

The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

by **Paul Tavernier**

The ancient dream of international criminal jurisdiction is gradually becoming a reality. Article 227 of the 1919 Treaty of Versailles provided that German Emperor Wilhelm II should be tried by an international court to answer charges of “flagrant offences against international morality and the sacred authority of treaties”. But since the Netherlands refused to give up the accused, the trial never took place, and Wilhelm II died in exile in Holland in 1941. Articles 228 and 229 of the Treaty providing for the prosecution of war criminals were applied in a disappointing way in the Leipzig trial. The Nuremberg and Tokyo trials after the Second World War undeniably represented progress towards the creation of a body with truly international criminal jurisdiction, but they were greatly influenced by their origins and in effect applied the law and justice of the victors rather than those of the universal community of States.

For over 45 years, the international community, represented by the United Nations, endeavoured to use the lessons drawn from Nuremberg to establish a permanent international criminal court, operating on the basis of an international criminal code, but its efforts proved to no avail.

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Note: all quotations from the original French are ICRC translations.

The debates of the International Law Commission, which was entrusted with the tasks of drawing up a code of offences against the peace and security of mankind and a statute for an international criminal court, became mired and seemed fated never to succeed, much to the disappointment of legal experts and certain idealists. For Mohamed Bennouna, who emphasizes the obstacle of State sovereignty, "the dialogue of the deaf between legal and political experts rolls merrily along, the former producing an inventory of the available legal techniques and the latter being neither ready nor willing to face the basic choices that need to be made".¹ His conclusions are very pessimistic: "The establishment of an international criminal court remains an academic exercise, which can even become dangerous if it is perverted by prevailing sovereignties to justify *faits accomplis* or to salve the consciences of those in power".²

It was only after the shock of the tragic events that followed the disintegration of the former Yugoslavia that the international community, at last made aware of the atrocities committed and alerted by the courageous reports of Tadeusz Mazowiecki, agreed to the establishment of an international criminal tribunal for the former Yugoslavia, which was instituted by resolutions 808 and 827 of the United Nations Security Council, adopted on 22 February and 25 May 1993. A second tribunal was subsequently set up to prosecute violations of international humanitarian law committed in Rwanda and was instituted by Security Council resolution 955 of 8 November 1994. The two courts are independent of each other, but nonetheless have many points in common and even some strong institutional ties. So far they are the only examples of criminal tribunals that have been established by the international community as a whole and have not been imposed by the victors on the vanquished in an international conflict. Before 1993, however, the idea had already been put forward of setting up an international criminal court to try war crimes committed by the United States in Viet Nam, or to prosecute Saddam Hussein for his responsibility in the Iraqi aggression against Iran.³ Since 1993-1994, proposals have been made to create new ad hoc tribunals to try war

¹ Mohamed Bennouna, "La création d'une juridiction pénale internationale et la souveraineté des Etats", *Annuaire français de droit international*, 1990, pp. 299-306, in particular p. 300.

² *Ibid.*, p. 306.

³ See Ige F. Dekker, "Criminal responsibility and the Gulf War of 1980-1988: The crime of aggression", in Ige F. Dekker and Harry G. Post (eds), *The Gulf War of 1980-1988*, Martinus Nijhoff, Dordrecht, 1992, pp. 249-268, in particular pp. 266-268.

criminals in Chechnya, Burundi and Zaire, now again called the Congo. It has even been suggested recently that Pol Pot, responsible for the genocide in Cambodia, should be brought before such a tribunal.

The establishment of ad hoc international criminal tribunals has nevertheless been severely criticized by some, on the grounds that they would serve as a cover for the policy of selectivity pursued by the Great Powers and would provide an alibi for indefinitely deferring the institution of a permanent international criminal court.⁴ We for our part shall express a more qualified judgement on the experience of the International Tribunals for the former Yugoslavia and for Rwanda. They have the merit of already being in existence and in operation.⁵ They have taken many important decisions. The Tribunal for the former Yugoslavia has passed two sentences, and the vice is tightening round the war criminals indicted by the Tribunal, as may be seen from the arrests made in the summer of 1997. The first trials should shortly open before the Tribunal for Rwanda. The experience gained from the workings of the two Tribunals admittedly remains disappointing in many respects, above all because it is incomplete and highly ambiguous. On the other hand, it has also proved extremely valuable and instructive. It will undoubtedly have a decisive impact as regards the establishment of a permanent international criminal court, which can now be regarded as a possibility, and on the application of humanitarian law, violations of which must no longer be allowed to go unpunished.

An ambiguous experience

Although legal experts had long pondered the conditions required for setting up an international criminal court, the creation of the ad hoc Tribunals for the former Yugoslavia and for Rwanda was largely improvised, with the result that numerous ambiguities arose in the procedure

⁴ See in particular Olivier Russbach, *ONU contre ONU, le droit international confisqué*, La Découverte, Paris, 1994, p. 312, and "Une justice internationale à la carte", *Politique internationale*, No. 67, Spring 1995, pp. 313-326.

⁵ Despite the criticisms it has drawn and the crisis it has undergone, the record of the Tribunal for Rwanda is not negligible. In this connection, see Cyril Laucci, "Quelques aspects de l'actualité des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda", *L'Observateur des Nations Unies*, No. 2, 1997, pp. 119-137, at p. 136: "The results recorded by the Arusha Tribunal show that it has not done its work so badly." Of the 21 persons indicted, 13 have been arrested, whereas the Tribunal for the former Yugoslavia has indicted 74 persons, only seven of whom had been arrested and transferred to The Hague by December 1996.

that led to their establishment; these are also apparent in the legal status assigned to the two Tribunals.

Ambiguities of the procedure that led to the creation of the Tribunals

In the face of two exceptional and largely unforeseen situations, both of which had been potentially explosive for many years already, the international community was compelled to react as a matter of urgency to the horror of the events. The facts surrounding the disintegration of the former Yugoslavia are in no way comparable to the Rwandan genocide, but the need to bring criminal charges against those responsible for committing grave breaches of humanitarian law and to set up an international court for that very purpose quickly became apparent in either case. The International Criminal Tribunal for the former Yugoslavia proved a useful and easily transposable precedent for the Rwanda Tribunal.

There were two possible courses of action regarding the procedure for the establishment of these courts. Had the choice fallen on the traditional method of drawing up and concluding a treaty or an agreement, a great deal of time would have elapsed before either court could operate; in other words, it would have been too late for the proceedings to be fully effective. The urgency of the situation therefore made it necessary to opt for unilateral decisions, which, considering the present structure of international society, could emanate only from the United Nations Security Council. The two Tribunals were accordingly instituted by Security Council resolutions, on the basis of Chapter VII of the United Nations Charter.

This choice, largely imposed by the circumstances, had both advantages and drawbacks that entailed a number of consequences and raised certain questions. It proved effective in that it led to the rapid establishment of both Tribunals, which began to function immediately.⁶ On the other hand, the future of the two courts depends not only on the decisions of a small United Nations body, namely the Security Council, in which the five Great Powers have the right of veto, but also, as regards financial matters, on those of the General Assembly (the United Nations' plenary

⁶ In a completely different context, mention may be made of the International Tribunal for the Law of the Sea provided for in the Montego Bay Convention of 1982, which was established after the Convention came into force in 1994 and which has not yet had any case brought before it. In the sphere of humanitarian law, the record of the International Fact-Finding Commission provided for in Article 90 of 1977 Additional Protocol I is also indicative of the impact of State sovereignty on the functioning and effectiveness of judicial or quasi-judicial bodies and even simple investigating bodies.

body), and the inadequacy of the resources made available to the Tribunals has often been denounced.

It was, moreover, inevitable that the competence of the Security Council itself to set up such tribunals should be questioned, since no such competence is expressly assigned to it in any part of the United Nations Charter. The matter was mentioned in the *Tadic* case, but it raised the very sensitive issue of an international judicial body having control over Security Council decisions, a question currently submitted for the consideration of the International Court of Justice in the *Lockerbie* case. The Trial Chamber of the Tribunal for the former Yugoslavia evaded the issue in its decision of 10 August 1995, but the Appeals Chamber dealt with it in definitive terms in its decision of 2 October 1995.

The option chosen by the Security Council for setting up the Tribunals has had other consequences as well. The imperative of speed prevented any real discussion within the Council, and certain technical shortcomings in the texts could have been avoided if more in-depth debates had been held. Some countries admittedly drew up drafts and the United Nations Secretariat took them into account, but what is striking is the significant and perhaps excessive role played by the United Nations Department of Legal Affairs, which alone drafted the Statutes of the two Tribunals; these were not changed in any way by the Security Council (except for some minor amendments with regard to the Tribunal for Rwanda).⁷ The result was a partly incomplete text, which may seem somewhat scamped, but above all the absence of preparatory sessions was not compensated by the Secretary-General's Report, and the role of the interpreter and particularly of the judges themselves is not facilitated thereby. Conversely and paradoxically, however, the judges are often left entirely free to adopt the interpretation that they consider to be most suitable, most effective and most useful. Apart from that, the judges of the two Tribunals were assigned an important role in drawing up the rules governing their activities, being responsible for adopting "rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other

⁷ Some authors minimize the role of the UN Secretariat in drawing up the Statutes; see, for example, Philippe Weckel, "L'institution d'un tribunal international pour la répression des crimes de droit humanitaire en Yougoslavie", *Annuaire français de droit international*, 1993, pp. 232-261. For the opposite view, see Daphna Shrager and Ralph Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal of International Law/Journal européen de droit international*, 1994, pp. 360-380, in particular p. 362.

appropriate matters” (Art. 15 of the Statute of the Tribunal for the former Yugoslavia).⁸ They adopted very detailed Rules of Procedure and Evidence, which settle important issues and have been hailed as constituting a veritable international code of criminal procedure. This code is not subject to any monitoring on the part of the Security Council and has been amended on several occasions, which may give the impression of a certain amount of improvisation.

The ambiguities of the process of setting up the International Criminal Tribunals for the former Yugoslavia and for Rwanda also became apparent in connection with the question of the binding nature of Security Council decisions and the requirement of State cooperation. It was obvious from the outset that these issues should be at the centre of the debate if a truly effective international criminal jurisdiction was to be established, and this was amply confirmed by subsequent developments. The various facts of the matter are nevertheless far from clear. While all the observers and commentators indeed stressed that the Security Council had taken care to base its resolutions on Chapter VII, very few of them pointed out that the Council could use this basis for issuing decisions and also simple recommendations.⁹ The binding nature of Security Council decisions stems from Article 25, as well as Article 103, of the Charter,¹⁰ but the preemptory character of those decisions has raised questions among certain legal experts, although they are admittedly in the minority.¹¹

State cooperation is required under Article 29 of the Statute of the International Tribunal for the former Yugoslavia and under Article 28 of the Statute of the Rwanda Tribunal. The Statutes of the two Tribunals are annexed to the Report of the Secretary-General approved by the Security Council (for the former Yugoslavia) and to the relevant Security Council

⁸ The powers of the Tribunal for Rwanda are more limited, as Article 14 of its Statute provides that it is to apply the Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia, introducing any amendments to those Rules that it may deem necessary.

⁹ See Hervé Ascensio and Alain Pellet, “L’activité du Tribunal pénal international pour l’ex-Yougoslavie (1993-1995)”, *Annuaire français de droit international*, 1995, pp. 101-136, and in particular p. 119 concerning the decision of the Appeals Chamber in the *Tadić* case (2 October 1995).

¹⁰ For example, Article 103 may be invoked to invalidate the application of extradition agreements, assuming that the transfer and delivery of an accused person to either of the International Criminal Tribunals may be assimilated to extradition.

¹¹ See Paul Tavernier, “Le caractère obligatoire de la résolution 598 (1987) du Conseil de sécurité relative à la Guerre du Golfe”, *Journal européen de droit international/European Journal of International Law*, Vol. 1, No. 1-2, 1990, pp. 278-285.

resolution (for Rwanda) and therefore contribute to the legal validity of the Council's decisions. Moreover, each of the Council resolutions establishing the Tribunals contains a paragraph dealing in particularly strong terms with State cooperation (resolution 827, para. 4, for the Tribunal for the former Yugoslavia and resolution 955, para. 2, for the Rwanda Tribunal).

Confirmation of the obligation to cooperate with the Tribunals and of the binding nature of the Tribunals' decisions by no means eliminates all uncertainties and ambiguities. Since the texts refer only to States, the question has arisen as to whether they also apply to non-State entities (such as the Bosnian Serb or Bosnian Croat authorities) and even to individuals. Moreover, although these decisions are binding, their implementation often calls for the prior enactment of national legislation, even in countries, such as France, which claim to follow the monist tradition. The parliamentary debates held on such occasions have shown the difficulties that can arise when it comes to implementing a Tribunal's decisions, and these difficulties are largely due to the ambiguity of the Statutes of both Tribunals.

Ambiguity of the Statutes of the two Tribunals

The speed with which the two ad hoc Tribunals were established made it impossible to eliminate from their Statutes certain basic ambiguities, relating mainly to the very purpose of instituting such courts and to the general spirit of the legal system they apply (common law or civil law). The purpose of the International Tribunals results from the procedure chosen for their creation — or imposed by circumstances. Indeed, this procedure was not neutral, since entrusting the institution of these courts to the United Nations Security Council amounted to allowing the imperative of maintaining peace to take precedence over those of law and justice. This does not mean that the requirements of justice were automatically set aside: on the contrary, they are insistently called to mind in the Statutes, but in the final count, if a conflict were to arise, considerations linked to maintaining peace would probably prevail. In any event, there is a threat there that constantly hangs over the operation and the very survival of these ad hoc judicial bodies.

Not only does the creation of the two Tribunals stem from Security Council resolutions which were based on Chapter VII of the Charter and noted the existence of a threat to international peace and security within the meaning of Article 39, but, by virtue of the same principle, it will be for the Security Council to put an end to their activity, that is to say, to

dissolve them. That is what was feared, briefly, at the time of the conclusion of the Dayton agreements, when the work of the International Criminal Tribunal for the former Yugoslavia had barely started. The dissolution of the ad hoc Tribunals will certainly give rise to numerous problems, particularly on account of the time limits allowed for the parties to avail themselves of certain remedies (appeal, review) and of the close institutional ties that exist between the two Tribunals (in the event of the dissolution of one of the two, in particular the Tribunal for the former Yugoslavia).

The link between the Statutes of the ad hoc Tribunals and the maintenance of peace is also evident from the provisions concerning the execution of the Tribunals' decisions, which is primarily entrusted to States, but if these fail to fulfil their obligations, recourse to the Security Council is provided (see, for example, Rules 11, 59 and 61 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia). The Security Council thus appears to be, so to speak, the "punch" of the International Criminal Tribunals, but in actual fact the Council's action, when solicited, has never gone further than a simple reminder to States of their obligations by means of new resolutions or declarations by the President. The measures taken have hardly ever extended beyond the very limited practice observed in connection with Article 94 of the United Nations Charter, and the execution of orders of the International Court of Justice.

As has often been pointed out, focusing on the need to maintain peace entails the risk of allowing certain senior officials to go unpunished and of hampering the effectiveness of the Tribunals. Indeed, to conclude a peace treaty the international community is obliged to negotiate with the very people who held the highest positions of responsibility, including some who have been formally indicted by the Tribunals (the cases of Radovan Karadzic and Ratko Mladic, whom it has not yet been possible to arrest despite their removal from the official political scene following the Dayton agreements, are absolutely typical).

In view of this basic contradiction between the requirements of justice and that of maintaining peace, the ambiguities resulting from the uncertainty in the Statutes concerning the choice of the legal system to be applied by the Tribunals may appear unimportant, and yet they have an appreciable effect on the operation of both courts, which is hampered thereby and may seem somewhat chaotic. Where criminal procedure is concerned, two radically different systems are involved, namely the accusatorial system currently characteristic of common law countries and the inquisitorial system applied in civil law countries. The Statute of the International Tribunal for the former Yugoslavia, which served as a model

for that of the Rwanda Tribunal, was drafted by the United Nations Department of Legal Affairs and by common law experts. It is therefore greatly influenced by common law, as already applied in Nuremberg. Yet this choice was not always carried to its logical conclusion, which explains some of the ambiguities as well as the contradictory and at times highly critical comments of both civil and common law experts on the decisions of the ad hoc Tribunals — particularly on the very thorny issues of respect for the requirements of fair trial and of trial *in absentia*.

The practice of the two Tribunals, though already considerable, has not helped to clear up all these ambiguities, the more so since new ones are arising and will no doubt continue to arise in the future. Nevertheless, the experience of both courts is now authoritative and decisive in many respects.

A decisive experience

The operation of the two International Criminal Tribunals has given rise to a wide variety of questions, and their already abundant practice is highly instructive. The decisions of the Tribunal for the former Yugoslavia, which are the more numerous, have been widely commented on and criticized by the media and by legal experts. This jurisprudence, which can no longer be ignored because of its significant contribution to international and humanitarian law, should be even more broadly disseminated and studied, especially in universities. It bears witness to the determination of both Tribunals to operate efficiently and in many respects has proved constructive and capable of serving as a model for a future permanent criminal court.

An international judicial structure striving towards efficiency

When the time came to deal with violations of humanitarian law in Rwanda, the Security Council could have maintained a single judicial body by extending the competence of the International Criminal Tribunal for the former Yugoslavia to breaches perpetrated in Rwanda. This solution, which might have been justified for reasons of economy and efficiency, was discussed but not adopted. Preference went to setting up a second ad hoc tribunal, with a structure so similar to that of the first that it might be regarded as a simple copy.¹² It is nevertheless separate

¹² Mutoy Mubiala, "Le Tribunal international pour le Rwanda: vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie", *Revue générale de droit international public*, 1995, pp. 929-954.

and independent, despite its many institutional links with the Hague Tribunal. The two Tribunals have the same Prosecutor (Art. 15 of the Statute of the International Tribunal for Rwanda). A Deputy Prosecutor is provided for the Rwanda Tribunal, which guarantees a certain unity of policy in conducting the investigations and prosecutions. The judges serving in the Appeals Chamber of the Tribunal for the former Yugoslavia also sit in the Appeals Chamber of the Rwanda Tribunal (Art. 12 of the Statute). Moreover, the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia apply, *mutatis mutandis*, to the Rwanda Tribunal (Art. 14 of the Statute). The similarity between the two courts arises mainly from the common composition of the Appeals Chamber,¹³ which must ensure unity of jurisprudence of the Trial Chambers of each Tribunal and also between the Tribunals themselves. The Appeals Chamber has not yet had occasion to meet in connection with cases in Rwanda, but it has handed down some important decisions in cases pertaining to the former Yugoslavia (particularly in the *Tadic* case); these augur well for a judicial system which strives to work as efficiently as possible by itself filling the gaps in the Statutes and emphasizing the indispensable cooperation of States.

The judges of the International Tribunal for the former Yugoslavia introduced some innovations regarding several provisions of the Rules of Procedure and Evidence, trying to fill certain gaps and to eliminate shortcomings in the Statute. The best-known example is that of the procedure set out in Rule 61, which has been applied on several occasions (i.e., in the cases of *Nikolic; Martić; Mrksić, Radic* and *Sljivancanin*: the *Vukovar Hospital* case; *Rajić; Karadžić* and *Mladić*).¹⁴ This procedure is intended to remedy failure to execute a warrant of arrest signed by a judge of the Tribunal and the absence of any reference to trial *in absentia* in the Statute. It provides for a public hearing and for the appearance of witnesses before a Trial Chamber, which may confirm the indictment, supplement it or modify it and issue an international arrest warrant in respect of the accused, which shall be transmitted to all States. The accused will thus become a pariah in all countries.

¹³ The composition of the Chambers, particularly that of the Appeals Chamber, might give rise to certain difficulties on account of the provisions laid down for the disqualification of judges (Rule 15 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia). Moreover, the composition of the Appeals Chamber should reflect more closely that of both Tribunals, and not only that of the Hague Tribunal.

¹⁴ Faïza Patel King and Anne-Marie La Rosa, "The jurisprudence of the Yugoslavia Tribunal: 1994-1996", *European Journal of International Law/Journal européen de droit international*, 1997, pp. 123-179, in particular pp. 128-142.

The absence of provision for trial *in absentia* in the Statute of either Tribunal reflects the wishes of countries of the common law tradition, which refuse, on account of their requirements in this regard (fair trial, due process of law), to allow a trial to be held in the absence of the accused. The omission has, on the other hand, greatly disappointed civil law experts (trial *in absentia* having been provided for in the French draft).¹⁵ The possibility of holding this type of trial would have guaranteed the Tribunal a certain degree of efficiency, even in the event of lack of cooperation on the part of States — a problem that was foreseeable at the time and unfortunately came to pass. The procedure set out in Rule 61 of the Rules of Procedure and Evidence appears as a kind of hybrid, a legal aberration and a substitute that satisfies no one.¹⁶ With all its faults and limitations, however, practice has shown it to be useful, since it has made it possible to maintain and even intensify pressure on the accused, with the help of the Security Council at times, pending political developments that will at last allow for their arrest and thus prevent them from enjoying impunity.

The attitude of the International Criminal Tribunals, particularly that of the Tribunal for the former Yugoslavia, to the question of cooperation with States has ultimately proved to be a realistic one, combining as it does firmness of principle with flexible and imaginative practical application. The Hague Tribunal, with the support of the Security Council, has frequently reiterated that States are under the obligation to cooperate with it. This was further emphasized by President Antonio Cassese, in a remarkable decision, handed down on 3 April 1996, concerning a request for modification in the conditions of detention of General Blaskic. The *Blaskic* case gave him occasion to explain that such an obligation was incumbent upon States even prior to the enactment of national legislation on the subject and to specify the nature of that obligation, stressing the distinction between obligations in terms of conduct, means and results.

¹⁵ S/25266 of 10 February 1993, Article XV, para. 2. On the regrettable rejection of the proposal of trial *in absentia*, see Alain Pellet, "Le Tribunal criminel pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?", *Revue générale de droit international public*, 1994, pp. 7-60, in particular p. 48, and Paul Tavernier, "Vers une juridiction pénale internationale?", in Cao Huy Thuan and Alain Fenet, *Mutations internationales et évolutions des normes*, PUF, Paris, 1994, pp. 137-154.

¹⁶ According to H. Ascensio and A. Pellet (*op. cit.* (note 9), p. 110), Rule 61 is "an imperfect substitute for trial *in absentia*". F. Patel King and A.-M. La Rosa stress the legal problems raised by this procedure (*op. cit.* (note 14), p. 142). André Klip severely criticizes the Rule 61 procedure both from the point of view of the accused and from that of witnesses in his article entitled "Witnesses before the international criminal tribunal for the former Yugoslavia". *Revue internationale de droit pénal*, Vol. 67, 1996, pp. 267-295.

Even though analyses of this kind are not entirely convincing,¹⁷ they bear witness to the Tribunal's considerable efforts to ensure that its task is accomplished with the greatest possible degree of efficiency.

The events of the summer of 1997, with the arrest of Slavko Dokmanovic on 27 June and that of Milan Kovacevic on 10 July, were a further illustration of the Tribunal's realistic and pragmatic approach in seeking cooperation with States. Efficiency often calls for discretion, and public opinion discovered a hitherto unknown aspect of the Tribunal's activity with these arrests, obtained with the cooperation of certain Western States which have trained commandos for this type of operation. Prosecutor Louise Arbour justified this unusual procedure on grounds of efficiency. It should be noted that Rule 53 (B) of the Rules of Procedure and Evidence provides that there may be no public disclosure of the indictment until it is served on the accused, but people did not know that that possibility had been used.¹⁸

These arrests, carried out by specially trained and equipped units, are somewhat reminiscent of the kidnapping of Eichmann by Israeli agents in Argentina, and the question arises as to whether the end justifies the means. While it is true that they allow the trials to proceed because the presence of the accused in The Hague has been ensured, recourse to such a procedure is warranted only if the Tribunal is certain of cooperation on the part of States. Otherwise, it denies itself the possibility of applying Rule 61 of the Rules of Procedure and Evidence, and, in the name of efficiency, runs the risk of prolonging the impunity of the accused. It should also be noted that in the *Vukovar Hospital* case the Tribunal combined public disclosure of the indictment and the Rule 61 procedure in respect of three of the accused and non-disclosure as regards Dokmanovic. The second operation, carried out by NATO's SFOR¹⁹ led to the death of one of the accused and to the capture of another. It should be followed by similar operations if it is not to be perceived as an alibi designed to mislead public opinion, thus enabling other war criminals,

¹⁷ See our report to the symposium of the "Société française pour le droit international", Strasbourg, May 1997, in Andrew Drzemcewski and Paul Tavernier, *L'exécution des "décisions" des instances internationales de contrôle dans le domaine des droits de l'homme* (to be published), Editions Pedone, Paris.

¹⁸ Eric David expressed doubts as regards the practical use of such absence of publicity in his article entitled "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue belge de droit international*, No. 2, 1992, pp. 565-598, in particular pp. 590-591.

¹⁹ Stabilization Force for Bosnia and Herzegovina.

including some of the most important ones, to remain sheltered from prosecution and to lead a peaceful existence.

Public opinion was rightly struck by the arrests of the summer of 1997. The ensuing trials will undoubtedly enable the Hague Tribunal to supplement and refine its already ample jurisprudence.

A constructive jurisprudence

The many decisions taken so far, especially by the International Tribunal for the former Yugoslavia, have enabled both courts to develop progressive and constructive case law in the spheres of general international law and international humanitarian law, covering different questions of procedure and competence and also some substantive issues of considerable importance. We shall confine ourselves to raising a few points which we regard as particularly significant, without claiming to offer an exhaustive analysis. These points are the question of fair trial, the distinction between international and non-international conflicts and the role of custom in humanitarian law.

The issue of respect for the rights of the defence and the right to a fair trial was at the heart of numerous debates before the Tribunal for the former Yugoslavia and had been underscored during the drafting of the Statutes of the two Tribunals. Article 21 of the Statute of the Hague Tribunal and Article 20 of the Statute of the Rwanda Tribunal essentially restate the guarantees set out in Article 14 of the International Covenant on Civil and Political Rights. Special attention was paid to the question of trial *in absentia* and to that of the anonymity of witnesses. The first issue has already been discussed in connection with the efficiency of the International Criminal Tribunals, but was viewed mainly from the angle of procedural fairness. As mentioned above, the procedure of trial *in absentia* was excluded in the interests of fair trial, although the Committee on Human Rights considered that it was not contrary to the Covenant, under certain specific conditions.²⁰ Some common law authors have even criticized the procedure set out in Rule 61 of the Rules of Procedure and Evidence on the grounds that it prejudices the rights of the accused, particularly in the event of a subsequent trial if the accused is finally brought before one of the Tribunals.

²⁰ See Paul Tavernier, "Le droit à un procès équitable dans la jurisprudence du Comité des droits de l'homme des Nations Unies", *Revue trimestrielle des droits de l'homme*, No. 25, 1996, pp. 3-22, in particular pp. 13 and 14.

The question of calling anonymous witnesses is also a highly sensitive matter.²¹ Common law experts are against the procedure, invoking the requirements of fair trial. Yet Article 22 of the Statute of the Tribunal for the former Yugoslavia (Art. 21 of the Statute of the Rwanda Tribunal) concerning the protection of victims and witnesses provides for the possibility of “*in camera* proceedings and the protection of the victim’s identity”, and Rules 69 and 75 of the Rules of Procedure and Evidence set out the details of such protection, including non-disclosure of the identity of a victim or witness. These measures indeed seem to be indispensable, as the witnesses — who are often victims — run grave risks when they leave the court and return to their countries. The Tribunal for the former Yugoslavia took such protective measures in the *Tadic* case (decision of 10 August 1995).²² The Tribunal for Rwanda, however, has taken no such decision, which may seem surprising.²³ In any event, case law has brought to light the importance of fair trial not only with respect to the accused, but also to the victims or witnesses, who are vulnerable and are entitled to assistance and protection.

Another noteworthy contribution of the jurisprudence of the International Criminal Tribunals concerns the breakdown of the barriers between international and non-international conflicts. International and internal aspects are closely intermingled in the conflicts in the former Yugoslavia and in Rwanda. It would therefore be arbitrary to attempt to separate the two types of conflict, although international and humanitarian law have established different rules pertaining to each category of situation. The problem has been approached from the point of view of competence, particularly in the *Tadic* case (decision of the Appeals Chamber of 10 October 1995).²⁴ The Hague Tribunal has also narrowed the gap between international and internal situations in connection with the obligation to cooperate that is incumbent not only on States but also on non-State entities, although

²¹ André Klip, *op. cit.* (note 16); see also Monroe Leigh, “The Yugoslav Tribunal: Use of unnamed witnesses against accused”, *American Journal of International Law*, Vol. 90, April 1996, pp. 235-238.

²² The Tribunal seeks to strike a balance between the interests of the accused and those of witnesses, setting five fairly stringent conditions for the admissibility of anonymity. The Tribunal’s decision is accompanied by the well-structured dissenting opinion of Judge Stephen, based on a strict concept of fair trial, close to the common law concept.

²³ The first hearing of witnesses before the Rwanda Tribunal was held on 17 January 1997, in connection with the *Akayezu* case.

²⁴ For a detailed analysis and critique of the problem, see H. Ascensio and A. Pellet, *op. cit.* (note 9), pp. 125 ff.

this is not mentioned in the Statute or in the Rules of Procedure and Evidence. President Cassese, in his aforementioned decision on the *Blaskic* case, did not hesitate to declare that the obligation was incumbent upon any State, and even upon “every other *de facto* government”.

The blurring of the distinction between the features characteristic of international and non-international conflicts has led to the emergence — or is the result of the appearance — of customary rules in humanitarian law, the existence and content of which the Hague Tribunal has rightly recognized and formally acknowledged. There again, the Tribunal’s decision of 2 October 1995 in the *Tadic* case has provided some very interesting lessons, which would deserve detailed comment and which have rightly attracted the attention of legal experts.²⁵ It will be noted that in its judgment of 7 May 1997 the Tribunal restated and supplemented the analyses of the Appeals Chamber. It provided a detailed discussion of the customary status of the prohibition of crimes against humanity referred to in Article 5 of the Statute of the Tribunal (paras 618 ff. of the judgment) and of the individual criminal responsibility provided for in Article 7, para. 1, of the Statute (paras 663 ff. of the judgment). The Hague Tribunal thus largely bases its decisions on custom and on the evolution of international humanitarian law, while at the same time contributing to its development.

Conclusion

In the final count, the experience of the two ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda has proved constructive in many respects, despite the difficulties encountered and the weaknesses and flaws inherent in the two structures.

Both courts have now been confirmed as a result of their substantial, original and practically unprecedented activity (the Nuremberg and Tokyo trials having taken place under very different conditions). In their decisions, the Tribunals, and particularly the Hague Tribunal, have firmly proclaimed their autonomy, for instance with regard to the question of anonymous witnesses, which was dealt with by the Committee on Human Rights in relation to the International Covenant on Civil and Political

²⁵ See, for example, Theodor Meron, “The continuing role of custom in the formation of international humanitarian law”, *American Journal of International Law*, Vol. 90, April 1996, pp. 238-249. See also the remarks of Luigi Condorelli in his general conclusions put forward on the occasion of the Geneva Symposium of October 1995, in Luigi Condorelli, Anne-Marie La Rosa and Sophie Scherer, *Les Nations Unies et le droit international humanitaire*, Editions Pedone, Paris, 1996, pp. 445-474, in particular p. 466.

Rights and by the European Commission and the European Court of Human Rights. As mentioned above, this desire for autonomy is reflected most markedly in the Tribunals' position vis-à-vis their parent organ, the Security Council. Indeed, the Hague Tribunal has not hesitated to look into the matter of the legality of its establishment, and hence of the relevant Council resolution.

Another important point of the Tribunals' jurisprudence is the gradual convergence that has taken place, not without some difficulty, between the opposing systems of common law and civil law. This original synthesis, which is still imperfect, will undoubtedly develop in the future.

The workings of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and the experience gained therefrom will undoubtedly be of great assistance in the discussions now under way with a view to setting up a permanent international criminal court with universal jurisdiction. The establishment of the two Tribunals in 1993 and 1994 gave new impetus to the debates that had become mired in the International Law Commission, and the convening of an international conference in 1998 augurs well in this respect. Numerous technical factors and points of comparison are now available.

The experience of the International Criminal Tribunals has attracted much attention from legal experts and many commentaries have appeared in specialized reviews. The particular interest shown by young jurists and students should be stressed; universities should bear such interest in mind and take care not to disappoint the hopes placed in international criminal jurisdiction, for therein lies an appreciable potential which should be fostered if we are to promote the development of international humanitarian law. It is obvious, however, that the responsibility of States remains essential in ensuring the effectiveness of international judicial bodies, as may be seen from the efforts currently being made to ensure that the accused are actually brought before their judges. Louise Arbour, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, showed optimism in this regard in a recent interview: "I am absolutely sure, above all now that the Tribunal is firmly established, that the arrest or surrender of Karadzic is only a matter of time and circumstance", she said, adding that "[s]ince the arrest of Milan Kovacevic in July, by confidential warrant, we have been most satisfied with the cooperation with SFOR"²⁶ — that is to say, with the NATO States. Even

²⁶ Interview in *Le Monde*, 30 August 1997.

so, this is a policy that needs to be firmly maintained. Indeed, it is the only way of preventing the most odious criminals from going unpunished, which would be wholly unacceptable, not only from the legal standpoint but above all from a moral point of view.
