

STRENGTHENING ENFORCEMENT OF HUMANITARIAN LAW: REFLECTIONS ON THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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I. INTRODUCTION

On February 22, 1993, the United Nations Security Council unanimously adopted Resolution 808, which formally decided that an international tribunal should be established "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."¹ The substance of Resolution 808 was realized three months later on May 25 when the Security Council adopted Resolution 827, which formally established such a tribunal.² The creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the Tribunal) reaffirms the necessity of punishing persons accused of criminal violations of humanitarian law and of the laws of war, particularly against civilians. The statute authorizing the creation of the Tribunal also underscores the individual penal liability of offenders responsible for such violations.³

Persons in Yugoslavia's successor governments and their armed forces, as well as some civilians, are being indicted and tried for war crimes. Since the first indictment against Dragan Nikolic, a former commander of a Bosnian Serb concentration camp, was announced in

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1. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

2. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

3. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 6, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute].

November 1994,⁴ fifty-one other indictments have been announced by the Tribunal. The Tribunal indicted twenty-four Serbs in late July 1995 and six leading Bosnian Croats in November 1995 for atrocities involving genocide, crimes against humanity and war crimes.⁵ Among those most recently indicted as war criminals are the Bosnian Serb leader, Radovan Karadzic, and the commander of the Bosnian Serb military, General Ratko Mladic.⁶

Given the recent international resolve to punish persons who violate humanitarian law and the laws of war, this Article has three purposes. First, it briefly examines the competence and jurisdictional scope of the Tribunal. This analysis identifies the crimes for which the Tribunal will prosecute individuals, and describes the Tribunal's legal mandate for undertaking that responsibility. The second purpose is to assess the nature of international legal obligations flowing from the Tribunal's formal mandate. This analysis strives to clarify the duty of states to comply and cooperate with the Tribunal's warrants and orders. Some thoughts are also proffered on the general notion of enforcement as an act of interstate conduct, with a view to explaining how the psychology of enforcement of international norms operates and how that process relates to the Tribunal's functions. The third purpose is to examine what legal recourse to enforcement the Tribunal

4. On November 7, 1994, the Tribunal charged Dragan Nikolic with murder, torture, and mutilation of Muslim prisoners. The indictment also charges Nikolic with "illegal deportation" of Muslims. The illegal deportations are alleged to be part of the Bosnian Serb policy of "ethnic cleansing," pursuant to which indigenous Muslims were forced out of cities and villages. See *Law of War: Yugoslav War Crimes Tribunal Makes First Indictment*, 10 INT'L ENFORCEMENT L. REP. 488 (Dec. 1994). Neither the Bosnian Serbs nor the Serbian-controlled Yugoslav government are likely to turn Nikolic over to the Tribunal. *Id.*

Germany, on the other hand, recently introduced preparatory legislation that would ensure cooperation with the Tribunal and make it compulsory under German law for a summoned witness in Germany to appear before the Tribunal in The Hague. See Andre Klip, *Germany: Draft Action on the Co-operation with the International Tribunal for War Crimes in Former Yugoslavia (ITWCFY)*, 11 INT'L ENFORCEMENT L. REP. 70 (Feb. 1995).

5. Marlise Simons, *U.N. Tribunal Indicts Bosnian Serb Leader and a Commander*, N.Y. TIMES, July 26, 1995, at A9; William Drozdiak, *U.N. Tribunal Indicts Six Bosnian Croats for Crimes Against Muslims*, WASH. POST, Nov. 14, 1995, at A8.

6. *Id.* In mid-February 1995, twenty-one Serbs were charged with war crimes for the atrocities committed at the prison camp called Omarska. Roger Cohen, *Tribunal Charges Genocide by Serb*, N.Y. TIMES, Feb. 14, 1995, at A1. The Tribunal charged Zeljko Meakic, commander of the Omarska Camp, with genocide and crimes against humanity and charged twenty other Serbian commanders, guards and visitors with war crimes. *Id.* At that time, only one of those indicted, Dusan Tadic, was in custody. He was charged with crimes against humanity, rape, and group beatings of prisoners at Omarska. *Id.* at A2; see also *Making Rules for War: The World Tries Again*, ECONOMIST, March 11, 1995, at 21 [hereinafter *Making Rules for War*].

has in the event that a government refuses to cooperate with the Tribunal's orders for arrest and surrender of accused offenders. This discussion considers the range of policy options available to the Tribunal for pressuring or punishing recalcitrant governments. Finally, some conclusions on the functioning of the Tribunal and its role in enforcing the rule of humanitarian law are proffered for critical reflection.

II. LAWFUL JURISDICTION OF THE TRIBUNAL

A pivotal consideration underpinning the legitimacy of the Tribunal is that it has been established by international legal authority and exercises a jurisdiction that is internationally conferred.

The Security Council unanimously approved the creation of the Tribunal under Resolutions 827 and 808.⁷ Under the United Nations Charter, to which 185 states are now party (including the Republic of Yugoslavia [Serbia and Montenegro], Bosnia and Herzegovina, and Croatia), Member States are bound to abide by substantive decisions adopted by the Security Council.⁸ Such Security Council decisions are legally binding, authoritative and controlling.⁹ They carry the force of law. Therefore, the creation of the Tribunal by Security Council Resolutions 827 and 808 endows the Tribunal with international legitimacy and authoritative jurisdiction.

III. COMPETENCE OF THE TRIBUNAL

The Tribunal has been allocated legal competence to deal with designated crimes of an international character, perpetrated by certain persons, during a specified time period, in a given territory.¹⁰ In this respect, legal competence flows from the Tribunal Statute and its stipulated jurisdiction over criminal subject matter. Four groups of crimes may be prosecuted under the Tribunal Statute: (1) grave breaches of the four Geneva Conventions of 1949;¹¹ (2) violations of

7. S.C. Res. 827, *supra* note 2; S.C. Res. 808, *supra* note 1.

8. U.N. CHARTER art. 24, ¶ 1.

9. As substantiated in Article 25, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25.

10. Tribunal Statute, *supra* note 3, art. 1.

11. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S.

the laws or customs of war; (3) acts of genocide; and (4) crimes against humanity.¹²

A. Grave Breaches of the 1949 Geneva Conventions

The clearest articulation of what constitutes grave breaches of the 1949 Geneva Conventions is found in common Article 50/51/130/147 of those instruments.¹³ The common provision defines the “grave breaches” of international humanitarian law that states are required to punish, and which clearly relate to offenses prohibited by Article 3 common to all four Geneva Conventions.¹⁴ Common Article 50/51/130/147 also prescribes minimum rules applicable to situations of armed conflict not international in character.

The Tribunal Statute incorporates the essential language of this common “grave breaches” provision into its Article 2. Article 2 gives the Tribunal power to prosecute persons “committing or ordering to be committed” the following acts:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or

85 [hereinafter 1949 Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 267 [hereinafter 1949 Geneva Convention IV].

12. Tribunal Statute, *supra* note 3, arts. 2-5.

13. 1949 Geneva Convention I, *supra* note 11, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; 1949 Geneva Convention II, *supra* note 11, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; 1949 Geneva Convention III, *supra* note 11, art. 130, 6 U.S.T. at 3606, 75 U.N.T.S. at 238; 1949 Geneva Convention IV, *supra* note 11, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388. As defined in the 1949 Geneva Convention IV, “grave breaches” are crimes committed against persons or property protected by the conventions and include:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

14. 1949 Geneva Convention I, *supra* note 11, art. 3, 6 U.S.T. at 3116-18, 75 U.N.T.S. at 32-34; 1949 Geneva Convention II, *supra* note 11, art. 3, 6 U.S.T. at 3220-22, 75 U.N.T.S. at 86-88; 1949 Geneva Convention III, *supra* note 11, art. 3, 6 U.S.T. at 3318-20, 75 U.N.T.S. at 136-38; 1949 Geneva Convention IV, *supra* note 11, art. 3, 6 U.S.T. at 3518-20, 75 U.N.T.S. at 288-90 (prohibiting any violence to life and person, the taking of hostages, and outrages against personal dignity, even in conflicts not of an international character).

health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.¹⁵

Two notable improvements are made in Article 2 over the 1949 Geneva Conventions. First, paragraph (b) of the Tribunal Statute specifies "biological experiments" as a form of prohibited "inhuman treatment." Second, the Tribunal Statute's language replaces the notion of "protected persons" with a specific designation of "civilians." This change protects civilians from the commission of grave breaches of the laws of war, irrespective of whether the conflict is legally interpreted to be an internal or an international war.

B. Violations of the Laws or Customs of War

Another important part of international humanitarian law embodied in the Tribunal Statute is derived from the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907 Hague Convention) and regulations annexed thereto (1907 Hague Regulations).¹⁶ As prescribed in the Tribunal Statute, persons may be prosecuted for violating the laws or customs of war, including, but not restricted to, the following:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended

15. Tribunal Statute, *supra* note 3, art. 2. Compare the language cited in common articles 50/51/130/147 of the four 1949 Geneva Conventions. 1949 Geneva Convention I, *supra* note 11, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; 1949 Geneva Convention II, *supra* note 11, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; 1949 Geneva Convention III, *supra* note 11, art. 130, 6 U.S.T. at 3606, 75 U.N.T.S. at 238; 1949 Geneva Convention IV, *supra* note 11, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

16. Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 1 Bevans 631; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regulations), Oct. 18, 1907, 36 Stat. 2295, 1 Bevans 643 [hereinafter 1907 Hague Regulations].

- towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.¹⁷

These provisions originate from Articles 23-28 of the 1907 Hague Regulations. Significantly, they are specifically intended to punish persons who have engaged in indiscriminate bombardment of civilian population centers without military need or justification.

C. Genocide

It must also be realized, especially within the context of crimes committed within the territory of the former Yugoslavia, that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹⁸ directly relates to actions to be prosecuted by the Tribunal.¹⁹ The Tribunal Statute makes this plain: Article 4 of the Tribunal Statute provides that the Tribunal will prosecute persons accused of genocide. In this provision, genocide is defined as

. . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.²⁰

Article 4 of the Tribunal Statute goes on to stipulate that the following acts shall be punishable:

17. Tribunal Statute, *supra* note 3, art. 3; *see* 1907 Hague Regulations, *supra* note 16, arts. 23, 25, 27, 28, 36 Stat. 2295, 1 Bevens 643, 648, 648, 648-49, 649.

18. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

19. Obviously, application of the Genocide Convention is warranted by the purposeful use of "ethnic cleansing" to drive out Muslims from Bosnia and Herzegovina.

20. Tribunal Statute, *supra* note 3, art. 4, ¶ 2.

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.²¹

It is noteworthy that these paragraphs in Article 4 of the Tribunal Statute were transposed verbatim from Articles II and III, respectively, of the 1948 Genocide Convention.²² Much has been made about the incredible violence directed specifically against the Muslim population in Bosnia and Herzegovina—violence that was motivated principally by their ethnic, cultural and religious heritage.²³ Specific inclusion in the Tribunal Statute for prosecution of the crime of genocide is intended to redress such gross violations of international humanitarian law.

D. Crimes Against Humanity

The Tribunal must address the most serious war crimes—those that have been committed on a massive scale, in a systematic manner, and which have caused acute revulsion and made necessary a direct international response. To this end, the Tribunal has asserted its jurisdiction over cases that allege crimes against humanity. The United Nations General Assembly and international law in general have adopted the view that there should not be any statute of limitations for genocide or crimes against humanity.²⁴ An individual's ability to elude apprehension or detection for seven, or ten, or even fifty years should not be a sufficient reason to permit that person to escape punishment for acts so heinous that they would violate the very fundamental rights of humankind.

As criminal conduct, such acts have their origins in the 1945 Nuremberg Charter.²⁵ Crimes against humanity are those aimed at

21. *Id.* art. 4, ¶ 3.

22. Genocide Convention, *supra* note 18, arts. II, III, 78 U.N.T.S. at 280.

23. See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report of the Commission of Experts*].

24. This is provided for in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68 (1969).

25. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter *Nuremberg Charter*].

any civilian population, and are prohibited in armed conflict, regardless of its international or internal character. Article 5 of the Tribunal Statute acknowledges this critical point and enumerates eight categories of specific acts that will be treated as crimes against humanity. These are: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; and (8) persecution on political, racial and religious grounds. A ninth category, "other inhumane acts," is included to make the list potentially all-inclusive.²⁶

The Tribunal Statute enlarges the scope of crimes against humanity found in Article 6 of the Nuremberg Charter.²⁷ In the case of the former Yugoslavia, two new acts were specifically designated as crimes against humanity: torture and rape. The heinousness and condemnation of acts of torture finds expression in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²⁸ which is now in force and accepted as a peremptory norm in human rights law. The crime of rape, the criminality of which largely was overlooked in past wars, was brought to the forefront of international attention with reports of massive violations of women in Bosnia and Herzegovina during 1992 and 1993.²⁹ By designating rape as a crime against humanity, the gross criminality of the act of rape in international law has been spotlighted, and international concern has been directly focused on the need to punish perpetrators.

A final point with regard to crimes against humanity merits mention. The Tribunal will not specifically address crimes against the peace, i.e., it will not prosecute persons for participation in planning and waging of a war of aggression. The omission of crimes against the peace from the specific language of the Tribunal Statute reflects the problem of prosecuting such a charge. Proving such allegations would be protracted and extraordinarily difficult. The amount of documentation containing plans and war strategies is unknown, and securing access to military and diplomatic records of the governments involved—especially the Federal Republic of Yugoslavia (for Serbia), as well as Croatia and Bosnia and Herzegovina—would not be easy.

26. Tribunal Statute, *supra* note 3, art. 5.

27. See Nuremberg Charter, *supra* note 25, art. VI, 59 Stat. at 1556, 82 U.N.T.S. at 280.

28. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, *entered into force* June 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, 93d plen. mtg. at 197, U.N. Doc. A/RES/39/708 (1984).

29. See the discussion in *Final Report of the Commission of Experts*, *supra* note 23, at 55-60.

It is highly unlikely that requested documents would be duly turned over to tribunal investigators, particularly from government leaders who themselves may well be targets of investigation. Perpetrators of crimes against the peace will not automatically escape prosecution, however, because such persons will be held criminally responsible for planning gross violations of international humanitarian law.

E. Personal Jurisdiction

The principle of individual criminal responsibility is essential for making the Tribunal work. The Tribunal Statute addresses this concern in Article 7, which states that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”³⁰ The Tribunal thus confronts the principle that individuals may be held criminally liable under international law, even though their conduct might have been considered valid or even mandated by domestic law.

It will not be enough to enforce the laws of war only against ordinary soldiers and officers of low or mid-level rank. The Tribunal’s hand of punishment must reach up to military elites and civilian government officials, and it does so. Article 7 of the Tribunal Statute provides

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the [criminal] acts . . . of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.³¹

All persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia share in the commission of the crime and are therefore

30. Tribunal Statute, *supra* note 3, art. 7, ¶ 1.

31. *Id.* art. 7, ¶¶ 2-3.

individually responsible. The Tribunal will also hold that principal responsibility for war crimes carried out under orders will fall on those who issued the orders.

IV. SOURCES OF OBLIGATION

The source of obligation for U.N. Member States to comply with requests and orders from the Tribunal ultimately flows from the U.N. Charter. More immediately, though, such authority emanates from the Tribunal Statute.

The obligation of states to abide by the operative provisions of the Tribunal Statute is rooted in two sources. First, as stated earlier, the Tribunal Statute was created through Security Council resolutions taken as enforcement measures under Chapter VII of the U.N. Charter.³² The Security Council has the authority under Article 39 of the Charter "to 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."³³ It was with this authority that the Security Council created the Tribunal as an enforcement measure under Chapter VII and as a subsidiary organ within the scope of Article 29 of the U.N. Charter.

Security Council resolutions taken as such are binding as law and mandatory as policy, so long as the operative paragraphs indicate a direct imperative. That is, as fixed in Article 25 of the U.N. Charter, members "agree to accept and carry out the decisions of the Security Council."³⁴ Thus, Security Council decisions cast as resolutions constitute internationally lawful commands.

A second source of obligation derives from the action wording of the preambular paragraphs of the Tribunal Statute. Some Security Council actions may be merely advisory, i.e., they are recommendatory resolutions. However, when the Security Council "decides" on an action, it is in effect directing Member States to pursue a certain course of policy. An act of "decision" by the Security Council is a command, an order of legal obligation to Member States.

The resolutions adopted by the Security Council concerning an international tribunal to deal with violations of humanitarian law in

32. S.C. Res. 827, *supra* note 2.

33. U.N. CHARTER art. 39.

34. *Id.* art. 25.

Bosnia—both for formally authorizing formation of the Tribunal and for adopting the Tribunal Statute—are “decision” resolutions that carry the force of law for Member States of the United Nations.

Despite its authorization under Chapter VII, the Tribunal has a manifestly judicial purpose. That is, the Tribunal is charged with the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.³⁵ Importantly, the legal basis of the Tribunal must not be allowed to compromise its juridical quality or impartiality. The Tribunal must perform its functions independently of political considerations. Moreover, the Tribunal must not be subject to the authority or control of the Security Council in the performance of its juridical functions. The Tribunal must not be politicized or allowed to become a bargaining chip for trade among rival parties in the Bosnian civil conflict.

In sum, states have clear, unambiguous obligations under the operative elements of the Tribunal. There is little room for vagaries of interpretation or political finesse. The Tribunal Statute, in tandem with its adopted Rules of Procedure and Evidence,³⁶ make this manifestly clear.

V. STATE COOPERATION WITH THE TRIBUNAL

For the Tribunal to investigate and prosecute effectively, it must receive full cooperation from the governments of the states in which accused offenders are located. Such cooperation and judicial assistance from governments is critical not only for gathering sufficient evidence of criminal wrongdoing and producing indictments of accused offenders, but also for securing custody of accused offenders and surrendering them to the Tribunal for trial and prosecution. Under the Tribunal Statute, compliance by states with any requests from the Tribunal for judicial assistance is obligatory and is not subject to interpretation.

A. Article 29 of the Tribunal Statute

Article 29 of the Tribunal Statute is the key provision which refers to the obligation of states to comply with the Tribunal’s judicial processes. In full, Article 29 provides:

35. Tribunal Statute, *supra* note 3, art. 1.

36. See discussion *infra* parts V.B-C.

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender of the transfer of the accused to the International Tribunal.³⁷

The deliberate wording of Article 29 illustrates the mandatory nature of this provision. "States *shall* comply *without undue delay* with *any* request . . . including, *but not limited to* . . ." the stated procedures.³⁸ Use of the command verb "shall" connotes an imperative act; governments therefore are obliged to cooperate. Furthermore, a time element is inserted in the provision. Assistance must come "without undue delay."

B. Rules of Procedure and Evidence

The Rules of Procedure and Evidence adopted in 1994 by the Tribunal³⁹ for its work underscore the obligatory nature of state cooperation with that court. The cooperation of states is explicitly mandated in the execution of arrest warrants in Rule 56 of the Rules of Procedure and Evidence: "The State to which a warrant of arrest is transmitted shall act promptly and with due diligence to ensure proper and effective execution thereof, in accordance with article 29 of the Statute."⁴⁰ Thus, Rule 56 includes the same imperative character and the same time element as that contained in Article 29.

Further, Rule 56 avers that a government which receives an arrest warrant from the Tribunal shall act "with all due diligence to ensure proper and effective execution thereof . . ."⁴¹ That government

37. Tribunal Statute, *supra* note 3, art. 29.

38. *Id.* (emphasis added).

39. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32 (14 March 1994), *adopted* Feb. 11, 1994, *entered into force* March 14, 1994, *reprinted in* 33 I.L.M. 484 (1994) [hereinafter Rules of Procedure and Evidence].

40. *Id.* rule 56.

41. *Id.* rule 56.

must act with such sufficient perseverance, industry and assiduity that it can execute the arrest warrant in a manner that is adequate, proper and fit to meet that stipulated obligation. Failure to conform to this standard constitutes a breach of Rule 56, and hence, also a violation of Article 29 of the Tribunal Statute.

Finally, one must note the qualifying clause in Rule 56 that the state to which an arrest warrant is transmitted must act such that its government can "ensure proper and effective execution" of that warrant. Not only must the state concerned act with dispatch and perseverance, it must also move to complete and make valid the arrest of the accused. Again, to do less is to fail in the obligation articulated in Article 29 of the Tribunal Statute.

The Rules of Procedure and Evidence also set out a mandatory procedure after arrest of an accused offender is made. Rule 57 affirms the obligation that once the accused is arrested, "the State concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned and the Registrar."⁴² Close examination of the provision again highlights its obligatory character. The state concerned "*shall* detain him." This is not a policy decision that a concerned state is entitled to make. Not to be overlooked, the detaining government is also obligated to inform the Tribunal's Registrar of this detention, and to coordinate with that agency the ways, means and manner for transferring the accused to the Tribunal for trial.

The Rules of Procedure and Evidence further elaborate the scope of obligations in Article 29 of the Tribunal Statute for national governments to cooperate. Significantly, Rule 58 goes so far as to assert that the obligations articulated in Article 29 "shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned."⁴³ In effect, the duties to comply with the Tribunal's mandate and to cooperate with its requests supersede other legal obligations accrued in a state's national legislation or foreign treaties.⁴⁴

42. *Id.* rule 57.

43. *Id.* rule 58.

44. One conceivably could construe that Article 29 practically acts with the force of *jus cogens* and operates as a peremptory norm to override national laws and extradition treaties that might conflict with it.

C. Determination of a Breach of Cooperation

Although the Tribunal Statute does not designate or direct any specific agent to determine if and when the threshold of undue delay has been breached, the unmistakable inference is that the Tribunal will determine what is undue delay, as it is to this juridical body that such assistance is owed and expected.

The right of the Tribunal to make this determination is further confirmed by stipulations in its Rules of Procedure and Evidence. When a state fails to execute a warrant of arrest, the state concerned is mandated under Rule 59 to notify the Registrar of that failure and the reasons for it. Far more than this, Rules 59 and 61 emerge as critical provisions underpinning Article 29 of the Tribunal Statute and its enforcement. Rule 59 provides that:

If, within a reasonable time after the warrant of arrest has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest and the Tribunal, through the President, may notify the Security Council accordingly.⁴⁵

The state's duty to report back to the Tribunal is key. If a report is not made, that government will be in violation of the Tribunal Statute, and could hence be susceptible to Security Council action.

Obviously, the critical consideration in Rule 59 is the notion that "a reasonable time" should pass after transmission of the arrest warrant. The duration associated with a "reasonable" amount of time is undefined and subjective. One might construe a reasonable time to mean a sensible period, one that is not immoderate, excessive, or intolerable. Again, gauging the extent of a reasonable period remains a determination to be made by the Tribunal.

Rule 61 deals with procedures applicable when a state fails to execute an international arrest warrant issued by the Trial Chamber of the Tribunal.⁴⁶ The Prosecutor must satisfy the Trial Chamber that a failure to effect personal service of the indictment is "due in whole or in part to a failure or refusal of a State to cooperate with that Tribunal in accordance with Article 29 of the [Tribunal's] Statute."⁴⁷

45. Rules of Procedure and Evidence, *supra* note 39, rule 59, ¶ B.

46. *Id.* rule 61.

47. *Id.*

If such contention can be demonstrated, the Trial Chamber is mandated to so certify, and the President of the Tribunal is directed to notify the Security Council.⁴⁸

The clear implication here is that any responsive or punitive action taken against the delinquent government will be decided upon and imposed by the Security Council acting as the Tribunal's enforcement agent. The Tribunal itself does not have the means to physically effect its orders; it does not have an appointed army, designated marshals, or police force at its disposal. Consequently, it is natural under the U.N. Charter that the principal agent entrusted with the responsibility of enforcing the Tribunal's orders is the Security Council.

VI. THE PSYCHOLOGY OF ENFORCEMENT

In international relations, genuine compliance with legal norms depends on the adequate enforcement of those norms. Enforcement of the Tribunal's directives really means having a system of preestablished threats to deal with violations of the Tribunal's established international legal rules. Generally, then, enforcement by the Tribunal of the Tribunal Statute that would apply to governments is the system of deterrence inherent in criminal law. The Tribunal would thus strive to induce governments to comply with its agreed laws and rules by establishing means to punish those governments which violate those laws and rules.

To prevent violations of the Tribunal's rules, threats of punishment must be credible. It is not enough for punishment to appear serious; there must also exist a sufficiently high degree of probability that the Tribunal will impose punishment if laws affecting its functions are violated. If there is little chance that a penalty will be imposed, or if the designated penalty is perceived by governments to be slight, then a targeted government is not likely to be deterred from violating a particular norm of the Tribunal.

The credibility of threatened punishment by the Tribunal depends on several factors. First, any breach of the law must be clear and unambiguous. The norm or rule of law at stake must be apparent to and perceptible by official decisionmakers. Actions that violate the law must be evident, well-defined, and salient. Second, credibility depends on the likelihood that (1) the Tribunal will reach a decision that a

48. *Id.*

penalty ought to be imposed; (2) that the Security Council will concur with that conclusion; and (3) that a decision by the Security Council to punish the violator government will be implemented.

The bottom line of deterrence thus lies in choice by an individual policymaker. The threat of punishment causes a person to make the "good" or "right" rather than "bad" or "wrong" choice. It is a matter of weighing costs and benefits. If policymakers in a government determine that it is more advantageous in some circumstances to refuse to comply with the Tribunal's requirement of cooperation, then a government is likely to violate that rule. If the costs of violating the law are perceived as outweighing derivative gains, then compliance is more likely to be forthcoming.

VII. ENFORCEMENT ACTION AND THE TRIBUNAL

Enforcement is clearly central to the success of any international tribunal of this nature. In this regard, the experience of the Tribunal is likely to raise several questions. What recourse does the Tribunal have in the event that a government refuses to comply with a request from the Tribunal for its cooperation or judicial assistance? What remedies might the Tribunal seek to induce or compel the assistance of a government that intentionally refuses to cooperate? What measures might be used to pressure recalcitrant leaders of an offending state to come into compliance with the Tribunal's requests for assistance in securing testimony, obtaining evidence, arresting accused offenders, or surrendering persons for prosecution? What policy options are available to the Tribunal in order to persuade governments to fulfill these international obligations under the U.N. Charter and the Tribunal Statute?

In similar fashion, if pressure to comply is unsuccessful, what measures might be employed to punish governments that flaunt these obligations? Simply put, compliance with the provisions in Article 29 is expected by the Tribunal. What actions can be taken against a government that fails to live up fully, promptly, and properly to that duty to comply?

A. The Security Council

It is essential to keep in mind that the Tribunal was established by a decision based on Chapter VII of the U.N. Charter. Such a decision creates a binding legal obligation on all Member States of the United Nations to take whatever steps are necessary to implement the decision. An order by the Trial Chamber for the surrender or transfer

of an accused person to the custody of the Tribunal is therefore an application of a measure under Chapter VII.

If states fail to fully comply with an order from the Tribunal, the Security Council is responsible for its enforcement, as provided for in Article 41 of the U.N. Charter. Under Article 41, the Security Council is empowered with the authority to enforce its decision through "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."⁴⁹ If the Security Council chose to proceed under Article 41 against an uncooperative state, the Security Council would likely authorize the establishment of a Sanctions Committee to oversee and coordinate international economic coercion against that state.

A number of tactics are available to the Security Council in its resort to nonmilitary sanctions. For example, a boycott might be imposed against that state's commerce. A boycott might entail a complete prohibition on the import of all commodities and products originating in the recalcitrant state.

The sanctions operation might also be reinforced by the imposition of an embargo against the export of goods or services to the uncooperative state. While the embargo should be comprehensive in scope, provision might be included for exceptions in the case of humanitarian aid or medical supplies.

U.N. sanctions might also include financial restrictions against the uncooperative government. In an effort to intensify economic isolation, the Security Council could authorize a complete ban on financial transactions and transfers of funds to that government or any national entity in that country. Such actions might include imposition of freezes on that government's assets in foreign states and blocking mechanisms for its loans in international lending institutions.

The imposition of contract restrictions on pre-sanctions commercial arrangements with the recalcitrant state would provide another dimension of the Security Council sanctions effort. Any and all contractual obligations held by states or their nationals with the uncooperative government would be suspended.

49. U.N. CHARTER art. 41. For a general discussion, see Christopher C. Joyner, *Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience*, 16 AUSTRALIAN Y.B. INT'L L. 1 (1995). Moral condemnation is also available as a sanction for noncompliance, but seldom has it been very effective in persuading governments to comply with United Nations' directives.

To enforce these sanctions, imposition of a multinational naval interdiction could be ordered by the Security Council. Naval forces of Member States would have to be recruited by the Security Council to perform this interdiction task. A naval blockade would require verification of cargoes and destinations of shipping and could, with Security Council authorization, include the search and seizure of vessels found to be in violation of the sanctions regime.

The Security Council could also mandate initiation of an air embargo to complement the naval interdiction. Such a Security Council order could forbid the takeoff and landing from the territory of all states' aircraft from the target state, except for a specially designated shipment sent for humanitarian or medical reasons. Supervision of the air embargo would be entrusted to the Sanctions Committee, which would receive reports of implementation measures taken by the states.

Still another facet of international sanctions might involve travel restrictions by all governments on their own nationals going to and from the uncooperative state, as well as on nationals from the target state wishing to enter their country.

Finally, instigation of an arms embargo against the recalcitrant government would be fundamental to a U.N. sanctions effort. A general embargo might be placed on the transfer of weapons and military equipment, as well as services related to technical support and training, to the uncooperative state. To induce added pressure on those governments already being embargoed—Yugoslavia, Bosnia, and Croatia—the Security Council might even consider lifting the arms embargo against Muslim factions in Bosnia, but not on the other states in the region.

These various dimensions of sanctions are not new to the Security Council. The Security Council has already employed such sanctions during the past three decades in varying ways, with various degrees of success, against Rhodesia,⁵⁰ South Africa,⁵¹ Iraq,⁵² Libya,⁵³ Serbia⁵⁴ and

50. The Security Council first imposed sanctions against Rhodesia by Resolution 232, adopted on December 16, 1966. S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg., U.N. Doc. S/RES/232 (1966). Security Council Resolution 221, adopted on April 9, 1966, strengthened the sanctions operation, as it authorized Great Britain's interception of ships carrying oil to the port of Beria. S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg., U.N. Doc. S/RES/221 (1966). Security Council Resolution 253, adopted on May 29, 1968, imposed a total ban on imports to and exports from Rhodesia, and created a special sanctions committee. S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg., U.N. Doc. S/RES/253 (1968); see Margaret Doxey, *International Sanctions in Theory and Practice*, 15 CASE W. RES. J. INT'L L. 276 (1983).

51. The Security Council imposed sanctions against South Africa to pressure the white minority government to abandon apartheid policies and human rights abuses and foster black majority rule. Resolution 418 of November 8, 1977, ordered a mandatory arms embargo to be applied universally to South Africa. S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg., U.N. Doc. S/RES/418 (1977). Security Council Resolution 569, adopted on July 26, 1985, authorized voluntary, selective sanctions against South Africa. S.C. Res. 569, U.N. SCOR, 40th Sess., 2602d mtg., U.N. Doc. S/RES/569 (1985). Recent developments in South Africa leading to dismantlement of the apartheid system and black majority rule resulted in lifting of these international sanctions. See Mark Mathabane, *The World After Sanctions*, N.Y. TIMES, July 29, 1991, at A15.

52. The most sweeping sanctions effort to date authorized by the Security Council is that being applied to Iraq, resulting from its invasion of Kuwait in August 1990. Given the unprecedented international consensus for condemnation of Iraq and the impressive scope of U.N.-approved action taken against that state, much in the way of lessons for sanctions operations can be gleaned from the Iraqi sanctions experience.

On August 1, 1990, Iraqi tanks and troops invaded and quickly conquered its small but oil rich neighbor, Kuwait. In response to the urgent request of Kuwait, the Security Council convened on August 2, 1990 to consider the invasion of that state by Iraqi forces. The Security Council adopted Resolution 660, citing its authority under Articles 39 and 40 and announcing its determination that a breach of international peace had occurred. The resolution condemned the invasion, called for the immediate withdrawal of Iraqi troops from Kuwait, and announced that the Security Council would meet as necessary to ensure compliance with that mandate. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990).

This Security Council action initiated a protracted series of at least sixteen resolutions aimed at condemning various policies and activities by Iraq and at taking measures to compel that government to cease, desist and amend its transgressions against Kuwait, and human rights abuses against its own citizens. Taken in tandem, these Security Council resolutions established the legal mandate through which international economic sanctions were imposed against Iraq.

On August 6, 1990, the Security Council adopted Resolution 661, which imposed comprehensive economic sanctions against Iraq and Kuwait under Chapter VII of the U.N. Charter. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990). The Security Council also established a Sanctions Committee to monitor implementation of and compliance with the mandatory measures. The prescript of this resolution furnishes the foundation upon which the sanctions regime against Iraq was constructed. For an assessment of this sanctions regime, see Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1 (1991).

53. The Security Council imposed sanctions against Libya on March 31, 1992 on account of that government's support of international terrorism and its refusal to surrender to the United States or to the United Kingdom two Libyan nationals indicted for the bombing of the Pan Am 103 aircraft over Lockerbie, Scotland in December 1989. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992). For an assessment of the international legal implications for extradition of this episode, see Christopher C. Joyner and Wayne Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222 (1993).

54. The Security Council imposed sanctions in 1992 against the government of Serbia in reaction to its aggression against and massive violations of human rights in Bosnia and Herzegovina. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1992); S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992); S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992). Additional sanctions against Yugoslavia were authorized by the Security Council on April 17, 1993. These U.N. sanctions include a worldwide freeze on all Yugoslav assets, as well as a seizure of all Yugoslav aircraft,

Haiti.⁵⁵

Resort by the Security Council to use of military force against a recalcitrant government also remains legally and theoretically possible. Under Article 42 of the U.N. Charter, should nonmilitary measures prove inadequate, the Security Council is empowered to "take such [military] action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."⁵⁶ Such actions to this end "may include demonstrations, blockade, and other operations by air, sea, or land forces" from U.N. Member States.⁵⁷

The Security Council might find it relatively convenient to hire, deputize or call upon one or more national governments to inflict military punishment on an offending government in order to implement a decision. Still, such a limited military option, as well as any large scale military action, appears remote on legal, practical and political grounds.

It may be difficult to make a compelling argument that a state's refusal to surrender an accused offender to the Tribunal would constitute a sufficiently grave breach of or threat to the peace such that massive use of military violence by the Security Council is warranted. The use of force in such a situation would grossly exceed the traditional legal limitations of necessity and proportionality associated with the lawful use of force.

On a fundamentally political level, it would indeed be paradoxical to expect that the Security Council—especially its five permanent members—would be willing to authorize use of military force to punish a government's refusal to comply with a request from the Tribunal. This doubt seems especially acute given that those same five Great Powers have been so manifestly unwilling to authorize the

ships, trucks and other vehicles on foreign territory. In addition, the new sanctions ban shipments of most goods by air, land, and water to and from Yugoslavia, block shipping through Yugoslavia via the Danube River, forbid foreign vessels from approaching within twelve miles of Yugoslavia's Adriatic coast, and specify strict new penalties for persons or states that violate the trade ban. Medicine, food and humanitarian supplies and service are exempt from the sanctions. See David B. Ottaway, *New Yugoslav Sanctions Take Effect*, WASH. POST, Apr. 27, 1993, at A1. For an assessment of the human rights implications of the Bosnian tragedy, see Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for An International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235 (1994).

55. The Security Council imposed a mandatory oil embargo and related sanctions, including an embargo on arms, police equipment, and petroleum products, and a freeze of the assets of the Haitian government and its de facto authorities. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993).

56. U.N. CHARTER art. 42.

57. *Id.*

use of U.N. forces to halt the mass killings, rapes and other pervasive acts of brutality that have marked the human tragedy of "ethnic cleansing" in Bosnia since 1992.

B. Difficulties of Enforcement

There is another dimension to the difficulty of enforcing the Tribunal's orders, namely, the profound lack of financial resources allocated by the United Nations for the Tribunal's work. As the Tribunal's Prosecutor, Judge Richard J. Goldstone, noted recently, the financial resource problem is critical.⁵⁸ The United Nations has no experience in dealing with the war crimes tribunal process, its bureaucracy, and its personnel needs. As a result, there is little appreciation for the diverse resource needs of the investigative and prosecutorial processes. The proposed budget for the Tribunal's prosecution has no surplus at all. Recent estimates suggest that even with a proposed budget for 1995 of \$34.6 million, substantial increases are needed to finance critical aspects of the Tribunal's function, such as mass grave exhumation, travel for witnesses and the accused, and laboratory expenses.⁵⁹ Without adequate funding, the Tribunal will be unable to perform sufficient investigation into alleged violations of humanitarian law, nor will it be able to prepare cases adequately for trial and prosecution of those who have been indicted.⁶⁰ The conclusion here is obvious. If the Tribunal is not able to have its operation adequately financed, it will not be able to carry out its mission to enforce humanitarian law and prosecute those who have

58. See *Law of War A: Prosecutor for Former Yugoslavia War Crimes Sets Agenda*, 11 INT'L ENFORCEMENT L. REP. 27-28 (Jan. 1995) [hereinafter *Prosecutor Sets Agenda*].

59. As detailed by Judge Goldstone, in October 1994 the Tribunal's prosecutor and Registrar submitted to the U.N. Controller a proposed budget of \$34.4 million. See *Report of the Secretary-General as requested by the General Assembly in Resolution 47/235*, Revised Estimates Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 5th Comm., 48th Sess., Agenda Item 159, addendum 1, U.N. Doc A/C.5/48/44 (1994). The budget does not include funds needed for several critical activities, including two to four mass grave exhumations (\$5-10 million); defense counsel and support services (\$2 million); travel for witnesses (\$1 million); witness counseling and security (\$500,000); witness protection program (\$5-10 million); travel of the accused (\$200,000); expert witnesses for the prosecutor (\$100,000); and laboratory expenses (\$1 million). The funds needed above the budgetary request are estimated to range between \$14.8 and \$24.8 million. *Prosecutor Sets Agenda*, *supra* note 58, at 28.

As of March 1995, the Tribunal had received only \$7 million from the United Nations. There is as yet no full budget allocation for 1995. *Making Rules for War*, *supra* note 6, at 22.

60. *Prosecutor Sets Agenda*, *supra* note 58, at 27-28.

breached those norms. If the United Nations is not willing or able to fund all operations of the Tribunal's work, then state governments must voluntarily contribute to make up the difference.

VIII. CONCLUSION

The Tribunal Statute sets out the competence of the Tribunal with respect to the law that it may apply, as well as the persons to whom the law will apply. Included here are considerations regarding the principle of individual criminal responsibility, the Tribunal's territorial and temporal reach, and the relations of its work to national courts.

The wording in Article 29 of the Tribunal Statute was carefully crafted such that states must cooperate with the Tribunal. Compliance is not an option; it is flatly an obligation.

Should a government fail to comply with an order from the Tribunal for cooperation or judicial assistance, the U.N. Security Council inherits the responsibility to undertake enforcement or punitive action against that government. The Security Council must determine what, if any, measures should be taken against that government for its delict.

The political efficacy of enforcement action imposed by the Security Council will be only as strong as U.N. Member States permit it to be. That is the essence of political effectiveness. States must work together to make sanctions work well. In previous Security Council enforcement actions, governments have not cooperated in uniform, coordinated, and consistent ways. As a result, sanctions have been rendered less effective as instruments of international enforcement.

This Article thus returns full circle to the premise that effective enforcement of the Tribunal's directives turns on perceptions and choices by national governments. If a government believes that a credible threat—one that is real and unacceptable to its national interests—will be triggered by failure to cooperate with the Tribunal, then that government seems likely to abide by that obligation. If, on the other hand, a government should determine that actions taken by the Security Council to punish uncooperative governments will be relatively painless, or less than compelling, then that government will not be deterred from violating obligations to cooperate with and assist the Tribunal. Regrettably, the record of past compliance with mandatory nonmilitary U.N. sanctions against various states does not foster much optimism about effective enforcement by the Security

Council of the Tribunal's orders for cooperation by states in securing evidence, arrests and surrender of indicted persons.

Political will is the key to effectively enforcing the work of the Tribunal. When credibility and deterrence break down in the perceptions of certain governments, members of the Security Council in particular and the United Nations in general must exercise sufficient political will, national determination and sometimes economic sacrifice to make international enforcement actions work. The Tribunal must be given adequate financial resources to carry out its prosecutorial mandate. A government must genuinely believe that enforcement of a Security Council decision to impose sanctions is in its national interest, and it must be willing to cooperate with other governments toward that end. Otherwise, enforcement actions imposed by the Security Council against some recalcitrant state will be more sieve than substance, more of an impotent symbol than a viable policy. Such failure would do much to undercut the lawful authority and political credibility of the Tribunal.

In the end, however, the work of the Tribunal will not be gauged by political events. The Tribunal stands on its own as a symbol against complacency and indifference when basic human rights are egregiously violated. Realism about the Tribunal's prospects of having its obligations enforced must not degenerate into cynicism about either its purpose or importance.

The Tribunal is empowered to request the U.N. Security Council to take action against any government that fails to cooperate with it. It is here that a core lesson for humanitarian law emerges from this experience: the more serious governments are about the Tribunal, the greater the potential deterrent the Tribunal will be. The Tribunal can make a difference. It can punish war criminals. It can serve as a deterrent to potential aggressors. It does strengthen the fabric of humanitarian law and the laws of war, especially by placing the force and prestige of international law on the side of the victims. That in itself remains a noble tribute to the rule of law in this post-Cold War era of pervasive civil strife and ethno-nationalistic turmoil.

