan, 'Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice' (2006) 88 *International Review of the Red Cross* 19 (Hereinafter *Hazan*) 30.

⁴ *Expert Group Report on ICTY and ICTR* (n 3) [25]: 'The Tribunals are unique in another important respect: their dependency upon Member States.'; *Paper on some policy issues before the Office of the Prosecutor*, September 2003 <http://www.icc-cpi.int/otp/otp_policy.html> accessed 6 August 2007, 1 (Hereinafter *Paper on some policy issues before the Office of the Prosecutor*): 'In principle, a national prosecutor acts within a State which has the monopoly of force in its territory. The enforcement agencies of the State are subject to the rule of law and are at the disposal of the national prosecution system. Neither of these two assumptions applies to the Prosecutor of the International Criminal Court.'

⁵ Judge Philippe Kirsch, President of the International Criminal Court, Address to the United Nations General Assembly, 1 November 2007, http://www.icc-cpi.int/about/Court_Reporting.html (Hereinafter *President of the ICC address to UNGA 2007*) 4: '...The Court requires support and cooperation in many areas, in particular the arrest and surrender of suspects and the protection of victims and witnesses. The primary responsibility for providing

described as a “lack of coercive authority.” This problem primarily causes the extreme institutional dependency and politicization of international criminal law, discussed in this article. Successive prosecutors and court representatives have complained of the restrictions caused by international criminal institutions’ lack of coercive authority and the difficulties of obtaining cooperation from governments.⁶ The three most affected areas are: access to evidence, the protection of victims and witnesses, and arrests.

a. Access to Evidence

Obtaining evidence is problematic in the variety of situations facing the Office of the Prosecutor in supranational criminal trials.⁷ The circumstances of supranational criminal law, including, the disparate locations around the world, in many cases years after the fact, in countries frequently hostile to these institutions, seriously complicate the conduct of effective investigations.⁸

Negotiations are required on several levels to obtain the evidence needed for supranational criminal trials, including: obtaining government agreement to investigate in a States’ sovereign territory, requesting assistance in investigations, or requesting evidence in the possession of that government. Former Chief Prosecutor Richard Goldstone explains, “Arrangements to receive police information, and, even more so, intelligence information, required lengthy, complex and detailed negotiations.”⁹ Attempting to address these issues is time consuming for court officials¹⁰ and even after great effort can end in failure due to the non-cooperation, lack of political will or direct interference of these governments. Thus, difficulties of access to evidence gravely affect the functioning of trials at international criminal courts and tribunals.

cooperation and support rests with the States Parties to the Rome Statute. However, States not party to the Statute and international organizations, in particular the United Nations, are also in positions to provide valuable assistance to the Court.’; Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties encountered by Prosecutors in International Criminal Proceedings’ (2004) 2 *Journal of International Criminal Justice* 403, 404 (Hereinafter *Harmon and Gaynor*).

⁶ For example, Richard Goldstone, ‘A View from the Prosecution’ (2004) 2 *Journal of International Criminal Justice* 380, 383 (Hereinafter, *Goldstone, A View from the Prosecution*); Louise Arbour, ‘The Crucial Years’ (2004) 2 *Journal of International Criminal Justice* 396, 397 (Hereinafter *Arbour*); *1-2 Paper on some policy issues before the Office of the Prosecutor* (n 4); former President Jorda of the ICTY: *578 Jorda* (n 1): ‘The judge’s task is made singularly complex, however, when the proceedings are international: the international dimension of the conflict; the massive scale of the crimes; the difficulty in gathering evidence in a distant country where it is often withheld by the political leaders still in power or which is hit by an embargo to protect security; the fear of witnesses and victims to come and testify; and above all, the lack of cooperation, not only from the states directly concerned, but sometimes from third-party states as well...’; See also, *403 Harmon and Gaynor* (n 5): ‘the slender reed upon which these courts and international justice, will flourish or fail depends on two elements: the ability to arrest the authors of these foul crimes and the ability to acquire evidence against them.’

⁷ For example, *1-2 Paper on some policy issues before the Office of the Prosecutor* (n 4).

⁸ *Harmon and Gaynor* (n 5).

⁹ *381 Goldstone, A View from the Prosecution* (n 6).

¹⁰ *Ibid.*

b. Access to Witnesses – Protection of Victims and Witnesses

Despite the recognized importance of witnesses in international criminal proceedings,¹¹ access to witnesses to testify in trials before international criminal institutions can be difficult to obtain, for a variety of reasons. These problems are aggravated by the reality that these witnesses live in many countries around the world.¹² Witnesses must be identified and located. Subsequently court representatives must negotiate with the local governments in order to obtain access to these individuals. Finally, the investigators must convince the witnesses to testify. Thus there are two primary complications regarding access to witnesses: first, the understandable reluctance of witnesses to come to testify and face their tormentors at these institutions, and secondly, problems of accessing witnesses and bringing them to the trial locations.

Convincing witnesses to testify is not an easy task as many potential witnesses are fearful of coming to give evidence before these courts.¹³ While the ICTY and ICTR did not make adequate provision for witness protection in their initial stages, extensive protections were developed at both tribunals through the Rules of Procedure and Evidence and case law.¹⁴ Building on the experience of the ad hoc tribunals, the ICC makes extensive provisions for the protection of victims and witnesses in the Rome Statute, its rules of procedure and evidence, and the regulations of the court.¹⁵

¹¹ Patricia M. Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 Yale Human Rights and Development Law Journal 217, 219 (Hereinafter *Wald, Dealing with Witnesses in War Crime Trials*). Former Judge Wald has described witnesses as 'the lifeblood of ICTY trials' stating, 'it is clear that witnesses have been vital in establishing the occurrence of the crimes committed.'

¹² Eric Møse, 'Main Achievements of the ICTR' (2005) 3 Journal of International Criminal Justice 920, 937 (Hereinafter *Møse*).

¹³ David Paciocco, 'Defending Rwandans Before the ICTR: A Venture Full of Pitfalls and Lessons for International Criminal Law' in *La Voie vers la Cour penale internationale: tous les chemins menent a Rome - The Highway to the International Criminal Court: all roads lead to Rome* (Les Journees Maximilien-Caron, Editions Themis, Faculte de droit Universite de Montreal, Montreal 2003), 99, 112 (Hereinafter *Paciocco*), see also 116; *Expert Group Report on ICTY and ICTR* (n 3) [141]; Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, 13 November 1997, UN Doc. A/52/582 [second annual report] [51] (Hereinafter *ICTR 1997 Annual Report*); Larry Krotz, 'Justice on Trial' *The National Post* (Toronto, Canada 14 December 2002) <<http://www.nationalpost.com/>> accessed 15 July 2007 (Hereinafter *Krotz*).

¹⁴ *Article 22*, Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Security Council resolution 827(1993) (with later amendments) (adopted 25 May 1993). (Hereinafter *ICTY Statute*): Protection of Victims and Witnesses; ICTY Rules of Procedure and Evidence, Rule 34, Providing for the establishment of the Victims and Witnesses Section, Rule 69: Protection of Victims and Witnesses, Rule 75: Measures for the Protection of Victims and Witnesses; *Article 21*, Statute of the International Criminal Tribunal for Rwanda, annexed to Security Council resolution 955(1994) (with later amendments) (adopted 8 November 1994). (Hereinafter *ICTR Statute*): Protection of Victims and Witnesses; ICTR Rules of Procedure and Evidence, Rule 34, Providing for the establishment of the Victims and Witnesses Section, Rule 69: Protection of Victims and Witnesses, Rule 75: Measures for the Protection of Victims and Witnesses.

¹⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90. (Hereinafter *Rome Statute*). Some important articles are: *Article 68*: Protection of victims and witnesses and their participation in the proceedings, *Article 43 (6)*, providing for the Registry to set up the Victims and Witnesses Unit; Rules of Procedure and Evidence of the International Criminal Court (RPE) (adopted 9 September 2002) ICC/ASP/1/3 (part II-A), *Rule 17*, providing for the Functions of the Unit, *Rule 88*, making reference to special measures with specific reference to traumatized victims and witnesses, a child, an elderly person or a victim of sexual violence – mainly vulnerable victims and witnesses; Regulations of the Court (adopted 26 May 2004, amended on 9 March 2005) ICC/BD/01-01-04/Rev. 01-05, *Regulation 81*, Office of Public Counsel for Victims; For an in-depth

However, while it is important for international courts and tribunals to make orders regarding the protection of witnesses, the orders are worth very little without proper enforcement. Without a police force these institutions are restricted in their capacities for enforcement and are reliant on state cooperation.¹⁶ The lack of coercive authority means that contempt of court proceedings are the only enforcement mechanism available to these judicial bodies.

Regarding access to witnesses and travel to trial, state cooperation is again critical. The U.N. Expert Group noted, “[The Tribunals] have no access to witnesses or victims without the cooperation or assistance of Governments or international forces.”¹⁷ International criminal institutions must negotiate with governments to obtain entry to states to interview witnesses.¹⁸ In addition, without state cooperation it is not possible to bring witnesses before these international courts due to the requirements of immigration documents and other such matters.¹⁹

Thus, if states are not willing to provide assistance and fulfill their obligations, international criminal institutions will have great difficulties accessing witnesses, bringing them to testify, and ensuring their protection.

c. Arrests

As mentioned, international criminal bodies do not have a police force to effect arrests and consequently are dependent on their investigators and national governments to locate the accused and are entirely dependent on national governments to arrest and deliver accused to the courts.²⁰ This has proven to be a major problem at the ad hoc tribunals, described as “life-threatening” and “acute” by former Chief Prosecutor Louise Arbour of the ICTY.²¹ Similarly, the problem of ensuring arrests has arisen at the ICC. Regarding the situation in Darfur, the Prosecutor’s seventh report to the Security Council explained that the Government of Sudan “has taken no steps to arrest and surrender

discussion of the ICC’s provisions see: FIDH – International Federation of Human Rights, ‘Victims’ Rights Before the International Criminal Court: a Guide for Victims, their Legal Representatives and NGOs’ (Report) (23 April 2007) <http://www.fidh.org/article.php?id_article=4208> accessed 20 September 2007 (Hereinafter *FIDH Guide on Victims’ Rights Before the ICC*); and Helen Brady, ‘Victims and Witnesses: Protective and Special Measures for Victims and Witnesses’ in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, New York 2001) (Hereinafter *Brady Victims and Witnesses*).

¹⁶ 5 President of the ICC address to UNGA 2007 (n 5): ‘operational cooperation from the United Nations and its Member States will continue to be critical, especially in the field. In addition to arrests, another area of pressing importance is assisting in the relocation and protection of victims and witnesses.’

¹⁷ *Expert Group Report on ICTY and ICTR* (n 3) [25].

¹⁸ 380 Goldstone, *A View from the Prosecution* (n 6): ‘Whilst it might be appropriate for a private lawyer to travel to a foreign country to interview a willing witness, it was inappropriate for investigators from an international tribunal to do any work without the express or implicit consent of the government of that country.’

¹⁹ Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, 2 July 2002, UN Doc. A/57/163 [seventh annual report] [87] (Hereinafter *ICTR 2002 Annual Report*). For example, in 2002, the Rwandan Government imposed conditions which effectively made it impossible for witnesses to travel to the ICTR to testify resulting in the loss of 21 trial days. ; 939 Møse (n 12).

²⁰ 383 Goldstone, *A View from the Prosecution* (n 6).

²¹ 397 Arbour (n 6).

[Ahmad Harun and Ali Kushayb] and stop crimes.”²² Furthermore, since the filing of the Prosecutor’s application and particularly since its issuance in March of this year, President Omar Al Bashir is openly defiant of the arrest warrant issued for him.²³

International criminal bodies’ intractable dependence on state cooperation to arrest indictees poses significant difficulties for these institutions.²⁴ Thus, international courts and tribunals may succeed or fail through no fault of their own but as a result of the failure of state cooperation.²⁵ A former president of the ICTY writes, “The Tribunal did the best job it could, hindered by the absence of direct enforcement powers.”²⁶ Despite positive notes over the years,²⁷ the problem remains today: eight indictees of the ICC, two indictees of the ICTY and a worrying thirteen accused at the ICTR remain at large.²⁸

d. Dependence on International Political Bodies

The politics of state cooperation with international criminal institutions is further aggravated by these institutions’ dependence on international political bodies, such as the Security Council, the General Assembly and the Assembly of States Parties (ASP).

Some examples of this dependence include the ad hoc tribunals’ budgetary dependence on the U.N. and the imposition of the Completion Strategy. Court officials at the ICTY and ICTR have also expressed frustrations due to U.N. control over the election of judges²⁹ and prosecutors.³⁰ While the ICC is not controlled by the U.N., it is dependant on the politics of the ASP. Furthermore, though not controlled by the U.N., the ICC is dependent on that political body in specific situations. Cases referred by the Security

²² Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 June 2008 [5] (Hereinafter *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593*); See also, Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 3 December 2008 [14] (Hereinafter *Eighth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593*); Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 December 2007 (Hereinafter *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593*) [4]; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, [229] – [230] (Hereinafter *Bashir Arrest Warrant Decision*).

²³ *Bashir Arrest Warrant Decision* (n 22) [231]: “It appears that Omar Al-Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements.”; See also, Simons and MacFarquhar, *New York Times*, *Bashir Defies War Crimes Arrest Order*, March 6, 2009; *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [5]; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [4].

²⁴ 933 *Møse* (n 12).

²⁵ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 18 September 1997, UN Doc. A/52/375 [fourth annual report] [175] (Hereinafter *ICTY 1997 Annual Report*).

²⁶ Gabrielle Kirk McDonald, ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 *Journal of International Criminal Justice* 558, 565 (Hereinafter *McDonald*).

²⁷ 563-564 *McDonald* (n 26).

²⁸ As of April 2009.

²⁹ 926 *Møse* (n 12).

³⁰ 380 *Goldstone, A View from the Prosecution* (n 6).

Council under Article 13(b) create a close link between the two organizations.³¹ The Security Council is also given the influential possibility of requiring deferral of investigation or prosecution for a year.³² In addition, many of the proposals for the definition of the crime of aggression in the Rome Statute include decisive involvement by the Security Council, which would create added dependence and corresponding control by the Council.³³

International politics are always restricted through the bargains and actions of powerful and less powerful states. This factor, also known as *realpolitik*, is a particular difficulty regarding supranational criminal law, prolonging negotiations and results through compromises in the development of rules as well as in the ongoing processes of these institutions. Former President Claude Jorda of the ICTY explains the effect of *realpolitik* in international criminal institutions, “a political negotiation procedure, led legitimately by the international community, and judicial proceedings, initiated, no less legitimately, by the Prosecutor, will be forced to coexist.”³⁴

2. A Politicized System

International criminal institutions’ dependence on national governments and international political bodies has resulted in the politicization of the international criminal justice initiative. The relevant parties infusing politics into this difficult balance are, first, the country at issue, such as Rwanda at the ICTR; second, third party states having a real or perceived interest; and finally, the international community. This politicized system creates serious constraints restricting the operations of international criminal courts and tribunals.³⁵ This section examines some of these difficulties; first, the politics of cooperation is discussed and secondly, the most serious state political action, through active political interference, is illustrated.

a. Cooperation

International criminal courts and tribunals’ dependence on national and international political bodies illustrates these institutions’ great reliance on the cooperation of governments and political groups.³⁶ Former President Gabrielle Kirk McDonald of the ICTY highlights, “the cooperation of states and international organizations is essential to the effective functioning of an international criminal institution.”³⁷ The requirement for cooperation is inextricably linked with the Lack of

³¹ In fact some commentators argue that a hierarchy is likely to emerge between the ‘trigger’ mechanisms in Article 13 and that referrals by the Security Council are likely to be at the top of that hierarchy. See, Chris Gallavin, ‘Prosecutorial Discretion within the ICC: Under the Pressure of Justice’ (2006) 17 Criminal Law Forum 43.

³² *Article 16 Rome Statute* (n 15).

³³ See Stein for an overview of the discussions on this topic. Mark S. Stein, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’ (2005) 16 Indiana International and Comparative Law Review 1 (Hereinafter, *Stein*).

³⁴ 579-580 *Jorda* (n 1).

³⁵ For example Former President Jorda of the ICTY lists some of the difficulties of working in the politicized system of that tribunal. *Jorda* (n 1), 574-575.

³⁶ Coalition for the International Criminal Court – CICC, ‘Secretary-General’s Statement to the Inaugural Meeting of Judges of the International Criminal Court’, The Hague, Netherlands (11 March 2003)

<www.iccnw.org/documents/Annan03112003.pdf> accessed 25 March 2008.

³⁷ 564 *McDonald* (n 26).

Coercive authority, discussed earlier in this article. Yet the governmental decision of cooperation or non-cooperation is inevitably driven by political influences. As noted by Carla Del Ponte, former prosecutor of the ICTY, “politics comes into the picture in the assessment that States make of their cooperation with us.”³⁸

According to the Security Council resolutions establishing the ad hoc tribunals, all states are obliged to cooperate with these institutions.³⁹ This obligation is reaffirmed in the Tribunals’ statutes.⁴⁰ The President of the Security Council reiterated this obligation in a Presidential Statement in 2002.⁴¹ Regarding the ICC, Article 86 of the Rome Statute provides that all states parties are obliged to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁴² When a State accepts the jurisdiction of the Court, “the accepting States shall cooperate with the Court without any delay or exception.”⁴³ Furthermore, in situations which have been referred by the Security Council to the ICC, the Council can urge states not party to the Statute to cooperate.⁴⁴ Decisions of the Security Council are binding on U.N. member states by virtue of Article 25 of the U.N. Charter.⁴⁵

Despite these obligations to cooperate the required cooperation has been difficult to obtain at each of the international criminal institutions discussed in this article. Throughout its existence, particularly during its establishment period, the ICTY has been hampered by refusals to cooperate by many of the states of the former Yugoslavia. Though cooperation has improved through a combination of changes in government and political pressures, the issue of non-cooperation has remained a grave concern throughout the Tribunal’s existence.⁴⁶

³⁸ Interview, ‘Exclusive Interview with Carla del Ponte, “By End 2004, I’ll Have Completed my Programme of Prosecutions”’, *Fondation Hirondelle* (Arusha Tanzania 19 December 2002) <<http://www.hirondelle.org/hirondelle.nsf/0/58532063643cca47c1256721007ae0d0?OpenDocument>> accessed 10 July 2007 (Hereinafter, *Interview with Carla del Ponte, “By End 2004, I’ll Have Completed my Programme of Prosecutions”*).

³⁹ (ICTY) UNSC Res 827 (25 May 1993) UN Doc S/Res/827 [4]; (ICTR) UNSC Res 955 (8 November 1994) UN Doc S/Res/955 (Hereinafter *UNSC Res 955*) [2]; *Expert Group Report on ICTY and ICTR* (n 3) [25]: ‘Under the Statutes of the Tribunals, national Governments are required to cooperate and assist, but there is no enforcement mechanism. In cases of non-cooperation, ICTY and ICTR can only report to the Security Council.’

⁴⁰ *Article 29 ICTY Statute* (n 14): Cooperation and judicial assistance ‘(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...’; *Article 28 ICTR Statute* (n 14): Cooperation and judicial assistance.

⁴¹ UNSC Presidential Statement 39, (2002) UN Doc S/PRST/2002/39.

⁴² *Article 86 Rome Statute* (n 15): General obligation to cooperate.

⁴³ *Article 12(3) Rome Statute* (n 15).

⁴⁴ For example, UNSC Res 1593 (31 March 2005) UN Doc S/Res/1593, [2] (Hereinafter *UNSC Res 1593*): ‘[The Security Council] Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.’

⁴⁵ *Article 25 UN Charter*; See also, 559 *McDonald* (n 26).

⁴⁶ 577-578 *Jorda* (n 1); Statement by Carla Del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia to the Security Council, 10 December 2007 <<http://www.un.org/icty/pressreal/2007/pr1202e-annex.htm>> accessed 22 January 2008 (Hereinafter *Prosecutor Carla Del Ponte Statement to UNSC*); Statement by Judge Fausto Pocar, President, International Criminal Tribunal for the Former Yugoslavia to the Security Council, 10 December 2007 <<http://www.un.org/icty/latest-e/index.htm>> accessed 22 January 2008 (Hereinafter *Judge Fausto Pocar Statement to UNSC*).

Similarly, the ICTR has faced difficulties ensuring cooperation; President Erik Møse notes that “the relationship between Rwanda and the Tribunal has fluctuated.”⁴⁷ While “Rwanda has generally cooperated with the ICTR,”⁴⁸ difficulties have arisen over the years, primarily regarding investigations of crimes committed by the Tutsi-dominated Rwandan Patriotic Front (RPF) and the treatment of victims before the tribunal, at times resulting in government obstruction of the tribunal’s work.⁴⁹ While cooperation has improved, court representatives must continuously remind states individually, and as part of the international community, of the importance of ongoing and effective cooperation.⁵⁰

The mandatory nature of cooperation with the ICC was set out earlier. To date, cooperation with that court has been mixed. Positive cooperation with the ICC has come from individual states⁵¹ and international organizations including various bodies and organs of the U.N.⁵² Yet, difficulties have already been met and “a number of direct requests for cooperation have not yet been fulfilled.”⁵³ As noted, the court has encountered obstacles to achieving effective cooperation regarding crucial issues including the execution of arrest warrants,⁵⁴ the implementation of judicial decisions⁵⁵ and ensuring the protection of victims and witnesses.⁵⁶ Particular difficulties have been encountered regarding cooperation in the situation in Darfur. While cooperation from international and regional organizations in this situation has been helpful,⁵⁷ the Sudanese government is not cooperating with the Court in breach of its obligation set out in Security Council Resolution 1593.⁵⁸

In an effort to advocate cooperation Court representatives are required to make diplomatic and political efforts to gain support for these institutions. Thus, the relationship between politicians and court representatives has become a critical

⁴⁷ 939 Møse (n 12).

⁴⁸ *Ibid.*

⁴⁹ Hans Nichols, ‘U.N. Court Makes Legal Mischief’, *Insight* (23 December 2002) <www.insightmag.com> accessed 14 September 2007; 939 Møse (n 12); UNSC Presidential Statement 39, (2002) UN Doc S/PRST/2002/39.

⁵⁰ Address to the United Nations General Assembly, 12th Annual Report of the International Criminal Tribunal for Rwanda, Judge Dennis Byron, President, 15 October 2007 <http://69.94.11.53/default.htm> accessed 14 December 2007 (emphasis added) (Hereinafter *Judge Byron address to UNGA, 12th Annual Report of ICTR*); Address to the United Nations Security Council, Six-Monthly Report on the Completion Strategy the International Criminal Tribunal for Rwanda, Judge Dennis Byron, President, 10 December 2007 <http://69.94.11.53/default.htm> accessed 14 December 2007 (Hereinafter *Judge Byron Address to UNSC, Six-Monthly Report on Completion Strategy ICTR*).

⁵¹ 4 *President of the ICC address to UNGA 2007* (n 5).

⁵² *ibid.*, 4.

⁵³ *ibid.*, 5.

⁵⁴ *Ibid.*, 5: ‘Of these requests, the outstanding warrants of arrest are the most significant. Without arrests, there can be no trials. Without trials, victims will again be denied justice and potential perpetrators will be encouraged to commit new crimes with impunity.’

⁵⁵ *Ibid.*, 5: ‘... the implementation of the judicial decisions issued by the Court has been uneven.’

⁵⁶ *Ibid.*, 5.

⁵⁷ *Eighth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [86]-[96]; *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [43]-[54]; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [29]-[35].

⁵⁸ *Bashir Arrest Warrant Decision* (n 22) [231]; *Eighth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [82]; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [4],[26]: ‘The [Government of Sudan] has failed to comply with its legal obligations under UNSCR 1593 (2005); *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [5], [30].

requirement to encouraging cooperation. A former registrar of the ICTY writes, “the Registrar or her representatives had to spend considerable time...traveling to gain political support.”⁵⁹ President McDonald describes her experience:

During my presidency, it seemed to me that my duties as a Judge were subjugated by the political demands of the office. I was required to spend an inordinate amount of time seeking international political support to overcome the effect of states non-cooperation...⁶⁰

b. Political interference

In addition to a lack of cooperation international courts and tribunals have also faced active political interference seeking to undermine the work of these institutions. Such interference is made possible through the extreme institutional dependency discussed throughout this article and is arguably the most damaging of the factors discussed. Political interference has manifested itself in a number of ways including non-cooperation, political pressure and undermining court efforts.

At the ICTY political interference through state non-cooperation and obstruction has been common.⁶¹ The level of non-cooperation at the ICTY is made clear through a perusal of that tribunal’s annual reports to the Security Council, recording the level of cooperation and non-cooperation of the states involved in the tribunal’s proceedings.⁶² While some states’ non-cooperation and obstructive behavior has been addressed and improved, others continue to hinder the proceedings of the court.⁶³

The difficulties of accessing witnesses and maintaining a cooperative relationship with the Rwandan government, mentioned earlier, are a combination of problems of lack of political will and political interference. A significant cause of this type of government non-cooperation is the need to cooperate with governments which may be the subject of investigation. Prosecutor Carla del Ponte explained some of the problems faced in investigating allegations of crimes committed by those who are currently in power in that country.⁶⁴ She noted that despite the Security Council mandate to continue these

⁵⁹ Dorothee de Sampayo Garrido, ‘Problems and Achievements as Seen from the Viewpoint of the Registry’ (2004) 2 *Journal of International Criminal Justice* 474, 476 (Hereinafter *de Sampayo Garrido*); See also, 381 *Goldstone, A View from the Prosecution* (n 6).

⁶⁰ 568 *McDonald* (n 26): ‘Additionally, I traveled the world, seeking enforcement of sentences and witness relocation agreements with numerous states, and sought financial support. Therefore, although first and foremost a judge, it appeared to me that I most often functioned as an ambassador.’

⁶¹ See for example, 400-401 *Arbour* (n 6).

⁶² For example, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 16 August 1996, UN Doc. A/51/292. [third annual report] [199]; Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 August 1999, UN Doc. A/54/187 [sixth annual report], [91]; Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 17 September 2001, UN Doc. A/56/352 [eighth annual report] [195]. See also, [196]-[199].

⁶³ *Prosecutor Carla Del Ponte Statement to UNSC* (n 46).

⁶⁴ Interview, ‘Interview with Carla Del Ponte, “If I had had the Choice, I would have Remained Prosecutor of the ICTR”’, *Fondation Hirondelle* (Arusha, Tanzania 15 September 2003)

investigations, the success of the operation “depends on the Rwandan government allowing us to conduct the investigations on their territory.”⁶⁵ This situation gravely affects not only the functioning of specific trials, which are hindered through the obstruction of the government at issue, but also the overall credibility of these judicial institutions, through the appearance of bias.

Similar problems have arisen in the Darfur situation before the ICC. In that situation the current government of Sudan is suspected as the main instigator of the crimes which have been committed in that province.⁶⁶ As noted, three arrest warrants have been issued; however, the government of Sudan has broken off all cooperation with the court.⁶⁷ This is the difficult reality of political interference facing international criminal institutions when they seek to investigate crimes in the territory of countries where the alleged perpetrators are those in power.

Another manifestation of political interference is seen in active efforts to undermine the work of international criminal institutions through a variety of mechanisms. Of particular concern, regarding the ICC, are the destructive actions of the United States, a strong and vocal opponent of the court. This is not to suggest that the US is the only country opposed to the ICC, however, it has certainly been the most active in its harmful efforts. However, since the Obama administration took office in January 2009 there have been significant indications that the United States’ stance towards the court is changing substantially.

Although the U.S. was involved in the negotiations for the Rome Statute and President Bill Clinton signed the Statute, President George W. Bush illustrated his vigorous opposition to the Court by “unsigned” in May 2002. Since then, the U.S. government took its opposition to the court from vocal verbal opposition to direct calculated attempts to undermine the operations and development of this new court.⁶⁸ At the instigation of the U.S. government, the U.N. Security Council passed Resolution 1422 in July 2002, which effectively granted immunity to personnel from ICC non-states parties in a “United Nations established or authorized operation.”⁶⁹ This resolution was renewed in June 2003 as Resolution 1487⁷⁰; however, in 2004, the U.S. withdrew a

<<http://www.hirondelle.org/hirondelle.nsf/0/58532063643cca47c1256721007ae0d0?OpenDocument>> accessed 23 August 2007 (Hereinafter *Carla Del Ponte, If I had had the Choice, I would have Remained Prosecutor of the ICTR*).

⁶⁵ *Ibid.*

⁶⁶ Human Rights Watch, ‘World Report 2008’ (Report) (31 January 2008) <<http://hrw.org/wr2k8/>> accessed 10 April 2008, Sudan Chapter. (Hereinafter *HRW World Report 2008*).

⁶⁷ *Eighth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [82]; *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [5] and [30]; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22).

⁶⁸ See for example, American NGO Coalition for the International Criminal Court, ‘Chronology of US Opposition to the International Criminal Court: From ‘Signature Suspension’ to Immunity Agreements to Darfur’ (29 January 2008) <http://www.amicc.org/usinfo/advocacy_materials.html> accessed 1 May 2008 (Hereinafter *AMICC, Chronology of US Opposition to the ICC*); Congressional Research Service (CRS) Report for Congress, U.S. Department of State, Clare Ribando, ‘Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America’ (10 April 2006) <<http://fpc.state.gov/fpc/c17547.htm>> accessed 14 November 2007 (Hereinafter *CRS Report Article 98 Agreements and Sanctions*); Human Rights Watch, ‘United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements’ (3 October 2002) <<http://hrw.org/campaigns/icc/docs/art98analysis.htm>> accessed 4 March 2007.

⁶⁹ UNSC Res 1422 (12 July 2002) UN Doc S/Res/1422.

⁷⁰ UNSC Res 1487 (12 June 2003) UN Doc S/Res/1487.

subsequent attempt at renewal when it became clear that it would not have enough support in the Security Council. As a further part of its campaign against the ICC, both houses of Congress passed the American Servicemembers' Protection Act (ASPA) in July 2002. Through this act the U.S. adopted, *inter alia*, a policy of requiring so-called Article 98 Agreements,⁷¹ also known as Bilateral Immunity Agreements (BIAs), under threat of withdrawal of economic and military aid provided by the U.S.⁷² This aggressive approach has drawn strong international opposition⁷³ and in recent years U.S. officials have highlighted its negative effects.⁷⁴ As a result, the U.S. has recently softened its stance and in early 2008 Congress approved the National Defense Appropriations Act, which eliminates the restrictions on foreign military financing to states that refuse to sign BIAs.⁷⁵ In March 2009, the new law quietly adopted a new approach and revoked the remaining interferences imposed by the previous administration. This change in approach also demonstrates the power of politics, from the new changes to the developments largely brought about through political pressure.

3. Lessons for the Future

As noted, international law, and international criminal law in particular, will always be an inherently political exercise.⁷⁶ International criminal institutions find themselves in a position of political dependence where “a delicate balance must be struck between political realism and absolute justice. From this perspective, the truth is evident: international courts must accommodate themselves to the political environment, whether we like it or not.”⁷⁷ These prosecutorial bodies must satisfy the governments and political bodies they rely upon in order to ensure cooperation required to keep these institutions functioning. While this situation hampers the independence of these courts and tribunals, this part of the article explores some important lessons for the future of international

⁷¹ These types of agreements were not intended under this Article and are inconsistent with the provisions of the ICC. See, The Council of the European Union, ‘General Affairs and External Relations: External Relations’, 2450th Council session, 12134/02 (Presse 279), (Brussels 30 September 2002) <http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=EN> accessed 10 October 2007, Annex. *EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender Persons to the Court* (Hereinafter *The Council of the European Union, EU Guiding Principles*): ‘Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties.’; Coalition for the International Criminal Court, ‘Bilateral Agreements proposed by the US government’ (23 August 2002) <<http://www.iccnw.org>> accessed 15 June 2007: ‘The US-proposed ‘Article 98’ agreements are contrary to the language and intent of Article 98 and are therefore prohibited under the Rome Statute...’

⁷² See for example, *CRS Report Article 98 Agreements and Sanctions* (n 68); Coalition for the International Criminal Court, ‘Status of US Bilateral Immunity Agreements (BIAs)’ (Fact Sheet) (14 December 2006) <<http://iccnw.org/?mod=browserdoc&type=12&module=384>> accessed 21 February 2008.

⁷³ Coalition for the International Criminal Court, ‘Countries Opposed to Signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 and FY05 and Threatened in FY06’ (16 November 2006) <<http://iccnw.org/?mod=browserdoc&type=12&module=384>> accessed 14 June 2007; *The Council of the European Union, EU Guiding Principles* (n 71).

⁷⁴ Coalition for the International Criminal Court, ‘Comments by US Officials on the Negative Impact of Bilateral Immunity Agreements (BIAs) and the American Servicemembers’ Protection Act (ASPA)’ (Fact Sheet) (16 November 2006) <<http://iccnw.org/?mod=bia>> accessed 15 August 2008; *AMICC, Chronology of US Opposition to the ICC* (n 68).

⁷⁵ *AMICC, Chronology of US Opposition to the ICC* (n 68).

⁷⁶ *105 Paciocco* (n 13).

⁷⁷ *579-580 Jorda* (n 1).

criminal institutions. This discussion targets, (a) methods to ensure cooperation and (b) the role of the prosecutor, the court and the appearance of bias.

a. Methods to ensure Cooperation

The fundamental principle of state sovereignty is a primary factor in the politicization of international criminal law. Former President Jorda of the ICTY notes, “International society is and shall remain, above all, a society of sovereign states, and respect for this sovereignty is the price to pay for the promotion of any international institutional mechanism, *a fortiori* a judicial one.”⁷⁸ As illustrated in Part 2 of this article, this respect for state sovereignty results in the significant difficulties arising from the requirement of obtaining state cooperation in order to conduct investigations and prosecutions at these international criminal institutions. Former President McDonald of the ICTY emphasizes that “future tribunals should not allow the office to be shaped by unanticipated events such as state non-cooperation and should provide an organizational structure that could absorb these competing obligations.”⁷⁹ This section examines some methods which may be relied upon in an effort to address the former president’s concern.

i. The U.N. Security Council

In the face of the frustrating refusals to cooperate, discussed throughout this article, international courts and tribunals have sought solutions, *inter alia*, at the U.N. Security Council and through diplomacy. In an effort to address Sudanese non-cooperation and obstruction the prosecutor of the ICC has turned to the Security Council.⁸⁰ However, though similar attempts were made by representatives of the ad hoc tribunals these efforts have not had a strong record of success. The U.N. tribunals attempted to address failures to cooperate by establishing various reporting procedures to inform the Security Council of state failures, which were hindering the operations of the institutions.⁸¹ Yet, despite frequent reports⁸² to the Council it has been highlighted, “The theoretical appeal to the Security Council to ‘do something’ in such cases [of non-cooperation] has not proved a practical or effective remedy.”⁸³ Former President McDonald of the ICTY suggests the primary reason behind the failure of this approach was that “the Security Council has failed to respond in a meaningful way.”⁸⁴

This failure to respond effectively is largely attributable to a lack of political will. In the development of international criminal law governments come together, spurred by the horrific crimes committed, to establish international criminal institutions. However, as the work of these courts continues, requiring more time and money than anticipated, the political will and support for these institutions has waned.

⁷⁸ 580 Jorda (n 1).

⁷⁹ 568 McDonald (n 26).

⁸⁰ *Eighth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [21]; *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [105]; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [8].

⁸¹ 559-560 McDonald (n 26), and 564-565; *Prosecutor Carla Del Ponte Statement to UNSC* (n 46).

⁸² 562-564 McDonald (n 26).

⁸³ Patricia M. Wald, ‘ICTY Judicial Proceedings: An Appraisal from Within’ (2004) 2 *International Journal of Criminal Justice* 466, 472 (Hereinafter *Wald, An Appraisal from Within*).

⁸⁴ 562-563 McDonald (n 26).

Regarding Sudan, ICC Prosecutor Luis Moreno-Ocampo has emphasized that it was the decision of the international community to involve the court in this case and as a result it is now the responsibility of the international community to ensure that this justice can be achieved.⁸⁵ According to this argument the Security Council's involvement in referring a situation to the ICC or establishing an international criminal institution creates reciprocal obligations for the U.N.⁸⁶ Thus, regarding Darfur, since the Security Council referred this situation to the court, it now has an obligation to use its powers to ensure that the orders of the court are complied with. For the successful future of international criminal law, the Security Council must be more proactive and the members of the Security Council must remain committed to the work of these institutions from the initial outrage, through arrests and evidence and the final completion of trials. The Security Council should follow up a referral to the ICC, as in this case, by taking convincing action on reports provided by the prosecutor of the court. While the Council adopted a presidential statement in the aftermath of the prosecutor's Seventh Report, the Council has not shown strong and consistent support since its initial referral of the case.⁸⁷

A former president of the ICTY notes: "Despite all of these efforts by the Tribunal, in the end, as we knew in the beginning states, individually, and the international community collectively, would determine whether the Tribunal realized its full potential."⁸⁸ In order to achieve the state cooperation required for these institutions to reach their potential the political will must exist to pressure and encourage nations to cooperate. Regarding individual state cooperation, the members of the U.N. Security Council, and states making up the regional bodies discussed in the next section, there is a need to move beyond business as usual. In seeking to ensure cooperation with the ICC President Philippe Kirsch emphasized the mandatory nature of the obligation to cooperate, highlighting the need to remove the issue of cooperation from the usual tit-for-tat political negotiating processes that plague international organizations and institutions.⁸⁹

ii. The Role of Regional Bodies

The most successful approach to achieving cooperation and furthering the work of international criminal institutions has come through pressure from Regional bodies.⁹⁰ Today the role of regional bodies in supporting the international criminal justice system is more important than ever due to the ICC's general independence from the U.N., as well as the ineffectiveness of Security Council action in encouraging state cooperation to date.

⁸⁵ *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [8].

⁸⁶ See for example, *Seventh Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [9]; [105]: 'The UN Security Council referred the Darfur situation to the Prosecutor, recognizing that international justice is an integral part of a comprehensive solution for Darfur. The Council must ensure compliance with UNSCR 1593 (2005) and the full and immediate cooperation of the GoS in the arrest and surrender of Ahmad Harun and Ali Kushayb.'; *Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593* (n 22) [8].

⁸⁷ Presidential statement 21, 16 June 2008.

⁸⁸ *566 McDonald* (n 26).

⁸⁹ *5 President of the ICC address to UNGA 2007* (n 5): 'It is clear of course that the situations and cases before the Court are linked to broader, complex political issues and developments, as has always been the case in similar situation in the past. Nevertheless, compliance with the decisions of the Court is not just another issue on the negotiating table. It is a legal obligation under the Rome Statute and relevant resolutions of the Security Council.'

⁹⁰ *Prosecutor Carla Del Ponte Statement to UNSC* (n 46)

At the ICTY, cooperation was achieved largely through “pressure from Washington, D.C.”⁹¹ and the prerequisite of cooperation as a condition of potential European Union and NATO membership.⁹² This pressure resulted in “voluntary surrenders” and the arrest and transfer of high profile indictees who had earlier continued to live in seeming impunity, including Slobodan Milošević and most recently, Radovan Karadzic.⁹³

At the ICTR, “alleged leaders of the 1994 events were arrested, in particular in Nairobi in July 1997 (Operation NAKI) and as a consequence of cooperation with several West African countries in 1998 (Operation Kiwest).”⁹⁴ In 2007, following the submission of a report from officials of the ICTR, “Interpol’s 19th African Regional Conference passed...a resolution for all National Central Bureaus to provide assistance in arresting the remaining fugitives.”⁹⁵ Amazingly, by October, some four months later, three of these previously elusive indictees were arrested.

These successes illustrate the potential of diverse regional bodies and organizations to be extremely effective in ensuring that international criminal institutions receive the cooperation they require in order to function. The member states of these regional institutions should utilize the significant power they wield to assist international criminal organizations in bringing perpetrators of these most serious crimes to justice.

b. The Role of the Prosecutor, the Court and the Appearance of Bias

The impact of this mingling of law and politics on the perception of these institutions as impartial or partial is critical to the current discussion. It is very difficult for those affected by the tribunals to view them as truly impartial in light of their dependence on national governments and international political bodies for their very existence.⁹⁶ As the above discussion has shown, these institutions are not above politics.⁹⁷ These types of international criminal institutions *cannot* be entirely removed from politics by virtue of their dependence on governments and international organizations. Former President Jorda cited Henry L. Stimson, former United States Secretary of State, in demonstration of this fact: “International law remains limited by international politics and we must not pretend that they can exist and grow without each other.”⁹⁸

Kerr makes a distinction between politics involved in general enforcement of law as separate from “the exercise of its judicial function” where she states “the Tribunal had

⁹¹ 383 Goldstone, *A View from the Prosecution* (n 6).

⁹² 420 Harmon and Gaynor (n 5); Kim, *Balkan Cooperation on War Crimes Issues: 2005 Update*, Congressional Research Service, Report for Congress, April 25, 2005

⁹³ 383 Goldstone, *A View from the Prosecution* (n 6).

⁹⁴ 932 Møse (n 12).

⁹⁵ Judge Byron address to UNGA, *12th Annual Report of ICTR* (n 50): ‘Following a report submitted by the three Principals of the Tribunal, Interpol’s 19th African Regional Conference passed, in July this year, a resolution for all National Central Bureaus to provide assistance in arresting the remaining fugitives. By October 2007, three of them were arrested in coordination with INTERPOL. ...’

⁹⁶ 109 Paciocco (n 13).

⁹⁷ 574 Jorda (n 1); 110 Paciocco (n 13).

⁹⁸ 577-578 Jorda (n 1).

to be apolitical – that is not susceptible to external political influence.”⁹⁹ This distinction is helpful and this article now turns to “the exercise of the judicial function” and the significant difficulties an international criminal institution faces in remaining free from “external political influence” in this area.

Allegations of political influence and bias have frequently arisen regarding the role of the prosecutor in the exercise of the judicial function in situations where the criminal institution is seeking to achieve a cooperative relationship with the government of a country where the party in power is alleged to have committed crimes. Such allegations were particularly strong regarding the ICTR. Claims have been made that the removal of Carla del Ponte as prosecutor of the ICTR was the result of pressure from the Rwandan government because she had initiated investigations into crimes allegedly committed by the RPF during and after the genocide of 1994.¹⁰⁰ The Kigali government had certainly opposed her continued role as prosecutor.¹⁰¹ Furthermore, although the Security Council argued that they were merely implementing a report, which recommended splitting the position of prosecutor of the ICTR and ICTY, Prosecutor del Ponte stated that she would have preferred to remain as prosecutor of the ICTR if she had been given the choice.¹⁰² Finally, though Prosecutor del Ponte emphasized the importance of the investigations into these alleged RPF crimes,¹⁰³ they were suspended and have not been resumed.¹⁰⁴

In contrast to Kerr, some practitioners suggest that prosecutorial decisions should also be made in consideration of their political impact.¹⁰⁵ However, these political requirements of the system have been criticized as compromising fair trial rights protected at these judicial bodies: “There is cause for concern that the rights of those charged have been subordinated to the larger political objective of gaining convictions and maintaining co-operative relations with governments affected by the tribunals.”¹⁰⁶ Certainly, the need to ensure cooperation of governments, which may be the subject of investigation, requires skilled negotiation.¹⁰⁷ In these situations court representatives must strike a difficult balance between ensuring cooperation and protecting the legitimacy and impartiality of these institutions.

In light of the political framework surrounding international criminal prosecutions there will always be a danger of an appearance of bias, particularly in cases where the

⁹⁹ Rachel Kerr, *The International Criminal Tribunal for Yugoslavia, Law and Politics*, p. 176.

¹⁰⁰ Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge & New York 2007), 96 (Hereinafter *Drumbl*): ‘the Rwandan government lobbied against the reappointment of Carla Del Ponte as ICTR Chief Prosecutor in part due to her insistence that allegations of RPA crimes be investigated. The Security Council complied by deciding not to renew her mandate. So it appears safe to say that the ICTR will not pursue this line of investigation.’

¹⁰¹ *Carla Del Ponte, If I had had the Choice, I would have Remained Prosecutor of the ICTR* (n 64).

¹⁰² *Ibid*, ‘When I was told that each tribunal would have its own prosecutor, I personally requested whether I could choose. I believe I would have opted for the ICTR because I still remain with one challenge: the special investigations. Unfortunately, I was not given the luxury of choosing. I was very attached to this tribunal.’

¹⁰³ *Ibid*.

¹⁰⁴ *108 Paciocco* (n 13).

¹⁰⁵ Minna Shrag, ‘Lessons Learned from ICTY Experience’ (2004) 2 *Journal of International Criminal Justice* 429.

¹⁰⁶ *Krotz* (n 13); -- ‘Defence Counsels Demand Revision of Tribunal’s Mandate’, *Fondation Hirondelle* (Arusha, Tanzania 8 April 2004)

<<http://www.hirondelle.org/hirondelle.nsf/0/58532063643cca47c1256721007ae0d0?OpenDocument>> accessed 15 September 2007; *113 Paciocco* (n 13).

¹⁰⁷ *Interview with Carla del Ponte, “By End 2004, I’ll Have Completed my Programme of Prosecutions”* (n 38).

international criminal institution is prosecuting crimes in a country where the government is also accused of crimes. While such appearance may be unavoidable in certain cases every effort should be made to prevent appearances of favoritism and to explain decisions, which could be perceived or distorted as biased. For example, the decision not to prosecute the RPF for alleged crimes could be justified by these institutions focus on the perpetrators of only the most serious crimes, such as genocide. The prosecutor and practitioners, aware of the politicized framework within which they are working, must make every effort to avoid an appearance of bias.

Conclusion

This article has brought together observations from diverse sources, placing particular importance on the views of practitioners to illustrate the challenges faced by international criminal bodies working to fulfill their mandates and objectives. These restrictions influence supranational criminal law on various levels. This examination of political constraints illustrates that international criminal law's dependence on national governments and international political bodies seriously compromises the achievement of its objectives.¹⁰⁸ Without the cooperation of states and international political bodies, international criminal institutions cannot function and will not succeed.¹⁰⁹

This reality has been highlighted by representatives of each of the international criminal institutions discussed in this thesis. President Dennis Byron of the ICTR states: "the continued assistance and co-operation of Member States is paramount to the successful accomplishment of our vital mission."¹¹⁰ President Fausto Pocar of the ICTY notes: "The success of the International Tribunal depends on the willingness of States to cooperate with the International Tribunal."¹¹¹ President Kirsch of the ICC observes: "the enforcement pillar [of the Rome Statute] has been reserved to States and, by extension, international organizations. The Court requires support and cooperation in many areas."¹¹²

The final part of this article provided a recommendation for methods to tackle the impact of politics on the functioning of international criminal institutions. These recommendations focused on encouraging more proactive efforts by the U.N. Security Council and its members, as well as diverse regional bodies in ensuring cooperation with supranational criminal bodies. This part further highlighted the danger of an appearance of bias through the influence of politics on these institutions, emphasizing the need to combat such an appearance at all stages of proceedings.

Working to tackle the politicization of international criminal law will further the achievement of its objectives, particularly deterrence. If potential war criminals see a true international commitment to the prosecution of mass atrocity crimes and the requisite political support to bring this to a reality, the deterrent effect of these international criminal institutions will be greatly enhanced.

¹⁰⁸ 29 *Hazan* (n 3).

¹⁰⁹ 577-578 *Jorda* (n 1).

¹¹⁰ *Judge Byron address to UNGA, 12th Annual Report of ICTR* (n 50); See also *Judge Byron Address to UNSC, Six-Monthly Report on Completion Strategy ICTR* (n 50).

¹¹¹ *Judge Fausto Pocar Statement to UNSC* (n 46).

¹¹² 4 *President of the ICC address to UNGA 2007* (n 5). See also, p. 6.

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