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Louise Arbour's Leadership in War Crime Prosecution

Section I: A Brief History of the Former Yugoslavia

A. Medieval Period to World War 1

Yugoslavia's mountainous geography has acted as the single most important factor in its history. The mountains gave rise to insular cultures that developed their own traditions, social mores, and religious preferences. The area has for centuries also served as a constantly shifting focal point between southern, central, and eastern Europe.¹ The rugged features of the land have also made Yugoslavia one of the most difficult places to wage warfare, a fact that has not stopped inhabitants and outsiders from waging prolonged, vicious wars there.

In 1389, the empire of the Ottoman Turks was pushing into the Balkans. The expanding Islamic state sought to expand its reach into southern Europe. Driving north, the Turks encountered a force of Orthodox Christian Serbs on the plains of Kosovo Polje, a strategically-important trade crossroads located in what was until very recently a region of Serbia. A force of 27,000-40,000 Ottoman soldiers clashed with 12,000-30,000 Serb and allied troops.² Like so many battles in Balkan history, after grievous slaughter,

¹ Library of Congress Country Studies, Yugoslavia Ethnographic History, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0048\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0048)) (last visited April 10, 2008).

² Wikipedia, Battle of Kosovo, http://en.wikipedia.org/wiki/Battle_of_Kosovo (last visited April 10, 2008).

neither party had scored a clear victory. The Serbs, however, were bled of their core fighting strength.³

The Ottomans pushed further into Serbia and Bosnia-Herzegovina (hereafter referred to as Bosnia), ruling both as vassal states. The inhabitants of Bosnia were more willing than the Serbs to accept Ottoman occupation, in part because the Ottomans offered carrots in the form of land grants to Bosnians who would convert to Islam, and a new class of Bosnian Muslim landowners arose over the centuries.⁴ The Serbs resisted more vigorously, and the Battle of Kosovo became a central part of the Serb mythology of resistance and martyrdom.⁵

The Ottoman push was eventually halted at the southern edge of the Austro-Hungarian Empire, which reached into what is now Croatia. The Military Frontier, as it was known to the Austrians, was well garrisoned by Austro-Hungarian troops.⁶ The Slovenes and Croats, under the protection of the Austrians, gravitated in culture and religion to the north.

Serbia, itching to fulfill what it regarded as its rightful role as the leading nation of the South Slavs, wanted to be free of the yoke of Austria-Hungary's paternalistic protection. It was a Serb nationalist by the name of Gavilo Princip who assassinated the Austrian monarch Archduke Ferdinand, putting flame to the Balkan tinderbox and initiating the First World War.⁷

³ Thomas A. Emmert, The Battle of Kosovo: Early Reports of Victory and Defeat, <http://www.deremilitari.org/resources/articles/emmert.htm> (last visited April 10, 2008).

⁴ Bosnia and Herzegovena, VII History, http://encarta.msn.com/encyclopedia_761563626_6/bosnia_and_herzegovina.html (last visited April 10, 2008).

⁵ Wikipedia, Battle of Kosovo, http://en.wikipedia.org/wiki/Battle_of_Kosovo (last visited April 10, 2008).

⁶ Wikipedia, Military Frontier, http://en.wikipedia.org/wiki/Military_Frontier (last visited April 10, 2008).

⁷ Encyclopedia Britannica, Gavrilo Princip, <http://www.britannica.com/EBchecked/topic/476793/Gavrilo-Princip> (last visited April 10, 2008).

The aftermath of the First World War gave rise to wild optimism among South Slavs. The tired Austro-Hungarian and Ottoman empires were finally destroyed, and the prospect of bringing all of the South Slavs together under one flag intoxicated many of the region's intellectuals.⁸ In the negotiations that followed the war, representatives from the South Slav states convinced the conquering powers to carve a new South Slav state out of the region where the southern reaches of Austria-Hungary met the northern limits of the Turkish Empire.

The new state was originally called The Kingdom of Serbs, Croats, and Slovenes.⁹ Later the name was changed to Yugoslavia, or Land of the South Slavs. Comprising the states of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia, it was united by the Serbo-Croatian language and divided by history, geography, and religion. Yugoslavia was established as a monarchy, and despite ethnic tensions during the interwar period, it survived until 1941, when the Axis powers invaded.

B. World War II

On April 6th, 1941, the German juggernaut slashed into Yugoslavia.¹⁰ By April 13th, the Nazis captured the capital city of Belgrade.¹¹ They had a far more difficult time gaining control of the entire country, even though they parceled sections of the conquered

⁸ Library of Congress Country Studies, Yugoslavia, The Kingdom of Yugoslavia, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0023\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0023)) (last visited April 10, 2008).

⁹ CIA World Factbook, Yugoslavia, <http://www.umsl.edu/services/govdocs/wofact2001/geos/sr.html> (last visited April 10, 2008).

¹⁰ MARTIN GILBERT, THE SECOND WORLD WAR 170 (1989).

¹¹ GILBERT at 173.

land to their Italian, Hungarian, and Bulgarian accomplices.¹² The rugged terrain and limited road network made the country ideal for partisan resistance. Unfortunately the Yugoslavs spent as much time fighting each other as fighting the Germans. Predominantly Serbian supporters of the monarchy, known as Chetniks, clashed repeatedly with communist partisans under the leadership of Josip Broz (Tito), who were recruited more broadly.¹³

The fighting became a strange three-way affair. One day partisans would destroy a German supply depot, and the next they would attack a Chetnik camp. The Chetniks made deals with the Germans on more than one occasion in order to go after the partisans.¹⁴ To make matters even more complicated, many Croats cooperated with the Germans. The puppet Ustashe government in Croatia fought the Chetniks and partisans, and provided troops for elite Waffen SS mountain divisions in the German Army.¹⁵ Ultimately the partisans prevailed, and when the dust settled at the end of the war, Tito's forces were firmly in control of Yugoslavia. But the bitter experience of the war had made many Croats and Serbs mistrustful of each other.

C. Runup to Civil War

Tito's Yugoslavia was a multi-ethnic state. Positions at the top of the national leadership were apportioned roughly by regional origin, and although there were ethnic

¹² Library of Congress Country Studies, Yugoslavia, The Kingdom of Yugoslavia, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0023\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0023)) (last visited April 10, 2008).

¹³ Library of Congress Country Studies, Yugoslavia, The Resistance Movement, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0031\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0031)) (last visited April 10, 2008).

¹⁴ *Id.*

¹⁵ Allen Milcic, Croatian Volunteers in the German Wehrmacht in WWII, <http://www.feldgrau.com/croatia.html> (last visited April 10, 2008).

tensions, the Tito-controlled military and police asserted firm control across the country.¹⁶

Yugoslavia positioned itself between the Cold War powers, as a nonaligned player willing to do business with both sides.¹⁷ The country didn't just depend on its geography for protection. Lessons learned by the partisans during World War II were turned into a sophisticated military doctrine that stressed mountain warfare, hit-and-run tactics, and a well-armed population trained to resist overwhelming forces.¹⁸ This worked as a deterrent against the Soviet Army, but also created a country well-stocked and trained for a civil war.

After Tito's death in 1980, the disagreements between ethnic groups became more open. The strong federal model established by Tito in the 1970s was accepted by many Serbs, who saw themselves as the rightful leaders of such a federation. The Slovenes and Croats, whose cultural allegiances were bound to Italy and Austria as well as to Bosnia and Serbia, argued for a looser coalition that emphasized state rights. Economic difficulties in the 1980s only heightened these differences.¹⁹

Academics and politicians began pushing into the cracks, pointing to the differences between the ethnic groups, trading on fear and hate.²⁰ During this time of heightened polarization, the ultra-nationalist Franjo Tudjman rose to power in Croatia,

¹⁶ SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 37 (1995).

¹⁷ Library of Congress Country Studies, Yugoslavia, Foreign Policy, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0160\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0160)) (last visited April 10, 2008).

¹⁸ Library of Congress Country Studies, Yugoslavia, Territorial Defense Forces, [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+yu0183\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0183)) (last visited April 10, 2008).

¹⁹ WOODWARD at 73.

²⁰ Robert M. Hayden, *The Triumph of Chauvinistic Nationalisms in Yugoslavia: Bleak Implications for Anthropology*, http://condor.depaul.edu/~rrotenbe/aeer/aeer11_1/hayden.html (last visited April 10, 2008).

while Slobodan Milosevic attempted to maintain Serbia's control of Yugoslavia.²¹

Radovan Karadzic formed a political party within Bosnia with the specific goal of leading ethnic Serbs in Bosnia-Herzegovina to merge with the state of Serbia.²²

D. Disintegration

In June, 1991, Slovenia, the northernmost Yugoslav state, seceded. A brief 10-day war followed, but the Yugoslav government didn't have the stomach to go to war over the small, ethnically unified state.²³ Croatia's secession later that year provoked a much more vicious response, as the predominantly Serb officer corps of the Yugoslav Army sided with the ethnic Serbs in Croatia, providing them with weapons and other supplies.²⁴ The ad-hoc Croatian Army fought against large Serb enclaves, and several Croatian cities including the beautiful Adriatic port of Dubrovnik were shelled relentlessly.²⁵

By 1992, Bosnia had been swept into the carnage.²⁶ Ethnic Croats and Bosniaks (Muslim Bosnians) frequently combined forces to fight encroaching ethnic Serbs that had been supplied by the Yugoslav Army. In keeping with Balkan tradition, at times the Croats and Bosniaks also fought each other.²⁷ The back and forth battles over cities, towns, and villages were intense, fueled by ethnic hatred, religious differences, and

²¹ BBC News, Franjo Tudjman: Father of Croatia, <http://news.bbc.co.uk/2/hi/europe/294990.stm> (last visited April 10, 2008).

²² BBC News, Profile: Radovan Karadzic, <http://news.bbc.co.uk/2/hi/europe/876084.stm> (last visited April 10, 2008).

²³ Wikipedia, Ten-Day War, http://en.wikipedia.org/wiki/Ten-Day_War (last visited April 10, 2008).

²⁴ WOODWARD at 263.

²⁵ David Binder, The New York Times, Dubrovnik Diary: Shelling, Sniper Fire, Chaos and for a Few, Escape by Sea, <http://query.nytimes.com/gst/fullpage.html?res=9D0CE2DE153CF935A25752C1A967958260> (last visited April 10, 2008).

²⁶ DAVID ROHDE, END GAME XIII (1997).

²⁷ Wikipedia, Croat-Bosniak War, http://en.wikipedia.org/wiki/Croat-Bosniak_war (last visited April 10, 2008).

memories that reached back to the Second World War, and further, to the Battle of Kosovo Polje. It was in Bosnia that the majority of later claims of atrocities surfaced.

In 1993 Yugoslavia burned. The country that had outlived the Ottoman Empire, resisted Nazi occupation, and cleverly played the Cold War superpowers found itself in the throes of a vicious civil war. Muslim Bosnians, Catholic Croats, and Orthodox Serbs fought for control over the remnants of a harsh, beautiful mountainous land.

E. Atrocities

At the geographic center of what was once Yugoslavia, the city of Sarajevo lay under siege. Ringed by mountains, the isolated capital of Bosnia-Herzegovina was surrounded by Serb forces. In spite of the presence of a small UN force, the Serbs lobbed artillery into the city. Snipers in the hills played target practice with desperate civilians, and mortar and artillery shells hit houses, businesses, hospitals, schools, and markets.²⁸

Other towns in Bosnia-Herzegovina were simply razed to the ground by Croat or Serb forces. The disgusting term "ethnic cleansing" had hit the Western media, and its import was clear. The term referred to the practice of forcing civilians, usually Bosnian Muslims, from a specific geographic area in order to make the area more ethnically homogeneous. There were stories of even fouler deeds, of civilians rounded up and taken to concentration camps, or removed to remote locations and shot.²⁹

The horror didn't end at ethnic cleansing. Shocking reports of rape camps began to circulate. Bosnian women were being taken to these camps, where they were forcibly

²⁸ GlobalSecurity1.org, Major Curtis S. King, The Siege of Sarajevo, 1992-1995, <http://www.globalsecurity.org/military/library/report/2002/MOUTKing.htm> (last visited April 10, 2008).

²⁹ *WOODWARD* at 242.

impregnated by Serb men, in a bizarre and perverted attempt to demean and humiliate the Bosnian Muslims and control ethnic distribution.³⁰

In Croatia, the northwestern crescent of the former Yugoslavia, Croats killed ethnic Bosnians. Croats killed ethnic Serbs. Enclaves of ethnic Serbs fought back, attempting to create their own ethnic Serb state within Croatia. Regular army forces and militias clashed in confusing, seldom decisive battles.³¹ UN peacekeepers were ineffectual, acting essentially as observers to the ongoing carnage.³²

To many western observers it was obvious that while the civil war was complex and difficult to understand, there was method to some of the madness. The systematic way in which even irregular forces carried out atrocities smacked of high-level coordination, perhaps even at the national leadership level.

Section II: The Process by which the International Criminal Tribunal for the Former Yugoslavia was Established

A. Introduction: Establishment of the ICTY

In response to the continued violence that took place in the former Yugoslavia, the Security Council requested that the Secretary General of the UN, Boutros Boutros Ghali, establish a commission to investigate acts violating international human rights laws in the area.³³ The report revealed that mass killings, systematic detention and rape of women,

³⁰ The Guardian, Chris Bird, UN Tribunal Told of Bosnian Rape Camp Horrors, <http://www.guardian.co.uk/world/2000/apr/21/balkans1> (last visited April 10, 2008).

³¹ The New York Times, Bosnia: Uncertain Paths to Peace, Chronology: 1990-1995, <http://www.nytimes.com/specials/bosnia/context/apchronology.html>, (last visited April 10, 2008).

³² BBC News, UN Peacekeeping Record, <http://news.bbc.co.uk/2/hi/americas/892592.stm> (last visited April 10, 2008).

³³ Project on International Courts and Tribunals, *International Tribunal for the Former Yugoslavia*, available at <http://www.pict-pecti.org/courts/ICTY.html>.

and the continued practice of “ethnic cleansing” were common practices in the region.³⁴ The result of the report was a high level of public attention, requiring action to be taken by the international community.

Per the request of the Security Council, the Secretary General drafted the statute of the ICTY and delivered it to the Council within 60 days.³⁵ On May 25, 1993, the United Nations Security Council, through resolution 827, officially established the ICTY. The legal foundation for the Council’s ability to establish the tribunal was found in Chapter 7 of the UN Charter which permits the council to “take action to maintain or restore international peace and security.”³⁶ To carry out the goals of Chapter 7, Article 42 provides for the Council to make use of a non-exhaustive list of “non-military measures.”³⁷ The authorization for the establishment of the ICTY is believed to be granted as one such non-military measure.

The Security Council has specifically mandated for the ICTY to accomplish four tasks: “(1) to bring justice to persons allegedly responsible for violations of international humanitarian law; (2) to render justice to the victims; (3) to deter further crimes; and (4) to contribute to the restoration of peace by promoting reconciliation to the former Yugoslavia.”³⁸ Thus far it appears that the ICTY has been at least partially successful in carrying out these goals.

B. The Unique Nature of the ICTY

³⁴ Rachel S. Taylor, *Tribunal Law Made Easy*, (2004) available at <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/ictyintro.htm>

³⁵ Project on International Courts and Tribunals, *International Tribunal for the Former Yugoslavia*, available at <http://www.pict-pcti.org/courts/ICTY.html>.

³⁶ Rachel S. Taylor, *Tribunal Law Made Easy*, (2004) available at <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/ictyintro.htm>

³⁷ Jeffrey W. Davis, *Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally – But it was the Right Thing to Do*, 28 N.C.J. Int’l L. & Com. Reg. 395, 403 (2002).

³⁸ *Id.* at 404.

1. The Importance of the Establishment of an *International Tribunal*

It was clear that the establishment of an international tribunal was necessary to both punish war criminals and to deter any future atrocities. The precedent for bringing war criminals to be personally responsible for their actions before an international tribunal was firmly set by the Nuremberg Tribunal following World War II.³⁹ In Nuremberg, war criminals were not allowed to avoid the tribunal's jurisdiction through a defense that they were public officials or acting under direct orders of superiors.⁴⁰ Rather, the charter of the Nuremberg Tribunal made it clear that those violating international laws would be personally liable for criminal punishment, and war criminals would not be able to hide behind principles of state sovereignty.⁴¹

It was of the utmost importance that the individuals responsible for the atrocities in the former Yugoslavia (as well as the genocide committed in Rwanda, which would be tried 18 months later) should be brought before an international criminal tribunal. An international criminal tribunal could achieve what local-national trials could not. Specifically, an international criminal tribunal would be most effective in four ways. First, an international tribunal could support national efforts to "allocate individual responsibility by lending its authority as an international tribunal."⁴² Second, an international tribunal provides both "symbolic and actual neutrality and fairness in the proceeding."⁴³ Third, an international tribunal "assists the process of extraditing criminals."⁴⁴ Fourth, it is necessary to involve the international community in

³⁹ Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 Colum. Hum. Rts. L. Rev. 177, 191 (1995).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 189.

⁴³ *Id.* at 190.

⁴⁴ *Id.*

enforcement of humanitarian laws in order to bring international condemnation “of genocide and other outrages against humanity.”⁴⁵

2. The ICTY is Distinguishable from Past International Criminal Tribunals

a. The Tribunal’s Ad-Hoc Nature

The ICTY was never meant to be of a permanent nature. Rather, the tribunal was established solely for assuring the “restoration and maintenance of international peace and security in the territory of the former Yugoslavia. Once the Security Council decides that peace and security have been established, the tribunal will be dissolved.”⁴⁶

The ICTY also has another unique feature that makes it different from a permanent criminal tribunal (e.g. the ICC: International Criminal Court): it has extended jurisdiction that gives it primacy over national courts. While the national courts have concurrent jurisdiction for trying war criminals, the ICTY may “formally request that the national courts defer competence to it.”⁴⁷ Thus, the ICTY has the power to prevent war criminals from facing “double-jeopardy” (being charged in more than one proceeding for the same crime) and primacy over national courts gives the judgments of the ICTY more weight and substance.⁴⁸

b. The ICTY is the First True International Criminal Tribunal

Although the Nuremburg Tribunal set the precedent for holding war criminals personally responsible for their human rights violations, the ICTY is a far more improved representation of how a true international tribunal should be composed. Nuremburg was

⁴⁵ *Id.*

⁴⁶ Project on International Courts and Tribunals, *International Tribunal for the Former Yugoslavia*, available at <http://www.pict-pecti.org/courts/ICTY.html>.

⁴⁷ 28 N.C.J. Int’l L. & Com. Reg. at 397.

⁴⁸ Michael P Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 Denv. J. Int’l L. & Pol’y 305, 307 (1997).

not actually an “international” tribunal. Rather, it was a multinational and military tribunal established primarily by four nations to implement what has been called “the victors’ justice.”⁴⁹ In contrast, the ICTY has the backing of the entire international community, and it aims to bring “true peace and reconciliation,” not merely to punish the nations that lost the war.⁵⁰

c. Victor’s Justice vs. Appearance of Fairness

The ICTY has sought to avoid the appearance of “Victors’ Justice,” which is the common criticism of the Nuremburg Tribunal. Instead, the tribunal believes that to “achieve success it must not only be fair, but be seen as fair.”⁵¹

The ICTY has accomplished this appearance of fairness in many ways. First, unlike the Nuremburg Tribunal, the ICTY was not established by the victorious nations of the conflict in the former Yugoslavia. Rather, it was established with the support of the entire international community and is comprised of judges that originate from around the world.⁵² Furthermore, the ICTY does not merely punish war criminals from the “losing” side, but prosecutes individuals from both sides of the conflict.⁵³

Second, the ICTY has implemented rules and procedures to protect the due process rights of the criminal defendants. The ICTY has created a detailed set of rules of evidence and procedure that are a vast improvement over those used at the Nuremburg Tribunal.⁵⁴ Where criminal defendants were not able to access the evidence of opposing counsel in the Nuremburg Tribunal, defendants at the ICTY are entitled to any

⁴⁹ 28 N.C.J. Int’l L. & Com. Reg. at 402.

⁵⁰ *Id.*

⁵¹ 25 Denv. J. Int’l L. & Pol’y at 305.

⁵² 27 Colum. Hum. Rts. L. Rev. at 192.

⁵³ *Id.*

⁵⁴ 25 Denv. J. Int’l L. & Pol’y at 305.

“exculpatory evidence in the possession of the prosecutor” and the prosecution must “disclose all documents and witnesses prior to trial.”⁵⁵ Furthermore, criminal defendants at the ICTY have a right not to incriminate themselves.⁵⁶

Third, in order to avoid the application of ex-post facto laws, a common criticism of the Nuremberg Tribunal, the ICTY only charges defendants for violating laws that are well established among the international community. Early on, the Security Council past resolutions putting the former Yugoslavia on notice that all participants of the conflict were bound by “existing international humanitarian law, in particular the Geneva Convention.”⁵⁷ By advancing such notice prior to the commission of the atrocities, the Security Council prevented any later claim that the ICTY was unfairly applying new laws to the criminal defendants. In addition, the ICTY seeks to prosecute war criminals under rules of law “which are beyond any doubt part of customary law to avoid any question of full respect for the principle” of fairness.⁵⁸

Lastly, as mentioned previously, as a result of the ICTY’s primacy over national courts, it can avoid criminal defendants facing double jeopardy by halting any concurrent or subsequent criminal actions against the war criminals in local proceedings.

C. The Security Counsel’s Ad-hoc Tribunal: A Superior Legal Mechanism

1. Three Different Methods for Establishing a Tribunal

There were primarily three different ways that the International Community could have established a tribunal to handle the prosecution of those that violated humanitarian laws in the former Yugoslavia: (1) by an international treaty, (2) through a resolution of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 306.

⁵⁸ *Id.*

the U.N.General Assembly, or (3) through a resolution of the Security Counsel.⁵⁹ I will examine the first two methods and explain why they could not be successful, thus making the resolution of the Security Counsel the only possible mechanism for establishing the tribunal.

Creating a tribunal through an international treaty was likely the first option considered for establishing a criminal tribunal for the former Yugoslavia. All prior international tribunals were created by international treaty, and so it must have appeared as the most “orthodox” method.⁶⁰ An international treaty is appropriate for creating such a tribunal is that the member states must relinquish a fundamental aspect of their sovereignty when they transfer power to the tribunal to prosecute one of their citizens.⁶¹ Principles of international law require that a state may only cede such sovereign powers by their own expressed consent.⁶² This consent is best memorialized through an international treaty.

While at first glance it may appear that an international treaty is the best method for establishing an international criminal tribunal, the nature of an ad-hoc tribunal is at odds with this method. An ad-hoc tribunal is one that prosecutes crimes that have already been committed.⁶³ The states involved in the conflict (in this case the nations of Serbia, Croatia and Bosnia) will realize before the consummation of the treaty that their citizens will be the target of the tribunal. The states, therefore, will likely refuse to ratify the international treaty, and, according to principles of international law, will not be bound to

⁵⁹ Roman A. Kolodkin, *An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *Crim. L.F.* 381, 385 (1994).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 386.

the treaty.⁶⁴ As a result, the “creation of the court would have no point since it would lack the means to exercise its jurisdiction.”⁶⁵

The second method for establishing an international criminal tribunal was through the resolution of the U.N. General Assembly. The General Assembly could have sought the establishment of the tribunal as a subsidiary organ, to carry out the mandate of the General Assembly with the powers conferred upon it.⁶⁶ However, the General Assembly simply does not have the authority to create such a tribunal. The UN Charter, “even given its broadest, most legally expansive interpretation, does not confer on the General Assembly the competence necessary to create either a permanent court or an ad-hoc tribunal.”⁶⁷ The General Assembly cannot confer powers to a tribunal as a subsidiary organ that it does not itself possess.⁶⁸

An ad-hoc criminal tribunal could not successfully be created by either a resolution of the UN General Assembly or through an international treaty, and therefore, its establishment through the resolution of the Security Council became the “sole option” in both a legal and practical sense.⁶⁹

2. A Resolution by the Security Council is a Superior Method fore Establishing an Ad-hoc Tribunal

The establishment of the ICTY as a subsidiary organ of the UN Security Council was a superior option for many reasons. First, a Security Council resolution, unlike an international treaty, had the ability to expedite the creation of the tribunal at a time when

⁶⁴ *Id.* at 386-387.

⁶⁵ *Id.* at 387.

⁶⁶ *Id.* at 390.

⁶⁷ *Id.* at 389-390.

⁶⁸ *Id.* at 390.

⁶⁹ *Id.* at 391.

it was necessary to take quick action to restore peace in the region of the former Yugoslavia.⁷⁰ Furthermore, the resolution bound all UN Member States, giving the ICTY the backing of the entire international community. It also guaranteed that states that might not otherwise ratify an international treaty would be bound by the judgments of the tribunal.⁷¹ Lastly, with the backing of the Security Council, the ICTY can force Member States to comply with its court orders and judgments through the use of sanctions imposed by the Security Council.⁷²

3. The Legal Foundation for the Establishment of the ICTY

The legality of the ICTY as an ad-hoc tribunal is founded in the powers conferred upon the Security Council through the UN Charter. Article 24(1) of the Charter provides that the Security Council has the primary responsibility for maintaining international peace.⁷³ Article 39 of Chapter 7 of the charter states that the security council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”⁷⁴

Article 42 goes on to provide for “military” measures to be utilized to maintain or restore peace.⁷⁵ Article 41, on the other hand, provides that the Security Council may decide what *non-military* measures are to be employed to give effect to its decisions.⁷⁶

⁷⁰ 28 N.C.J. Int'l L. & Com. Reg. at 405.

⁷¹ *Id.*

⁷² Project on International Courts and Tribunals, *International Tribunal for the Former Yugoslavia*, available at <http://www.pict-cti.org/courts/ICTY.html>.

⁷³ 5 Crim. L.F. at 391.

⁷⁴ *Id.* at 392.

⁷⁵ *Id.*

⁷⁶ *Id.*

Having determined that the mass killings, systematic enslavement and rape of women, and ethnic cleansing constituted a breach of international peace, the UN Security Council had authority to take action pursuant to Article 39.⁷⁷ The creation of the ICTY was an exercise of the Security Council's power to implement "non-military" measures under Article 41, in order to restore international peace to the region of the former Yugoslavia.⁷⁸

Section III: The role of Louise Arbour

A. Arbour's Legal Background

Louise Arbour began her legal career as a law clerk for Justice Louis-Philippe Pigeon of the Supreme Court of Canada after graduating from the Universite de Montreal with a degree in civil law (LL.L). While working as a clerk, Arbour attended graduate school completing her graduate studies at the faculty of law of the University of Ottawa. Through the 1970's and 1980's Arbour held many positions such as; research officer for the Law Reform Commission of Canada, the vice-president of the Canadian Civil Liberties Association, and associate dean of Osgoode Hall Law School. In 1987 Arbour was appointed to the Supreme Court of Ontario, and in 1990 she went on to be appointed to the Court of Appeals for Ontario. Arbour's already distinguished legal career gave her a variety of experiences both as a legal professional and as a leader, however her greatest challenge came in 1996 when Arbour was appointed chief prosecutor of war crimes at the International Criminal Tribunal for the former Yugoslavia.⁷⁹

B. Arbour's Obstacles as the New Chief Prosecutor

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *In Depth: Louise Arbour*, CBC News Online, March 11 2008, <http://www.cbc.ca/news/background/arbour/>

As chief prosecutor she was empowered by the 1949 Geneva Convention to prosecute those who committed transgressions of the laws or customs of war, crimes against humanity, and genocide in the former Yugoslavia. Typically these transgressions took the form of mass killings, systematic rape committed during the war, attacks on nonmilitary targets, and ethnic cleansing⁸⁰. Located in the Hague, the court's task of seeking out and prosecuting war criminals marked a profound step towards the international regulation of conduct during war.

While being tasked with such a momentous role she faced a number of obstacles in bringing justice to the war torn Yugoslavia. First, the International Criminal Tribunal is a nationless organization without any direct means of executing its charges. While practicing in Canada, Arbour benefited from a legal system with an executing arm. The International Criminal Tribunal however is forced to rely on other nations to arrest suspected war criminals and bring them before the tribunal. Most often this task is left to the very nation these war criminals served. This naturally creates powerful conflict of interests as Serbia and Croatia were asked to turn over leaders hailed in their country as war heroes to an international court to be tried as war criminals. Realizing this power deficiency Arbour had to rely only on moral gravitas and political networking as the driving forces behind the work of the International Criminal Tribunal.

Further complicating the issue of the Tribunal's inability to self-execute is the conflicting positions of the Serbian and Croatian governments. By 1996 forty-five Serbs and seven Croats had been indicted by Arbour's predecessor, Richard Goldstone. The Serbian government believed that the court was unfairly prosecuting Serbians over

⁸⁰ Louis Tuttle and Ayesha Qayyum, *International War Crimes Tribunal for the Former Yugoslavia*, The Center for Human Rights and Humanitarian Law at Washington College of Law, 1994, <http://www.wcl.american.edu/hrbrief/v1i1/tribun11.htm>.

Croatians, and the Croatian government felt as though it was the Serbian government's job to first cooperate with the tribunal. The Serbian and Croatian governments were in the best position to arrest those indicted by the tribunal, but neither was willing to cooperate first, creating a political stalemate and denying all parties justice⁸¹.

Arbour was also faced with the obstacle of transitioning from a career that was primarily legal in nature to one involving equal parts of the law and of politics. Arbour's legal education equipped her to handle issuing the indictments, however the position of the tribunal required cooperation with other International organizations such as the United Nations, and Nato. Without these organizations as well as countries like the United States the tribunal would have been unable to gather intelligence on the human rights violations, maintain some level of stability in the region while pursuing the indictments, or negotiating the arrests of suspect war criminals⁸².

Finally the tribunal suffered from budgetary constraints. With a budget of \$68 million dollars the tribunal's was just a fraction of what the Nuremburg prosecutors were afforded. This limited budget allowed for eleven judges, and approximately 250-275 staff to investigate war crimes, translate, and analyze the over one million pages of documents. Nuremburg on the other hand had four lead prosecutors, the U.S. prosecutor, Justice Jackson, alone had a couple hundred prosecutors and a staff that would dwarf that of the International Criminal Tribunal.

Despite her extensive legal background, Arbour was forced to adapt to a leadership position that went beyond the typical role of a lawyer, law professor, or judge.

⁸¹ Jane Perlez, *War Crimes Tribunal on Bosnia is Hampered by Basic Problems*, The New York Times, January 28, 1996,

<http://query.nytimes.com/gst/fullpage.html?res=9B05E0DB1639F93BA15752C0A960958260>

⁸² Id.

Arbour was placed in charge of a relatively new international organization. Her role as chief prosecutor required that she hone her political skills in order persuade nations to intervene and hold the leaders of other nations accountable for war crimes even where it might not seem in their own interests. She had to persuade warring nations to see the legitimacy of the tribunal as well as the benefits of an international judicial body that would try its own citizens. Finally she was tasked with this monumental undertaking while be provided a limited staff and minimal funding.

C. Duties and Goals

Arbour had clear goals through her role as chief prosecutor; she was not just looking at individual atrocities. Her mandate was to prosecute, crimes against humanity, which have to be widespread or systemic killings, extermination, rape, torture, enslavement, deportation. The crimes had to be on a widespread or a systemic scale, and it was important to consider the chain of command responsible for the crimes.⁸³ In her role as chief prosecutor Arbour indicted President Slobodan Milosevic charging him with crimes against humanity - specifically murder, deportation and persecutions, and with violations of the laws and customs of war.⁸⁴ This was the first time that a serving head of State had been called before an international court to account for his actions. Arbour also indicted four others: Serbian President Milan Milutinovic, Deputy Prime Minister Nikola Sinovic, Chief of Staff Dragoljub Ojdanic, and Internal Affairs Minister Vljako Stojilkovic.

Arbour's primary focus in The Hague was arresting and indicting these war criminals. In order to assist her in carrying out her duty she utilized NATO's Stabilization

⁸³ A Newshour with Jim Lehrer: War Crimes April 29, 1999

⁸⁴ Charles Trueheart *A New Kind of Justice*, April 2000 Atlantic Monthly

Force (SFOR) which carried a mandate to arrest war-crimes suspects. NATO's SFOR was created as a result of the 1995 Dayton Accords agreement that ended four years of strife in Bosnia.⁸⁵

D. Strategy and Leadership

Arbour implemented a unique strategy in order to get arrests. She disclosed that she had suspects facing criminal charges but chose not to release their identities to the public. This use of "sealed indictments" caused widespread concern among officials of the targeted countries. In addition, the sealed indictments caused outrage in Russia who had been a close ally with Yugoslavia and, perhaps paradoxically, caused a stir within the NATO command ranks.⁸⁶ Arbour responded to criticisms of the indictments by calling attention to the fact that this was the same strategy used by criminal prosecutors in North America.

E. Sealed Indictments

The purpose of the sealed indictments was to create widespread fear among suspects that would convince them that surrendering to the ICTY would garner more clemency than staying on the run would.⁸⁷ Furthermore Arbour's use of SFOR troops gave her the upper hand in actually making arrests which ICTY would be powerless to execute without their tactical assistance.⁸⁸ The sealed indictments also acted as a restraint on SFOR because if they did not serve the warrant then Arbour could call attention to

⁸⁵ Charles Trueheart *A New Kind of Justice*, April 2000 Atlantic Monthly

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

their failure to carry out their job. As an American diplomat put it: “It gave [SFOR] an excuse, or took away their excuse.”⁸⁹

F. Appeals to the Rule of Law

In the indictment of Milosevic et. al. Arbour called upon all States to comply with their capture. She stressed that the warrants were issued under the authority of a Security Council resolution that required states to comply with the orders of the tribunal. Arbour particularly called on the authorities of Yugoslavia to stand up for the Rule of Law and to voluntarily submit to the jurisdiction of the tribunal or at least provide for their arrests and transfer to The Hague.⁹⁰

G. Legitimate Law Enforcement

In her indictment Arbour also stressed her commitment to functioning as a legitimate law enforcement operation and making her work a major contribution to a lasting peace in Kosovo and more broadly the entire Balkan region.⁹¹ In attempting to rally others to her cause Arbour wrote: “No credible, lasting peace can be built upon impunity and injustice.” By Arbour’s standard all those who refused to cooperate with her efforts to bring the suspects into custody signified an affront to those who obey the law and a betrayal to those who rely on the law for peace and security.

H. Third Party Affirmation

In handing out the indictments Arbour did not act unilaterally. An independent review by a judge of ICTY confirmed that there was a credible basis to believe that those accused were criminally responsible for the deportation of 740,000 Albanians from Kosovo, and for the murder of over 340 identified Kosovo Albanians. Arbour made sure

⁸⁹ Charles Trueheart *A New Kind of Justice*, April 2000 Atlantic Monthly

⁹⁰ Arbour, Louise *UN press statement* (JL/PIU/404-E), 27 May 1999

⁹¹ *Id.*

to emphasize that the indictments were not directed against the State of Yugoslavia as a whole nor against its people but solely against the perpetrators guilty of these heinous crimes.⁹²

I. Conclusion: Louise Arbour as a Leader

Louise Arbour utilized unique and effective leadership skills to bring Milosevic and his cronies to justice. Her use of sealed indictments amounted to a well planned and technical strategy that actually made some of the criminals come to her. Although she faced considerable obstacles, her poise and commitment to the application of the Rule of Law helped unify the world powers behind her in her quest to bring these criminals to justice.

Section IV: The Immediate Effects of the ICT's Work and its Impact in the Former Yugoslavia

A. Introduction Early Mixed Progress of the ICT

Slobodan Milosevic's arrest and trial in the International Criminal Tribunal for the former Yugoslavia "ICTY" was a significant achievement for the tribunal,⁹³ the tribunal created a lasting body of international law based on civil and common law traditions⁹⁴, and the region has experienced some return of refugees⁹⁵. Other aspects of the tribunal's performance, however, have been minimal and have not made a lasting impact in the former Yugoslavia.

⁹² Arbour, Louise *UN press statement* (JL/PIU/404-E), 27 May 1999

⁹³ David Tolbert, *THE EVOLVING ARCHITECTURE OF INTERNATIONAL LAW: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. Vol.26, No.2, Summer/Fall 2002, 7

⁹⁴ *Id.* at 17-18.

⁹⁵ Monika Nalepa, *Why do they Return? Evaluating the Impact of ICTY Justice on Reconciliation*, www.ruf.rice.edu~nalepa, 2007, at 13.

B. Some Early Successes of the ICTY

In mid to late 1997, the United Kingdom effected several significant arrests.⁹⁶ Afterwards, an effort led by the United States led to the surrender of ten indicted Croatians. The tribunal rapidly began to conduct trials and develop rules and procedures⁹⁷. By December of 1999, the tribunal's effectiveness and credibility continued to make progress holding more trials and appellate proceedings⁹⁸. More high-level accused, including Ratko Mladic's chief of staff and other senior military and political personnel were arrested or had voluntarily surrendered⁹⁹. Increased support from the international community lead to additional and even more significant arrests, and greater regional cooperation¹⁰⁰. The ICTY has grown into an effective court, issuing arrest warrants and administering trials that are mostly perceived as fair. The tribunal has developed a set of workable procedures and rules of evidence, drawing both from civil and common law traditions¹⁰¹. The judges have developed an important body of law and criminal procedure that can serve as an example for other prosecutions for serious violations of international law. The tribunal is free from local influences, has become a credible court¹⁰², and has proven that it is possible to dispense justice irrespective of the great distance from the scene of the crimes¹⁰³.

C. Early Progress of the ICTY Left Much to be Desired

⁹⁶ David Tolbert, *THE EVOLVING ARCHITECTURE OF INTERNATIONAL LAW: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. Vol.26, No.2, Summer/Fall 2002, 10.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.* at 10.

¹⁰¹ David Tolbert, *THE EVOLVING ARCHITECTURE OF INTERNATIONAL LAW: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. Vol.26, No.2, Summer/Fall 2002, 7,17

¹⁰² *Id.* at 18.

¹⁰³ *Id.* at 11.

Early in the tribunal's history, hostilities on the ground in made effecting arrests and gathering evidence extremely difficult¹⁰⁴. In addition, the tribunal did not have any police force or coercive power on its own¹⁰⁵. As a result, indicted individuals such as Radovan Karadsic and Ratko Mladic passed through NATO checkpoints with impunity and the tribunal was reduced to virtual irrelevancy¹⁰⁶. Croatia and the Federal Republic of Yugoslavia remained defiant in their non-cooperation with the ICTY and thus those who were prosecuted in The Hague were not the most serious perpetrators of alleged crime¹⁰⁷. By the spring of 1997, the ICTY had only a handful of accused in custody despite many more indictments¹⁰⁸. Proceedings conducted in The Hague were in unfamiliar languages and the procedures used by the tribunal were not understood in the region¹⁰⁹. Thus the work of the court was subject to misinformation and distortions and regional politicians cynically manipulated these misunderstandings¹¹⁰. Even after arrests and prosecutions were taking place, atrocities were still reported in Kosovo in 1999 showing that the tribunal was not having a deterrent effect on new crimes¹¹¹. Additionally the tribunal did not work closely with or provide assistance to the justice systems of the region and as a result, there is not a local venue capable or bringing to justice the scores of other perpetrators who committed serious violations of international humanitarian law in the former Yugoslavia¹¹².

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 13.

¹¹⁰ David Tolbert, *THE EVOLVING ARCHITECTURE OF INTERNATIONAL LAW: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. Vol.26, No.2, Summer/Fall 2002, 7,13

¹¹¹ *Id.* at 11.

¹¹² *Id.* at 12.

D. Effects on the Future Yugoslavia

1. Reconciliation Effects

The ICTY's indictments, trials, and sentencing decisions have had almost no effect on the behavior between ethnic groups that were previously in conflict¹¹³. Many victim's demand for justice may be directed against perpetrators who inflicted harm on them directly rather than against those who were issuing orders¹¹⁴. Victims of war crimes are more likely to encounter lower level perpetrators than those high ranking criminals prosecuted by the tribunal¹¹⁵. Sometimes the former perpetrators hold positions of local authority. The prosecution of war criminals in the ICTY is selective and mostly high level criminals are prosecuted¹¹⁶. Therefore prosecution of the highest ranking criminals does not have the effect of reconciliation with the victims of the crime.

2. Effects of the Tribunal on Refugee Returns.

The tribunal has had an effect on refugee returns in some areas but not in others¹¹⁷. In two different locations, Srebrenica and Prijedor, similar Serbian atrocities caused the mass exodus of refugees¹¹⁸. Only the latter has experienced significant refugee returns despite similar prosecution of war criminals by the ICTY¹¹⁹. Both had a similar number of indictments and an aggregate sentencing in years¹²⁰. The type of individuals prosecuted as a result of war crimes in Prijedor were lower level direct perpetrators of

¹¹³ Monika Nalepa, *Why do they Return? Evaluating the Impact of ICTY Justice on Reconciliation*, www.ruf.rice.edu/~nalepa, 2007, at 3.

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 13–29.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.*

war crimes¹²¹. In Srebrenica, high level criminals were prosecuted¹²². While the tribunal has been responsible for the return of refugees, in some areas it has been more pronounced due to the type of prosecutions conducted by the court.

3. Effects Local Prosecution of War Criminals

Another major impact the new tribunal did not make on the former Yugoslavia was development of the local courts for prosecutions of war criminals and deterrent of new crimes. The tribunal's impact on the system of justice in the area of conflict has been minimal and there is virtually no effective enforcement of this new body of international law in the courts that matter most, the regions domestic courts¹²³. The lack of impact on preparing and building local courts or prosecutions of war crimes is troubling¹²⁴. There are only a relatively few war criminals who have faced or will face justice in The Hague¹²⁵. The tribunal was never intended to try more than the principal perpetrators of atrocities within the former Yugoslavia¹²⁶. Local courts capable of providing justice to the many perpetrators who committed war crimes would have been the best mechanism but it was never effectuated. While the tribunal was established as a local mechanism to restore peace and security in the region, it did not have any specific role in constructing or improving the domestic justice systems or assisting in local war crimes prosecutions¹²⁷.

E. Conclusion:

¹²¹ *Id.* at 17.

¹²² *Id.*

¹²³ David Tolbert, *THE EVOLVING ARCHITECTURE OF INTERNATIONAL LAW: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. Vol.26, No.2, Summer/Fall 2002, 8.

¹²⁴ *Id.* at 12.

¹²⁵ *Id.*

¹²⁶ *Id.* at 13.

¹²⁷ *Id.* at 24

The International Criminal Tribunal for the Former Yugoslavia has evolved into an effective court delivering fair trials to the perpetrators of atrocities in the former Yugoslavia. While the court has created credible rules of evidence and workable procedures developed from civil law traditions¹²⁸, it failed to develop a similar level of expertise in the former Yugoslavia. Based on prosecution of direct perpetrators of war crimes, the court has influenced the return of refugees in certain regions. Selective prosecution of higher level war criminals has limited refugee return in other region. As a result, the tribunal could have had a more significant impact on the former Yugoslavia and justice would have been dispensed to many more alleged perpetrators of war crimes.

Section V: Louise Arbor and the ICTY Legacy:

The ICTY and Louise Arbour have made contributions that extend beyond merely trying war crimes.

A. Making national leaders accountable for their actions

Louise Arbour's greatest achievement was obtaining an indictment against Slobodan Milosevic, the former head of Yugoslavia.¹²⁹ This indictment was the first of its kind, and served as a sort of "tipping point." Where international critics, particularly the United States had harshly judged the tribunal before Milosevic's indictment, after the indictment, the ICTY was awash in newfound international support.¹³⁰ The immediate results of Arbour's indictments against Milosevic was production of evidence. Journalists, foreign countries, and human rights organizations rushed to provide the ICTY with

¹²⁸ *Id.* at 17.

¹²⁹ Charles Trueheart, *A New Kind of Justice*, THE ATLANTIC MONTHLY, April 2000, <http://www.theatlantic.com/doc/200004/international-criminal-tribunal>.

¹³⁰ *Id.*

evidence to be used in prosecuting the war criminals.¹³¹ The long term effect of Arbour's efforts was to remind foreign leaders that they were not above international sanction and that there was the possibility that international leaders could be held for their crimes even if they could not be held accountable in their own countries.

B. Expanding the jurisdiction of international courts

First, the ICTY has resulted in establishment and expansion of international standards in crimes involving sex and sex-related violence.¹³² The ICTY represents the first time that offenders have been tried for sexual crimes tied to wartime conflicts, including the first ever designation of rape as a crime against humanity.¹³³ In addition to trying sex crimes, the ICTY has also established guidelines for other tribunals to follow when prosecuting murder, torture, persecution, and causing great suffering. In both cases, the ICTY has affirmatively shown the viability of extending international tribunals beyond war crimes.

Next, the tribunal has shown that it is possible to establish an international self-sustaining, and fully-featured court. For example, the ICTY has begun holding its own appellate hearings.¹³⁴ The tribunal has garnered support from over 70 countries, and over a thousand people are involved in prosecuting the war criminals.¹³⁵ Even NATO has chipped in and now supports the tribunal by ferrying prisoners to The Hague where they are tried.¹³⁶ The large number of countries and political bodies working together has

¹³¹ *Id.*

¹³² Gabrielle K. McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 24 HASTINGS INT'L & COMP. L. REV. 155, 166 (2001).

¹³³ *Id.* at 168.

¹³⁴ *Id.* at 169.

¹³⁵ *Id.*

¹³⁶ *Id.*

proved that international courts were viable and has led to invigorated efforts to establish a permanent International Criminal Court.¹³⁷

Finally, many countries had doubts as to whether a war crimes tribunal was the appropriate vehicle for bringing peace to Yugoslavia.¹³⁸ Many of these doubts were resolved after the establishment of the ICTY. As the trials happened, it became apparent that the tribunal promoted law and order rather than violence. Because the tribunal successfully prosecuted war criminals, this has opened the door to establishment of other international bodies.¹³⁹ Indeed, the International Criminal Court (ICC) was established in 2002 after an upsurge in countries ratifying the 1998 Rome Statute after the successes of the ICTY.¹⁴⁰

C. Arbour's Legacy: establishment of a permanent international criminal court

Arbour's most significant contribution is not something that she directly achieved while serving as the head of the international court. Her lasting success lies in what happened after her the ICTY's formal indictment of Milosevic. The ICTY is not a permanent body. It only has the power to exist so long as there are outstanding untried war crimes committed by leaders of the former Yugoslavia. All outstanding issues before the ICTY must be completed by 2010.¹⁴¹ Thus, the ICTY will not be a long term player in mediating global justice.

Although most countries do not state the apparent success of the ICTY as a reason for ratifying the Rome statute, there was a large upswing in countries ratifying the

¹³⁷ *Id.*

¹³⁸ *Id.* at 168-69.

¹³⁹ *Id.*

¹⁴⁰ Coalition for the International Criminal Court, *History of the ICC* <http://www.iccnw.org/?mod=icchistory> (last visited Apr. 9, 2008).

¹⁴¹ ICTY home page, *ICTY at a Glance*, <http://www.un.org/icty/glance-e/index.htm> (last visited Apr. 9, 2008).

Rome statute (ten in the following weeks).¹⁴² Although the International Criminal Court was not formally established until 2002, it is unlikely that the ICC Rome Statute would not have received the required 60 ratifying votes if it countries had not had confidence in an international judicial body. The ICTY was the example, and establishment of a permanent criminal court was the long-term result.

D. Conclusion

When all is said and done, Louise Arbor was a real leader. She entered her job as a prosecutor for the ICTY with almost no information on the crimes or the tribunal itself. Through perseverance and visionary leadership, she balked the United States and other western countries to be the first person in history to issue an indictment against a foreign head of government. She persevered at her job, resulting in over 100 indictments and 50 trials. Her legacy is increased accountability for foreign leaders, and perhaps most important, establishment of real jurisdiction for criminals that transcends national boundaries.

¹⁴² See McDonald, *supra* note 4, at 165.