

## BOOK REVIEW

# POLITICS AND JUSTICE AT THE ICTY

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***THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY* BY RACHEL KERR (OXFORD: OXFORD UNIVERSITY PRESS, 2004) 239 PAGES. PRICE AUD\$180.00 (HARDCOVER). ISBN 0 19 926305 1**

When the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in 1993, the fabric uniting the Balkans was ripping apart. How could an ad hoc Tribunal, thousands of kilometres from the conflict with no enforcement apparatus, ameliorate the anarchy and destruction sweeping the region? In its early years it languished almost unused, its courtrooms empty. In 2005, as the ICTY moves slowly towards the completion of its mandate, increased international pressure has led to a series of surrenders of indicted suspects.<sup>1</sup> It is a significant achievement that Slobodan Milosevic, the alleged architect of so much of the carnage in the Balkans, now sits in the dock of the ICTY, defending charges of genocide, crimes against humanity and war crimes. His favoured approach is to play the martyr. He has repeatedly refused to recognise the jurisdiction of the Tribunal,

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<sup>1</sup> See, Human Rights Watch, *Real Progress in The Hague*, available at <<http://hrw.org/english/docs/2005/03/29/serbia10386.htm>> (last visited Mar. 29, 2005).

denouncing it as an instrument of anti-Serb propaganda.<sup>2</sup> The outcome of his trial, and the evaluation of the processes by which it has been conducted, will have significant ramifications for the future of international criminal law.<sup>3</sup>

According to its own self-description, the ICTY 'provides a forum and framework for the enforcement of existing international humanitarian law.'<sup>4</sup> There is no doubt that the ICTY has made a very substantial contribution to this jurisprudence. The success of the Tribunal, however, will be measured not only by its legal output but also by the political role it has played in achieving justice for the victims of the conflict in the Former Yugoslavia. The political and legal matrix of the Tribunal is the topic addressed in Rachel Kerr's *The International Criminal Tribunal for the Former Yugoslavia: Law, Politics and Diplomacy*.<sup>5</sup> Unfortunately, the book is disabled by a sometimes unfocused thesis and the author's uncertain evaluation of the ICTY's political and legal achievements.

Rather than a collective imputation of guilt towards an entire nation or people, international criminal law focuses on the accountability of individuals. International criminal law can serve as an official forum for acknowledging past guilt, a putative demonstration of the power of law to gather history and memory towards justice and, perhaps, the truth; it also attempts to provide the certainties of law's order, predictability and impartiality after the chaos of war. The Dutch jurist B.V.A. Röling noted that

the foremost, essential function of criminal prosecutions [is] to restore confidence in the rule of law. The legal order is the positive inner relation of the people to the recognised values of the community, which relation is disturbed by the commission of crimes. If crimes are not punished, the confidence in the validity of the values of the community is undermined and shaken.<sup>6</sup>

Perhaps most importantly, in an era in which most wars are civil or ethnic in nature, criminal prosecution of wartime atrocities can demystify history's claim to be the authentic motor of conflict, and the incremental layering of evidence can unravel the historical narratives spun by cynical elites for political gain.

The ends of international criminal justice in the Balkans, however, were made particularly difficult to attain due to the circumstances of the ICTY's establishment.

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<sup>2</sup> See, e.g., *Milosevic Opens his Defence Case by Going on the Offensive*, THE NEW YORK TIMES (New York), Sep. 1, 2004; Tim Judah, *Milosevic on Trial*, 44(2) SURVIVAL 158 (2002); CHRIS STEPHEN, JUDGEMENT DAY: THE TRIAL OF SLOBODAN MILOSEVIC (2004).

<sup>3</sup> See, *Analysis: International Tribunals on Trial*, BBC NEWS ONLINE, Aug. 31, 2004 (online) at <<http://news.bbc.co.uk/1/hi/world/europe/3614854.stm>>.

<sup>4</sup> Prosecutor v. Delalic et al (Celebici) (Trial Chamber Judgment), (1998) Case No IT-96-21-T, 417.

<sup>5</sup> RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: LAW, POLITICS AND DIPLOMACY (2004).

<sup>6</sup> B V A Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 REVUE B. D. I. 8, 22 (1976) cited in Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law* 9(1) EUR. J. INT. LAW 2, 9 (1998).

Unlike the International Military Tribunals in Tokyo and Nuremberg, the ICTY was not created with the backing and resources of the great powers after a peace had been imposed. Instead, it was established at a time of increasing bloodshed in the Balkans; the horrifying apex of the conflict, the massacre of 7,000 at Srebrenica in 1995, had not yet occurred. Somewhat optimistically, Pierre Hazan has noted that “the Security Council’s actions thus laid down a legal absolute which was eminently moral: the conditions of peace were to be subordinated to the exercise of justice.”<sup>7</sup> However, a more cynical explanation for the establishment of the ICTY also presents itself. The reversed order of precedence between peace and justice was a risky strategy, bound to involve compromises and to draw criticism of its impotence. If its establishment was meant to bring hope of a truly just peace, said the doubters, then this was useless idealism; if the ICTY was the extent of the international community’s involvement, then it was a cynical abdication of true moral responsibility.

In 1992 the US public, and a world that had said “never again” to the horrors of the Holocaust, had been shocked to see television images of emaciated prisoners staring blankly from behind barbed wire. There were reports of prisoners being herded onto cattle cars, of unspeakable barbarities perpetrated in death camps. But in 1992 the US public had been equally horrified to watch, in Somalia, dead American troops dragged through the streets of Mogadishu by warlords. Military intervention in Bosnia was too risky; the rigid “Powell doctrine”, grounded firmly in the calculation of national interest, spoke decisively against it. The creation of an international tribunal – another Nuremberg – would satiate the public desire for tangible action while avoiding any chance of “Somalia syndrome.” The establishment of a tribunal, in other words, would place the West beyond moral reproach without incurring the military risk. What could be more ethical than offering justice instead of more war, indictments and prosecutions instead of ammunition?

Rachel Kerr sees the establishment of the ICTY as a tripartite collaboration involving a nascent international criminal law, an international security framework interpreting the UN Charter to promote human rights, and a world of international relations released from Cold War partisanship.<sup>8</sup> Whether Kerr sees this collaboration as a coincidence or the result of international law’s inner teleology is unclear. After a whirlwind tour through the positivist, natural law and process schools of legal thought, Kerr cites with approval Geoffrey Robertson’s lofty pronouncement of a “seismic shift from diplomacy to legality in the conduct of world affairs.”<sup>9</sup> But an endorsement of this view militates against the project Kerr has set for herself. Her focus is on the way in which diplomacy and international politics have acted as external pressures upon the Tribunal’s inner workings and have contributed to its functioning. But a perspective in which diplomacy and politics wither away to

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<sup>7</sup> Pierre Hazan, *The Revolution by the ICTY: The Concept of Justice in Wartime*, 2 JOURNAL I. CRIM. JUSTICE 533, 533 (2004).

<sup>8</sup> KERR, *supra* note 5, at 12.

<sup>9</sup> *Id.*, at 17.

reveal a fluid system of international criminal law is at odds with Kerr's thesis and with the evidence contained throughout the book.

Kerr's account of the Tribunal's establishment and early years vacillates between a vision of the Tribunal as a portent of the new world order's commitment to justice and a recitation of the presence of *realpolitik* in its establishment and enforcement. Kerr first outlines the "revolution" that took place when the Security Council proposed a Tribunal to deal with a situation in the Former Yugoslavia that amounted to a threat to international peace and security. The establishment of the Tribunal under Chapter VII of the UN Charter was a recognition that war criminals on the loose could constitute threats to the international order and was, Kerr suggests, "an explicit recognition of the link between peace and justice as mutually reinforcing objectives."<sup>10</sup> Some pages later, however, she cites an author who questions "whether the nexus between peace and justice was simply an expression of outrage clothed in judicial terminology in order to legitimise the application of Chapter VII."<sup>11</sup> Kerr, perhaps unsure of her own opinion, does not attempt to address this issue, or others which render problematic a simple belief that justice and peace reinforce one another.

For a book that seeks to understand the interrelationship between international law and politics, the treatment of the diplomatic context in which the Tribunal was established is remarkably thin. Kerr's discussion of the lead-up to the establishment of the Tribunal contains little analysis or discussion of the complex motivations driving the process. For example, Kerr mentions, in the discussions leading to the passage of UN Resolution 827 setting up the Tribunal,<sup>12</sup> the so-called "naming names speech" of former US Secretary of State Lawrence Eagleburger.<sup>13</sup> In that speech, to the consternation of many pushing for a diplomatic solution and an immediate ceasefire, Eagleburger identified a number of Serb leaders, including Milosevic, Radovan Karadzic and Ratko Mladic, as suspected perpetrators of war crimes and crimes against humanity. This was a significant step in US policy and helped build momentum for a Tribunal.<sup>14</sup> But Kerr does not examine how the declaration of international legality was used for strategic ends. Eagleburger's speech has also been interpreted as an implicit rejection of the Vance-Owen plan – a peace proposal which would have left Bosnia as a single state partitioned into cantons determined by ethnic composition – and an example of the way in which

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<sup>10</sup> *Id* at 19; *Cf.* 186-187. In her conclusion, Kerr states that the "jury is still out" over whether the ICTY has helped to bring peace and justice to the Balkans.

<sup>11</sup> *Id* at 38.

<sup>12</sup> UNITED NATIONS, UNITED NATIONS SECURITY COUNCIL RESOLUTION 827 ON ESTABLISHING AN INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE TERRITORY OF THE FORMER YUGOSLAVIA (1993); 32 ILM 1203.

<sup>13</sup> Statement of Mr Eagleburger, UNITED STATES SECRETARY OF STATE, THE NEED TO RESPOND TO WAR CRIMES IN THE FORMER YUGOSLAVIA (1992), *cited in* THE PATH TO THE HAGUE: SELECTED DOCUMENTS ON THE ORIGINS OF THE ICTY 67 (2001).

<sup>14</sup> *See* STEPHEN, *supra* note 2, at 85-87.

law was used for political ends to disrupt the attempt to find a negotiated peace.<sup>15</sup> Pierre Hazan calls this technique “strategic legalism.”<sup>16</sup> Its use demonstrates how delicate the process to establish a Tribunal was. If the Vance-Owen plan had been adopted, it is doubtful the ICTY would now exist; indeed, the ICTY’s existence was frequently on the verge of sacrifice at the altar of diplomacy.<sup>17</sup> The pursuit of an international tribunal, in other words, did not necessarily prove the convergence of peace and justice; rather, it highlighted the tensions involved in attempting to accommodate both in international diplomacy. It would have been useful had Kerr examined the contradictions and potentially destabilising effects of such a dual strategy. Larry Johnson, at the time of the Tribunal’s establishment a senior lawyer at the UN Office of Legal Affairs, noted that the oscillation between objectives

...seemed like a schizophrenia, like a discord. I mean, either you call for a war crimes court and go at it, or you take the diplomatic route and negotiate a peace settlement. But both? Cynics in the [UN General] Assembly said this was a Madeleine Albright initiative to defend European criticism of the US for not putting troops on the ground in Bosnia.<sup>18</sup>

Kerr’s second chapter is a discussion of the difficulties faced in establishing a tribunal that lacked historical precedent. She notes that when UN Resolution 827 was adopted, most member states did not comprehend the extent of the commitment they were undertaking.<sup>19</sup> The task of establishing a fully functioning international tribunal was an immense enterprise.

The ICTY needed a lot of money to function effectively, but it was funded directly out of the UN’s budget at a time when the institution was on the verge of bankruptcy, largely because the US was refusing to pay its dues.<sup>20</sup> Lack of money caused tremendous problems. A location for the courtrooms had to be established, a detention unit had to be built, and the administrative equipment had to be provided from scratch. Further, the Office of The Prosecutor required substantial funding to undertake field research, locate witnesses, establish witness protection programmes, and exhume mass graves. Michael Scharf notes that in 1995, less than 2% of the ICTY’s budget was allocated to pursue crucial prosecutorial tasks such as tracking down witnesses and recording and translating their accounts.<sup>21</sup>

<sup>15</sup> Eagleburger reported that Lord Owen, who at the time of the speech was conducting delicate negotiations with Milosevic, Karadzic and Mladic, “made it clear that he considered [Eagleburger’s] remarks ‘unhelpful.’” Cited in JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 40-41 (2003).

<sup>16</sup> Hazan, *supra* note 7, at 535.

<sup>17</sup> David P Forsythe, *Politics and the International Criminal Tribunal for the Former Yugoslavia* 5 CRIM. L. FORUM 401 (1994), cited in Michael P Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal* 49 DEPAUL L. REV. 925, 932 (2000).

<sup>18</sup> Cited in STEPHEN, *supra* note 2, at 89.

<sup>19</sup> KERR, *supra* note 5, at 41.

<sup>20</sup> Scharf, *supra* note 17, at 934.

<sup>21</sup> *Id.* at 935.

The appointment of key prosecutorial staff was also fraught with difficulty and political wrangling. The first nominee for Chief Prosecutor, the respected international lawyer M. Cherif Bassiouni, who had served as chairman of the commission of experts established to investigate war crimes in the Balkans, was rejected for the position, ostensibly for his lack of trial and advocacy experience. However, observers close to the nomination process suggested that Bassiouni was viewed as an overzealous and abrasive idealist, whose uncompromising attitude would frustrate Lord Owen's efforts to bring about a negotiated peace settlement.<sup>22</sup>

Eventually, in July 1994, South African Richard Goldstone was appointed as the ICTY's first Chief Prosecutor. Although he was unfamiliar with the corpus of international humanitarian law, Goldstone had brought significant litigation against the Apartheid regime in South Africa. He was viewed with respect, and seen as impartial and independent.<sup>23</sup> Goldstone was immediately under pressure to issue indictments, to demonstrate that the Tribunal was a legitimate legal enterprise and not a chimera, for his own, as well as the Tribunal's, credibility. Soon after his appointment, he was introduced to former British Prime Minister Edward Heath, who asked Goldstone, "Why did you accept such a ridiculous job?"<sup>24</sup>

As Kerr explains, the procedures for issuing indictments, taking witness statements and determining the appropriate amount of evidence for an indictment were all uncertain, which led to tensions between the Office of The Prosecutor and the Judiciary.<sup>25</sup> The Tribunal's judges wanted arrests, but Goldstone was not prepared to issue indictments without incontrovertible evidence.<sup>26</sup> Goldstone's investigations focused on the atrocities that had occurred at the prison camps in Bosnia, but the accumulation of evidence was soon frustrated by a lack of cooperation from member states. The prosecutor wanted US intelligence information, but the Pentagon was unforthcoming.

Kerr focuses on the political exigencies involved in eliciting state cooperation with the ICTY, and devotes two chapters to this topic. State cooperation with the institution was obviously crucial to the fulfilment of the ICTY's mandate. The first President of the Tribunal, Antonio Cassese, put the consequences of non-cooperation vividly: "The Tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution."<sup>27</sup> Kerr rightly points out that the lack of an enforcement mechanism meant that the Chief Prosecutor and the President were forced to play diplomatic as well as legal roles.<sup>28</sup> As noted by Gabrielle Kirk McDonald, the second President of the Tribunal,

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<sup>22</sup> KERR, *supra* note 5, at 51; HAGAN, *supra* note 15, at 33-38.

<sup>23</sup> *Id.* at 52.

<sup>24</sup> Cited in HAGAN, *supra* note 15, at 60.

<sup>25</sup> KERR, *supra* note 5, at 53-55.

<sup>26</sup> *Id.* at 57; STEPHEN, *supra* note 2, at 106-107.

<sup>27</sup> CASSESE, *supra* note 6, 12.

<sup>28</sup> KERR, *supra* note 5, at 115.

...during my presidency, it seemed to me that my duties as a judge were subjugated by the political demands of the office. I was required to spend an inordinate amount of time seeking international political support to overcome the effect of state non-cooperation, especially by the Federal Republic of Yugoslavia as the crisis in Yugoslavia unfolded, after I assumed office...Therefore, although first and foremost a judge, it appeared to me that I most often functioned as an ambassador.<sup>29</sup>

The legal framework demands state compliance with the ICTY. Article 25 of the UN Charter provides that all member States are required to undertake directives issued by the Security Council. Article 25 encompasses decisions taken by the Security Council acting under Chapter VII, pursuant to which the ICTY was established. Article 29 of the ICTY Statute requires all states to comply with the requests of the Tribunal for judicial assistance.<sup>30</sup> Further, additional compliance obligations flow from the grave breaches regime of the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>31</sup> The Dayton Accords also contained several provisions requiring parties to cooperate with the ICTY.<sup>32</sup> Therefore, pursuant to its legal framework, the ICTY does not function as a State entity in international law to which states owe horizontal obligations; judicial assistance is a vertical obligation on States stemming from the ICTY's authority as a body established pursuant to Chapter VII of the UN Charter.<sup>33</sup> Predictably, however, state cooperation has rarely flowed from the promise of compliance with international law alone; political and economic incentives have been instrumental in securing judicial assistance to the ICTY.

Kerr's chapters on judicial assistance to the Tribunal are the most useful and interesting of the book. She discusses in detail the content of the various Security Council resolutions creating enforcement obligations, the developments leading up to the Dayton Accords, the increasing level of NATO support for locating suspected war criminals, and the use of economic leverage to elicit cooperation with the Tribunal. She suggests that cooperation with the ICTY began to improve following

<sup>29</sup> Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 JOURNAL I. CRIM. JUSTICE. 558, 568 (2004).

<sup>30</sup> Statute of the International Criminal Tribunal of the Former Yugoslavia adopted 25 May 1993 by UN Resolution 827.

<sup>31</sup> GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND THE SICK IN ARMED FORCES IN THE FIELD, opened for signature 12 August 1949, 75 UNTS 31, art 50 (entered into force 21 October 1950); GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA, opened for signature 12 August 1949, 75 UNTS 85, art 51 (entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, art 130 (entered into force 21 October 1950); GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, opened for signature 12 August 1949, 75 UNTS 287, art 147 (entered into force 21 October 1950); CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, opened for signature 9 December 1948, 78 UNTS 277, art 280 (entered into force 12 January 1951).

<sup>32</sup> See SCHARF, *supra* note 17, at 953-954.

<sup>33</sup> See Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999).

the Dayton Accords and the introduction of the 30,000 strong NATO stabilisation force, SFOR.<sup>34</sup> Kerr's discussion of the early inaction of IFOR, the original NATO Implementation Force, would have been strengthened by a discussion of the limitations in IFOR's mission statement, and the political considerations involved in the decision to provide IFOR with such a restricted mandate. Richard Holbrooke, the US chief negotiator at Dayton, suggests that the Pentagon insisted upon limiting IFOR's mission to protection and disengagement because an expanded role in apprehending war criminals risked 'mission-creep' to non-military objectives.<sup>35</sup>

From 1997 onwards, NATO forces began to step up arrests of suspected war criminals. But the shift in policy was pragmatic rather than principled, with much of the initiative to arrest stemming from soldiers on the ground, increasingly frustrated by the disruptions to peace and unable to stabilise the conflict due to the presence of war criminals.<sup>36</sup> It is at this point that one could suggest a pragmatic alliance between peace and justice; the existence of the ICTY provided a convenient reason to rid the region of destabilising influences and to achieve SFOR's political mandate.

Recently, there has been an unprecedented wave of surrenders to the ICTY.<sup>37</sup> Economic pressure has been instrumental in eliciting this cooperation, and the EU has used prospective membership tied to judicial assistance as an effective way of ensuring the delivery of suspects. The arrest and prosecution of Muslim and Croat suspects has also done much to deflect criticism that the Tribunal is an anti-Serb institution.

The ICTY is able to refer State non-compliance to the Security Council for determination. But as Kerr notes, this strategy is not particularly effective.<sup>38</sup> A more useful process in the event of non-compliance was established through Rule 61 of the Rules of Procedure and Evidence.<sup>39</sup> According to Rule 61, if a State has failed to execute an arrest warrant, the ICTY may conduct a proceeding in which it receives evidence from the Prosecution. If the Trial Chamber is satisfied that there are reasonable grounds to charge the accused, the indictment is confirmed and an international arrest warrant is issued. Kerr points out that such a procedure was particularly useful in promoting the Tribunal's work in the early years, while the conflict in the Former Yugoslavia was still raging. At that time, the governments of the conflict refused to cooperate with the ICTY, and Rule 61 hearings served as a useful means of publicising the Tribunal's work.<sup>40</sup>

Kerr states that the "main consideration with regard to Rule 61 hearings was the external legal and political impact."<sup>41</sup> Indeed, Rule 61 has been subjected to fierce

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<sup>34</sup> KERR, *supra* note 5, at 137.

<sup>35</sup> RICHARD HOLBROOKE, TO END A WAR 223 (1998), *cited in* SCHARF, *supra* note 17, at 954.

<sup>36</sup> *Cited in* SCHARF, *supra* note 17, at 961-962.

<sup>37</sup> *Supra* note 1.

<sup>38</sup> KERR, *supra* note 5, at 147; McDonald, *supra* note 29, at 562.

<sup>39</sup> RULES OF PROCEDURE AND EVIDENCE, IT/32/Rev.34 ('Rules of Procedure and Evidence').

<sup>40</sup> KERR, *supra* note 5, at 100.

<sup>41</sup> *Id.* at 102.



criticism because of its overtly political character, and because there is no scope for intervention by defence counsel.<sup>42</sup> But as McDonald emphasises, these hearings also served a useful purpose at a time of sustained state non-compliance and profound scepticism of the ICTY's worth:

First, the proceedings gave some solace to victims, as an opportunity to testify about the atrocities they alleged to have been subjected to and thereby inform the international community of the egregious violations that had occurred during the conflict. Secondly, although not trials, they permitted the Tribunal to publicise its work and make its existence known. Finally, they were one method of triggering the reporting of state non-compliance by the President to the Security Council.<sup>43</sup>

The use of Rule 61 neatly highlights the contrasting personalities of the Chief Prosecutors. Rule 61 hearings declined substantially with the appointment of Louise Arbour as the second Chief Prosecutor of the ICTY. This was not only because states demonstrated increasing compliance, and NATO flexed its enforcement powers; Arbour also opposed Rule 61 hearings on principle, "on the basis that they were incomprehensible to a criminal lawyer."<sup>44</sup> Arbour favoured issuing sealed indictments to SFOR, which helped facilitate the apprehension of suspects on the ground. Arbour's preferred methods also suggested a retreat from the public and diplomatic role adopted by Goldstone: "[p]ublic indictments and Rule 61 hearings served Goldstone's purpose of making the work highly visible, whereas sealed indictments were more suited to a functioning prosecutorial body."<sup>45</sup>

In her final chapter Kerr provides a cursory examination of the contrasting tenures of the three Chief Prosecutors of the ICTY, and suggests that, in Carla Del Ponte, the Office of the Prosecutor has returned to the "symbolic gestures" and public methods of the Goldstone period.<sup>46</sup> Kerr seems to suggest that Del Ponte lacks the requisite political savvy for the position, and clearly favours the approach of Arbour, who helped transform the ICTY into a fully functioning criminal court, and whose strictly "legal" self-presentation won the respect and confidence of the Tribunal's political benefactors.<sup>47</sup> The chapter contains a useful discussion of the Office of The Prosecutor's approach to investigating alleged NATO war crimes, and provides a summary of the early stages of the Milosevic trial.

Kerr's discussion of the Rules of Procedure and Evidence seeks to highlight how the political context has affected the judicial interpretation of the procedural rules. Obviously, Rule 61's usage has been determined by the political climate and the frequency of state cooperation. Kerr also discusses the rules relating to admissibil-

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<sup>42</sup> HAGAN, *supra* note 15, at 85.

<sup>43</sup> McDonald, *supra* note 29, at 561-562.

<sup>44</sup> KERR, *supra* note 5, at 100.

<sup>45</sup> *Id.*, at 159.

<sup>46</sup> *Id.*, at 207.

<sup>47</sup> *Id.*, at 92, 206.

ity, disclosure and protection of victims and witnesses.<sup>48</sup> In relation to disclosure, Kerr stresses the uniqueness of Rule 70, which allows the Prosecution to obtain evidence derived from intelligence sources as a “lead” or “pointer” but which must not be disclosed in court so as to preserve national security.<sup>49</sup>

Because of the timing of the book’s composition and publication, Kerr has not included a discussion of the UN Security Council’s Completion Strategy for the ICTY.<sup>50</sup> This is a pity, for the debate surrounding the strategy highlights the political considerations and external pressures that are affecting the Tribunal’s legal mandate during its final years. This was the subject of judicial consideration in an interlocutory decision in *Prosecutor v Milosevic* relating to admissibility of written statements, in which the Appeals Chamber was forced to confront the relationship between the ICTY’s judicial work and the external political pressures brought to bear upon it for the rapid adjudication of cases.<sup>51</sup> The appeal concerned the reach of Rule 92*bis* (“Proof of Facts other than by Oral Evidence”), which governs the admissibility of written statements prepared by prospective witnesses for the purpose of legal proceedings. The question to be determined by the Appeals Chamber was whether a written statement could be introduced without recourse to the stringent Rule 92*bis* procedure if the prospective witness was present in court and willing to attest to the written statement. The Appeals Chamber held that, because the witness was present and able orally to attest to the accuracy of the written testimony, the proposed written evidence did not attract the requirements of Rule 92*bis*, which contemplates that the written statement will be *in lieu* of oral testimony.<sup>52</sup> The fact that a written statement has been prepared for legal proceedings does not, of itself, attract Rule 92*bis* unless there will be no oral evidence on the written statement. In a strong dissenting opinion, Judge Hunt disagreed sharply with this interpretation of Rule 92*bis*.<sup>53</sup> Judge Hunt discerned behind the Appeals Chamber’s decision a capitulation to the Completion Strategy:

The Majority Appeals Chamber Decision drives a horse and cart through the previous interpretation of Rule 92*bis*, and it seriously prejudices the accused in ways already pointed out. I recently stated, in an appeal from the Rwanda Tribunal, that the very proper endorsement by the Security Council “in the strongest terms” of the Completion Strategy of the Yugoslav Tribunal should not be interpreted as an encouragement by the Secu-

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<sup>48</sup> *Id.*, at 102-113.

<sup>49</sup> *Id.*, at 106.

<sup>50</sup> See, especially, SC Res 1503, 4817<sup>th</sup> mtg, UN Doc S/Res/1503 (2003); SC Res 1534, 4935<sup>th</sup> mtg, UN Doc S/Res/1534 (2004). For a discussion of the development of the ICTY Completion strategy, see Dominic Raab, *Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 JOURNAL I. CRIM. JUSTICE. 82 (2005).

<sup>51</sup> *Prosecutor v Milosevic* (Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements) Case No IT-02-54 (30 September 2003).

<sup>52</sup> *Prosecutor v Milosevic* (Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements) Case No IT-02-54 (30 September 2003) 16.

<sup>53</sup> *Prosecutor v Milosevic* (Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements) (Dissenting Opinion of Judge David Hunt) Case No IT-02-54 (21 October 2003).

rity Council to the Tribunal to conduct its trials so that they would be other than fair trials. It is necessary to repeat that statement in the present case in order to apply it directly to the Majority Appeals Chamber Decision. That Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore its previously carefully considered interpretations of the law or of the procedural rules, with a consequential destruction of the rights of the accused enshrined in the Tribunal's Statute and in customary international law. The only reasonable explanation for these decisions appears to be the desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion.<sup>54</sup>

It is likely that the political effect of the Completion Strategy upon the Tribunal's jurisprudence will be the subject of increasing debate as the mandate of the Tribunal draws to a close.<sup>55</sup> Further political questions, including the effects of a more localised judicial process upon a fragile peace, are involved in the remittance of cases to national courts in the Former Yugoslavia under Rule 11*bis* of the Statute – a process currently absorbing a great deal of the Tribunal's pre-trial work.<sup>56</sup>

Kerr is ambivalent about the political ends the ICTY serves. She accepts that “there is some merit” in the view that the Tribunal serves a dual political and legal role,<sup>57</sup> but elsewhere asserts that “[t]he Tribunal was a tool of politics, but it was a judicial, not a political tool.” This vacillation concerning the relationship between law and politics is apparent throughout the book. Much of Kerr's discussion tends to assert statements rather than develop arguments, and competing perspectives are often overlooked or brushed aside. Beyond some interviews conducted by Kerr with key figures, the book does not introduce any new material. A more focused theoretical viewpoint, allowing Kerr to elaborate what she actually means by the terms “law” and “politics” in the international context, may have steadied her thesis and led to a richer account of this important topic.

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<sup>54</sup> Prosecutor v Milosevic (Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements) (Dissenting Opinion of Judge David Hunt) Case No IT-02-54 (21 October 2003) 20.

<sup>55</sup> See, for example, Daryl A Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99(1) AMERICAN J. I. L. 142 (2005); Larry D Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99(1) AMERICAN J. I. L. 158 (2005).

<sup>56</sup> See Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, available at <<http://www.hrw.org/reports/2004/icty1004/icty1004.pdf>> (last visited Oct. 30, 2004).

<sup>57</sup> KERR, *supra* note 5, at 38-39.