

## **Arrest and transfer of indictees**

### **The experience of the ICTY**

Because of its specific and exclusive nature, the mechanisms of extradition in the usual sense of the word, ie a legal procedure by which a State requests to another State the transfer of a person who is wanted, whether because of ongoing criminal proceedings or for serving a sentence after a conviction , are not applicable before the United Nations Hague Tribunal.

The supranational essence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) made it necessary to set up not only new legal instruments but also innovative practices.

Established on 25 May 1993 by the Security Council acting under Chapter VII of the Charter of the United Nations, 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, has been dealing during the last twelve years with widespread and horrendous crimes committed during the armed conflicts which took place on the territories of four of the new States issued from the Socialist Federative Republic of Yugoslavia.

More specifically the ICTY investigated crimes committed in Croatia from summer 1991 till autumn 1995 (with an estimation of 20.000 victims); in Bosnia and Herzegovina from spring 1992 till Dayton agreement in November- December 1995 (with an estimation of 100.000 victims); in the Serbian province of Kosovo between Spring 1998 and June 1999 (with an estimation of 10.000 victims); finally in Macedonia from May till August 2001 (with an estimation of 50 victims).

More than two millions and a half civilians had also to forcibly leave their homes.

To collect and put together the necessary evidence to prosecute and indict those most responsible for the crime of genocide, the war crimes and the crimes against Humanity which were perpetrated during these protracted, complex and ethnically based conflicts was one of the main challenges for the Office of the Prosecutor .

Another serious challenge was and continues to be, to ensure that those perpetrators, once indicted, could be brought before their judges in the Hague after being located, arrested and transferred.

### The specificity of ICTY, a subsidiary organ of the Security Council

The Security Council established the Tribunal for the Former Yugoslavia as its subsidiary organ and gave it all authority to request States to cooperate fully and to comply with all requests and orders issued in the Hague. It created an autonomous legal order and a proper institutional scheme, and since the tribunal is a Chapter VII entity and have primacy over national courts, the relationship with States is not like one between equals. The relationship is vertical.

The Secretary-General's Report on the ICTY Statute pursuant to Paragraph 2 of Security Council Resolution 808 , of 3 May 1993 made it clear that a request for assistance from the *ad hoc* tribunal could be equated with a decision of the Security Council itself:

*“ The establishment of the International Tribunal on the basis of Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to co-operate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence , hearing of witnesses ....Effect shall also be given to orders issued by the Trial chambers , such as warrants of arrest , warrants for surrender or transfer of persons , and any other orders necessary for the conduct of trials . ”*

### The obligation of States to cooperate and the non applicability of domestic laws

The general and permanent obligation of all States to cooperate was also set forth by *article 29 of the Statute of the ICTY*, which provides that :

(1): *“States are bound to cooperate with the Tribunal in the obligation and prosecution of persons accused of committing serious violations of international law”*.

(2) *“States are bound to 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 or the transfer of the accused to the International Tribunal.”*

-In matters of arrests and transfers, this obligation has primacy on all domestic laws and regulations dealing with extradition and especially the ones prohibiting the extradition of nationals.

To that end, *Rule 58 of the Rules of Procedure and Evidence* of the Tribunal makes it clear, too, that:

*“The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.”*

-Similarly, the jurisprudence of the ICTY has quickly drawn all the consequences deriving from that status of primacy of the Tribunal and the prevailing authority of its Rules of Procedure and Evidence.

In *KORDIC and CERKEZ* , on 25 June 1999 , the judges of the Tribunal concluded that *“Pursuant to article 29 of the Statute , all States have an obligation to lend cooperation and judicial assistance to the ICTY ... The obligations under the Charter and particularly Chapter VII prevail over any international rules of consent based judicial assistance, The powers of the ICTY as provided for in the Statute are not in any way dependant upon domestic legislations “*

In the *Milan KOVACEVIC* case , the Appeals Chamber Judgement of 2 July 1998 considered also that one of the well known principles of laws and conventions on extradition , the principle of speciality which prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition was not applicable before an International Tribunal like ICTY.

*“In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal..... The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal.”*

However, despite this undisputable and regularly reaffirmed obligation to cooperate with the Tribunal, experience has shown that in reality some of the States of the region would simply ignore its warrants for arrest.

This attitude of blunt non compliance could have paralyzed the activities of the ICTY given that the arrest and transfer of indictees is a precondition for all trials to be conducted.

*Prohibition of trials in absentia*

Without the physical presence of an accused, trials cannot proceed before any of the three chambers of the ICTY.

Indeed, although the Statute does not expressly prohibit trials *in absentia*, its articles 20 and 21 implicitly do so.

*According to Article 20* of the ICTY Statute, the Trial Chamber is not authorized to set a date for trial until a number of preconditions have been met ,which require the presence of the accused.

*Article 21* of the same Statute lists several minimum guarantees of the fair trial for the accused, one of them being the right to be tried in his presence and to defend himself in person or through legal assistance.

Therefore, seeking to arrest fugitives and securing their presence in The Hague is one of the cornerstones of the Tribunal's work, and in particular for the Prosecutor's office after warrants have been issued by the confirming judges.

As former Prosecutor Louise Arbour said, *"There were many interesting issues at play in the office of the prosecutor, but there was only one overwhelming, all-encompassing and, I would say, life threatening issue for the ICTY as it had been conceived: arrests. In fact, the issue of arrests was so acute that although it had belonged essentially to the Prosecutor, it had become, inevitably, everybody's issue: the whole of ICTY, the NGOs, and the Press."*

Enforcement remains the Achilles' heel of international tribunals like ICTY. It does not have a police force as such at its disposal to secure the prompt arrest of indicted persons. The ICTY therefore depends either on State cooperation or on the cooperation provided by relevant international forces on the ground.

In practice, the ICTY has been working with all States of the former Yugoslavia, but also with NATO and more recently with EUFOR, as well as some of their member-States, to secure the location and the transfer of fugitives.

The three ICTY Prosecutors had to spend great efforts to secure the presence of fugitives in The Hague. As the ICTY's experience demonstrates, cooperation with regimes in the former Yugoslavia has for many years been illusory, especially with regard to high-level indictees, and has seriously impacted on the ICTY's ability to prosecute and try those responsible for serious violations of international humanitarian law in the former Yugoslavia.

States in the former Yugoslavia have generally, and sometimes openly, demonstrated reluctance and opposition to carrying out arrests, especially when those persons held senior military or political functions.

It was therefore necessary to find efficient ways to obtain the arrest and the transfer of the accused to the Hague.

a) One of these innovative ways was to request the arrests by international forces on the ground

Having been the theatre of genocide, crimes against humanity and war crimes Bosnia and Herzegovina had, for a long time, no judicial nor political ability to prosecute perpetrators, who often were still holding senior political and military positions. Moreover, the history of ICTY demonstrates that the assumption that arrests and surrenders would be conducted by national authorities proved in practice to be overly-optimistic.

Indeed, a significant number of arrests did not occur until the enactment of Rule 59bis, which explicitly permitted the transmission of arrest warrants to peacekeeping forces deployed in Bosnia-Herzegovina.

On 16 December 1995, the North Atlantic Council of NATO decided that their personnel in Bosnia and Herzegovina should detain any person indicted for war crimes, usually called in the NATO's jargon as Pifwcs, with whom they would come into contact in the execution of their assigned tasks.

Unfortunately, this mandate was interpreted restrictively by most commanders on the field, especially when it came to senior accused, such as Radovan Karadzic and Ratko Mladic.

There are several documented instances where, from 1995 till 1998, both men could have been arrested by NATO forces, but the local commanders apparently refused to give the appropriate orders.

On 9 May 1996, a Memorandum Of Understanding was signed between the ICTY Registrar, Ms. Dorothee de Sampayo, and NATO Supreme

Allied Commander in Europe, General George Joulwan, that formalized this restrictive interpretation of the mandate given by the North Atlantic Council. Article 2, paragraph 2.2 of this MOU states that “*Based upon arrest warrants, accompanied by the corresponding indictments and additional information provided by the Tribunal, and when the tactical situation permits, if IFOR personnel encounter and identify a Pifwc while executing their assigned tasks, they shall detain that Pifwc.*”

This practice has known some success, especially with the “smaller fish” in the first years of the life of the Tribunal.

However, as already stated these forces and relevant member States have shown little willingness in apprehending senior persons indicted by the ICTY.

Indeed, until this date, international forces present on the ground have not been able to arrest the two most notorious fugitives, Karadžić and Mladić. It appears that there is a significant lack of political will to arrest these men. Preserving the security of troops and fear for the “bodybag syndrome” are certainly some of the reasons why States participating in international forces have not taken such action.

b) Another measure to ensure the presence of indictees was *the use of sealed indictments*

In the Tribunal’s early years, the first Prosecutor Richard GOLDSTONE had adopted a policy of publicly announcing charges and indictments. This open and public policy, which was mainly justified by the necessity for the Tribunal to show that it was a fully functioning institution, was not very successful.

It had the serious flaw that all accused would know they were wanted and therefore could easily evade their capture.

As of 1996, the second Prosecutor, Louise ARBOUR, then decided to change that policy to a policy of non disclosure and by application of *Rule 53 of the Rules of Procedure and Evidence*, to issue sealed indictments in order to facilitate arrests.

More work was done behind the scenes and it led to important results.

Sealed indictments proved effective in a number of cases. It was indeed so effective that many perpetrators of war crimes, including many who were not wanted by the ICTY, started leaving Bosnia and Herzegovina and went to safer areas in Croatia and Serbia and Montenegro where they knew nothing could happen to them.

The practice was, however, discontinued after the number of accused was significantly reduced in Bosnia and Herzegovina.

c) Another measure to ensure the presence of indictees was

*the creation of a specialised tracking and intelligence unit in the Office of the Prosecutor*

As of 2001 a specialised team was set up for tracking the whereabouts of indictees with a view to providing timely intelligence to governments, organisations and entities with arrest capabilities.

The Unit, despite its limited assets has played a crucial role in obtaining intelligence and information on the whereabouts of several fugitives , which eventually led to their arrest, both in Bosnia and Herzegovina and in Serbia .

The activities of this Unit continue to-date but intelligence gathering is limited and difficult in hostile environments, and once relevant information has been obtained, the willingness of State authorities to act upon it is not always there .

*Consequences of non-arrest of fugitives*

Delays in securing prompt arrest of indicted persons result in considerable problems. The quality of evidence over time deteriorates e.g. witnesses forget certain facts or even pass away, and delays affect other related cases.

As a result, the Tribunal needs and will need again to repeat trials, to re-litigate the same crimes, to call the same witnesses back to The Hague. This is not an easy task because there is fatigue from witnesses and victims who become reluctant to repeat the terrible experiences they have suffered.

Such a reaction, if perfectly understandable is however damaging for a good administration of justice.

For instance, the crimes in Srebrenica are now being tried for the fourth time and had Mladić and Karadžić been arrested and transferred to The Hague, they would have been tried together with those seven accused on trial today in the new Srebrenica case.

Having to conduct their trials separately results in significant delays and needs for additional resources. This is also creating uncertainty for justice

to be done at the time when the Tribunal is supposed to complete all its cases at first instance by 2008.

### *The current situation at the ICTY*

In terms of numbers, the ICTY's record on fugitives may appear satisfactory. Today, out of a total of 161 accused, only 6 persons remain at large. The proceedings have been completed for 101 of them while they are ongoing for 60 of them .48 have been found guilty and are serving or have served sentences. 5 were acquitted ; 24 are in trial, 18 are in pretrial phase, 12 have been transferred to national courts . In the past two years, there has been an acceleration of the transfer of fugitives from States in the former Yugoslavia.

Also, almost all persons indicted at the end of 2004, the last persons indicted by the Tribunal as part of the completion strategy, have surrendered voluntarily, either to the States concerned or to UNMIK. This is mainly the result of the policy of conditionality consistently applied by the European Union and its member-States, as well as the continuing support of the US Government.

As stated before, the effective prosecution of the most serious crimes against the international humanitarian law depends for a great part on the cooperation from the States and their willingness to locate, arrest and transfer the accused to the Tribunal.

This cooperation has unfortunately its limits. The work of the Prosecutor's office consisted then largely in the last years and still consists of deploying complementary strategies and by having recourse to judicial as well as non judicial tools.

### *Judicial means in case of non-compliance*

#### *Non-compliance with Security Council resolutions*

When a State fails to answer a binding order from ICTY, it is definitely in breach of Security Council resolutions, the Statute and Rules of Procedure. It has committed an international wrongful act. The tribunal is, however, not vested with enforcement or sanctioning powers vis-à-vis

this state. It cannot punish a state that has not surrendered a person and cannot enforce its own decisions.

In that situation the Tribunal can only make a judicial finding to this effect and request the President to transmit it to the Security Council.

*Application of the provisions of Rule 7bis of Rules of Procedure and Evidence*

Rule 7bis of the Rules of Procedure and Evidence offers a legal remedy in cases of non-compliance. A judge, a Trial chamber or the Prosecutor may request the President to make a finding of non-compliance with the obligation to cooperate, and if the President makes such a finding, the Security Council must be notified.

Upon receipt of the President's report, the Security Council has the discretion with respect to what action, if any, is necessary to bring the recalcitrant State into compliance with its duties.

Such a mechanism of denunciation before the Security Council, is potentially a useful tool, since if used diligently, is tantamount to a public blame before the representatives of the whole international community in New York, which most of States will want to avoid.

However, the Security Council has not always responded effectively to the Tribunal's reports of non-compliance, typically issuing a Resolution or a Presidential Statement in response to the ICTY President's reports of non-compliance. This mechanism was used thirteen times since the beginning of the Tribunal's activities against Croatia, Serbia and Montenegro and Republika Srpska, the Bosnian Serb entity in Bosnia and Herzegovina.

Last time Rule 7bis was applied is in May 2004, when the President of the Tribunal brought to the attention of the Security Council a report from the Prosecutor regarding Serbia and Montenegro's consistent failure to comply with its obligations.

No measures, however, were taken by the Council in reaction to this report.

Given the relative inefficiency of such a mechanism the Office of the Prosecutor had to find innovative ways to obtain the cooperation from the recalcitrant states by using a substitute strategy and also by creating incentives for full cooperation with the ICTY, such as conditioning aid programs and admission to international organizations.

### Other mechanisms in case of non-compliance

The Tribunal would not have been so successful in obtaining the transfer of fugitives, without using other non-judicial measures like seeking assistance from the international community to stimulate non-cooperating States.

The Prosecutor's strategy to encourage States to fully cooperate, in particular regarding the arrest and transfer of fugitives, has been based on two components:

(1) The political dimension aimed at creating strong incentives for the State in question to co-operate like policies of conditionality towards the State with which the Prosecutor has difficulties. This conditionality is usually of a political or financial nature.

(2) The Prosecutor has worked also at the operational level to make sure that the State authorities were doing everything they could to locate and arrest the fugitives, or co-operate in whatever other form with her. In this context, she has also provided advice or other types of support to help that State in its investigations.

### Methods and incentives used to ensure a better co-operation of States

#### Conditionality to financial assistance

Fulfilling obligations vis-à-vis Tribunal may be a condition set by a State to receive financial assistance. Thus, Former President Milosevic was surrendered to the ICTY on 28 June 2001 due to a US threat to boycott a key donor's conference.

This strategy has worked to a limited extent at the time, but has not proven to be a strong enough incentive to move the current Government of Serbia to arrest the remaining fugitives.

Financial stimulation alone proved actually less effective than the prospect of the membership in the important institutions of Euro-Atlantic integration.

#### Conditionality to EU and NATO membership

In 2002, in Copenhagen, the European Union agreed to a strategy defining the conditions for the States of the former Yugoslavia to join the

EU. The full co-operation with the ICTY was one of them. In parallel, NATO told Bosnia and Herzegovina and Serbia and Montenegro that they could not join the Partnership for Peace program as long as the most wanted indictees would remain at large.

NATO changed recently this position by inviting the three States to join PFP.

But the EU remains firm on rigorous conditionality. At each and every step of the EU accession process, the European Commission or the EU Ministerial Council have evaluated the level of co-operation of the concerned State with the ICTY, most often on the basis of assessments provided by the ICTY Prosecutor, either to the Security Council or directly to the EU.

When the progress was considered insufficient, the EU did not shy away from taking tough decisions, like the postponement of accession talks with Croatia in March 2005.

It was only after the Prosecutor confirmed that Croatia was fully co-operating with the ICTY, on 3 October 2005, that the accession talks finally began. A few days earlier, Croatia had communicated Gotovina's whereabouts.

Ante Gotovina was arrested on 7 December 2005 in Tenerife and on 10 December was transferred to The Hague. His trial is due to start next year.

The conditionality to start of negotiations on EU membership has been the most effective tool, also, to make Serbia more cooperative with ICTY.

Indeed it was the prospect of starting stabilization and association negotiations with the EU, a first step towards full membership, that prompted Belgrade to deliver more than a dozen fugitives to The Hague in the first half of 2005.

But after it became clear that sufficient progress had been made to begin the negotiations, Serbia's co-operation unfortunately slowed down significantly.

The EU Council reminded then Serbia on 30 January 2006 that full cooperation with the ICTY is a priority and condition to Community assistance and on 3 May 2006, following a negative report of the Prosecutor, negotiations were suspended.

This suspension was reaffirmed by the European Commission on 8 November and a few days ago by the Council of Ministers on 11 December 2006.

*The Prosecutor's activity*

In addition to this specific pressure of conditionality to access to EU the Prosecutor needs to maintain regular contacts with all States , both in and out of the Balkans to ensure that all accused are located and transferred to the Hague. This activity has significantly increased with the completion strategy of the Tribunal.

The Prosecutor regularly travels to the former Yugoslavia where she meets with prime ministers and ministers of foreign affairs and other officials responsible for different aspects of co-operation, as well as with the representatives of the international community, international organisations, victims groups and NGOs.

She meets with Heads of State or Government, Ministers and Heads of international organisations. At the same time, working relationships will be maintained between her political and diplomatic advisers and their counterparts in key States, international organisations, and also with important NGOs.

Regular meetings are held with representatives of interested States and international governmental and non-governmental organisations in Brussels , The Hague and New York during her visits to the Security Council every six months,

These constant contacts are necessary to maintain the focus and interest of the International community on the Tribunal's activities and to make sure that the cooperation of States remain an obligation , especially when only a little more than three years are left to complete the ICTY mandate.

### Conclusion

Cooperation remains a fundamental aspect of an international criminal tribunal's work. ICTY like all other International Tribunals depends on this external cooperation and support, in terms of collecting information and intelligence and above all securing the presence of the accused.

As explained the tribunal has various legal instruments at its disposal. However, today's realities remain such that, only the policy of carrots and sticks produces results with States which are unwilling to cooperate. This game which requires tenacity has been a crucial and effective tool in securing fugitives and bringing them to Justice.

