The High Politics of ‘Ad Hoc’ Justice: 
(Re)Introducing the Problem of ICTY’s ‘Compliance’

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1 The Ad Hoc International Criminal Tribunal for the Former Yugoslavia.
“If a ruler is himself upright, his people will do their duty without orders; but if he himself be not upright, although he may order, they will not obey.”

-Confucius, The Analects

The idea that the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993, marked the genesis of global and cosmopolitan ‘justice’ is a thesis which aptly fits within conventional linear approaches to ‘norm diffusion’ politics. The liberal-legal school of international law holds that the driving force behind international war crimes tribunals, such as the ICTY, has been the progressive ascendancy of ‘legal justice’ from an international and to an alleged global plane. This teleological understanding of international law compliments well existing structural theories of ‘norm diffusion’ politics within the discipline of international relations (IR), where scholars have claimed that norms designated by ‘a community of liberal states’ are adopted by ‘norm following’ countries through a combination of material incentives and normative appropriateness.


conjoined legal and political approaches attribute the creation of international criminal tribunals to a linear process of ‘norm entrepreneurship’ and subsequent norm ‘globalization’.

However, what will be argued here, in a summary fashion, is that the teleological narrative of paradigmatic liberalism betrays the contingent and politicized context from which international tribunals actually emerge and develop. This liberal narrative, I claim, obscures the extent to which the ICTY has been an instrument of strategic politics and thus not a genuine expression of supranational legalism but instead ad hoc ‘justice’ in its proper manufactured sense. Thus, this paper aims to reveal how the ICTY’s inception and function has not been an example of liberal ‘norm diffusion’ on a revolutionary scale but rather an instance where a malleable ‘juridical ideal’ was used by Western powers to promote a selective political and legal agenda.

In sum, the normative rise of ad hoc ‘justice’, in the form of the ICTY, was not objectively legal or politically innate. Rather, it was politically instrumental, historically contingent and, foremost, normatively contestable from the outset. In what follows, therefore, I survey the contentious law and politics which have constituted the ICTY’s normativity; the aim being not to provide a comprehensive history of the ICTY’s ‘making’ and function, something already explored in other legal and historical texts, but rather to focus on selected legal and political contradictions which problematize the ICTY as a self-defined ‘rule of law’ project.

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1. Creating the ICTY: In the Name of ‘International Peace and Security’

When one thinks of a United Nations court or any institution bearing the designation ‘court’, an almost intuitive imagery and legitimacy is triggered. ‘Courts’, with their robes, protocols and chambers, command the secular mind and imagination as few modern institutions do; a symbolism so powerful in fact that it dampens our sense of critical inquiry vis-à-vis the origin and validity of professed judicial authority. It is this appearance of law and legality, I argue, which has been significant when looking at the rise of ad hoc international criminal tribunals during the 1990s: most notably, the groundbreaking ICTY. Further, the operation of such ad hoc tribunals under the UN flag, and located no less in The Hague, add an extra measure of symbolic legitimacy vis-à-vis the UN’s grand lore of international and ‘collective’ approval. In this way, not only are the performative requisites of a robe-cloaked and judgment-issuing body fulfilled, but also the veneer of international recognition and consensus are presented as well.

The aforesaid elements blend well with a further narrative cast strategically to support the historic credentials of the ICTY, and later the ICTR, as alleged successor bodies to the Nuremberg Trials, which sat in judgment on surviving Nazi leaders. Here, the ICTY and ICTR are heralded as the first institutions since Nuremberg to prosecute violations of international humanitarian law; a lineage proclaimed to legitimate the ad hoc tribunals both via legal historicism and the rhetorical correctness of international law. Notwithstanding that the actual International Military Tribunal at Nuremberg (IMT) tried the ‘supreme crime’ of ‘aggressive war’ and not egregious humanitarian violations which later came out in evidence during trial proceedings.

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7 International Criminal Tribunal for Rwanda.
Why does this ensemble of legal symbolism, assumed ‘collective’ legitimacy and narrative historicism matter? What do they suggest together vis-à-vis the creation of the ICTY as an international juridical initiative? Simply put, the appearance of international ‘justice’ through the pomp and bricks of a Hague-based court can be deceiving if one presumes normative legitimacy to derive from mere institutional existence and inertia. In other words, the fact that a professed ‘international court’ tries cases and produces decisions does not make it incontrovertible or reflective of an inherent international legal order. In fact, belief in such legalistic pretension makes one entirely vulnerable to the machinations of rhetoric which regularly characterize the form and substance of international politics qua law.

The argument here is that the veneration conferred upon the ICTY as a self-evident and pedigreed ‘rule of law’ institution is remarkably stretched when one looks at its actual constitution. The ICTY’s institutional existence, while concrete in administrative form, masks a contentious normative foundation in that the UN Charter does not expressly ‘securitize’ international humanitarian law or authorize the establishment of war crimes tribunals. In fact, it was only via a ‘seismic’ reinterpretation of Chapter VII, or more accurately a ‘reading-in’ of humanitarian law as a matter ‘international peace and security’, that the ICTY gained its UN and consequently administrative credentials. This combination of professed ‘legality’ and administrative function failed to resolve the crucial question of political and legal legitimacy, a ‘constitutional’ gap which I argue made the ICTY not only contestable but vulnerable to the claim that hegemonic self-interest in fact drove the touted altruism of ICTY ‘justice’.

1.1 Fiat Justitia, Ruat Coelum!

The popular storyline regarding the ICTY’s inception typically starts with ‘Yugoslav journalist’ Mirko Klarin and his notable article “Nuremberg Now!” which was published by

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10 On the concept of securitization and how conditions are named as ‘threats’ or matters of ‘security’, see Barry Buzan, Ole Weaver et al., Identity, Migration and the new Security Agenda in Europe (London: Pinter, 1993).

11 Robertson, Crimes Against Humanity, 194.

12 For an interesting discussion on the distinction between legality and legitimacy, see Friedrich Kratochwil, ‘On Legitimacy’, International Relations 20(3)(2006): 302-308.
the Belgrade newspaper *Borba* on May 16, 1991.\(^{13}\) Klarin is cited as being the first to propose an international tribunal for the prosecution of war crimes committed during Yugoslavia’s secessionist conflicts. The author pleaded for an immediate convocation of “impartial foreign experts” which would prosecute “big and small leaders” for crimes against humanity. Over the course of 18 months, the idea built political momentum, no doubt influenced by the televised ferocity of Yugoslavia’s dissolution, which by the spring of 1992 had engulfed Bosnia-Herzegovina, and the reciprocal will of the great powers to avoid overt military intervention.

What has been regarded as the diplomatic spark that kicked off the ICTY’s eventual creation is the London Conference on the former Yugoslavia held on August 26 and 27, 1992. There, German Foreign Minister, Klaus Kinkel, and his French counterpart, Roland Dumas, persuaded the conference to “…carry forward a study of the creation of an international criminal court.”\(^{14}\) Flowing from this, on October 6, 1992, Kinkel and Dumas were further successful in securing the unanimous endorsement of the UN Security Council for Resolution 780, which provided for the creation of a ‘Commission of Experts’ (780 Commission) that would launch an “international investigation on crimes against humanity…”\(^{15}\)

Yet, the most profound boost for the war crimes effort was a statement delivered, some two months later, on December 16, 1992, by then US Secretary of State Lawrence Eagleburger at the Geneva Conference on the former Yugoslavia. Eagleburger’s address is now celebrated as the “naming names” speech, a significant public statement that asserted the willingness of the United States to support war crimes prosecution in the ex-Yugoslavia. Eagleburger, a long-time State Department official, protégé of Henry Kissinger and former US Ambassador to Yugoslavia, provided what many have framed as the defining, altruistic foundation which spurred the ICTY into existence. The following abbreviated passage is often cited in summation of Eagleburger’s remarks:


“…[M]y government also believes it is time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity. […] The fact of the matter is that we know that crimes against humanity have occurred, and we know when and where they occurred. We know, moreover, which forces committed those crimes, and under whose command they operated. And we know, finally, who the political leaders are to whom those military commanders were—and still are—responsible. Let me begin with the crimes themselves, the facts of which are indisputable.”

However less scrutinized is the entirety of Eagleburger’s speech and the fuller context within which it was given; additional particulars that prompt reflection as to the actual motivations behind the US call for war crimes prosecution. Foremost, the Geneva Conference was not a random diplomatic affair; it was a permanent peace conference, set in motion by the earlier London Conference, and expected to consolidate the substantial gains made by EU and UN envoys, Lord David Owen and former US Secretary of State Cyrus Vance, during peace talks conducted in the fall of 1992. Eagleburger’s call for war crimes justice was expressed as part of US opposition to the Vance-Owen peace plan, which was at a delicate and conclusive stage by the winter of 1992; a peace deal which, if successful, would have cut short Bosnia’s civil war and preempted thousands of deaths which followed with the war’s continuation (e.g. the 1995 Srebrenica massacre).

Thus, the apparent altruism of Eagleburger’s “naming names” reveals a more strategic character when one considers the fuller text and circumstances of Eagleburger’s historic intervention. The pronouncement of US support for war crimes accountability was used

16 Eagleburger went on to name seven low-level operatives (four Serbs, two Croats and one Muslim) that should face war crimes prosecution. But he then added the further “bombshell” that: “…Slobodan Milosevic, the President of Serbia, Radovan Karadzic, self-declared President of the Serbian Bosnian Republic, and General Ratko Mladic, commander of the Bosnia Serb military forces, must eventually explain whether they sought to ensure, as international law requires, that their forces comply with international law and, if so, by what means…” Statement of Lawrence Eagleburger, U.S. Secretary of State, ‘The Need to Respond to War Crimes in the Former Yugoslavia’, In Cassese, The Path to The Hague, 67-69.

17 Former UN Secretary General Boutros Boutros-Ghali bemoaned the failure of the Vance-Owen initiative as follows: “In its first weeks in office [January 1993], the Clinton administration had administered a death blow to the Vance-Owen plan that would have given the Serbs 43 per cent of the territory of a unified state. In 1995 at Dayton, the administration took pride in an agreement that, after nearly three more years of horror and slaughter, gave the Serbs 49 per cent in a state partitioned into two entities.” Boutros Boutros-Ghali, Unvanquished: A U.S.-U.N. Saga (New York: Random House, 1999), 247.
instrumentally by the State Department to undermine the UN-EU peace plan and subsequently impose a more bellicose political agenda regarding Bosnia:

“It is clear that the international community must begin now to think about moving beyond the London [peace] agreements and contemplate more aggressive measures. That, for example, is why my government is now recommending that the UN Security Council authorize enforcement of the no-fly zone in Bosnia, and why we are also willing to have the Council re-examine the arms embargo as it applies to the Government of Bosnia-Herzegovina. Finally, my government also believes it is time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity. We have, on the one hand, a moral and historical obligation not to stand back a second time in this century while a people faces obliteration. But we have also, I believe, a political obligation to the people of Serbia to signal clearly the risk they currently run of sharing the inevitable fate of those who practice ethnic cleansing in their name.”

However Eagleburger’s statement was serendipitous for more than just its policy direction. Coincidence played two further roles, both in how Eagleburger’s address was framed ‘thematically’ to the public and with respect to the rise of the US-sponsored 780 Commission.

First, the “naming names” speech gained historical significance largely because of how the Secretary of State credited Holocaust survivor and Nobel Laureate Elie Wiesel with being the key impetus behind his morally inspired statement. Eagleburger hailed a ‘spontaneous’ encounter with Wiesel at Geneva as the motive for his determination that the American administration would not ‘stand by’ in the face of crimes against humanity. Yet,

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18 Multiple sources record that the French and British were surprised and angered by Eagleburger’s impassioned address. The Geneva Conference was believed to be the decisive moment for the Vance-Owen plan and Washington was expected to support the nearly done agreement. French Foreign Minister Roland Dumas, British Prime Minister John Major and envoys Vance and Owen believed that the ‘naming names’ speech sabotaged the UN-EU led peace process, as the Vance-Owen plan required the cooperation of Milosevic, Karadziez and Mladie—leaders which Eagleburger declared publicly to be targets of war crimes prosecution. See: Michael P. Scharf, Balkan Justice: The Story Behind the First International War Crimes Tribunal Since Nuremberg (Durham, North Carolina: Carolina Academic Press, 1997), 42-44; Pierre Hazan, Justice in a Time of War (College Station: Texas A&M University Press, 2004), 32-36; Michael Mandel, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity (Ann Arbor: Pluto Press, 2004), 125-128.


20 Lawrence Eagleburger, letter to Antonio Cassese, May 8, 1996, in the Cassese, The Path to The Hague, 89. Yet, Wiesel himself also believed he was instrumental in turning Eagleburger round in their December encounter: “In December, I had a long talk with my friend Larry Eagleburger on the possible means for stopping the butchery in the former Yugoslavia. […] We agreed that that not to prosecute the criminals would amount to condoning their crimes. […] An initial list of names was drawn up.” See: Elie Wiesel, letter to Antonio Cassese, June 28, 1996, in Cassese, The Path to The Hague, 91.
Eagleburger’s one-time staffer on war crimes policy, former State Department lawyer Michael P. Scharf, openly challenges this account. Scharf reveals that the Wiesel-inspired ‘turning point’ was no accident; Eagleburger’s ‘impassioned’ words had in fact been carefully crafted in advance of Geneva by US government officials:

“The speech was generally assumed to have been largely impromptu and some press reports implied it has not even been cleared with the White House. Nothing could be further from the truth. The ‘naming names’ speech was in fact ‘cleared’ throughout the government in advance, and I, myself, made certain revisions to ensure that the statement contained the requisite legal caveats and qualifiers.”

Second, Eagleburger’s speech was also in sync with the rising significance of the 780 Commission. In fact, the Commission convened its augural session in Geneva both on the same day as the Vance-Owen summit and in the room adjacent to the Conference, where Eagleburger dropped his diplomatic “bombshell.” What more, the “naming names” speech came as a prelude to the Commission’s interim report released on February 10, 2003 to the Security Council. The constitutive significance of that report cannot be overstated as it set the legal and political stage for Security Council Resolution 808 on February 22, which effectively established the ICTY. The 780 Commission recommended, one, the establishment of an ad hoc international tribunal, two, suggested this was “consistent” with the authority of the Security Council and, three, provided findings which supported Eagleburger’s ‘bombshell’ allegations:

“56. Based on the many reports describing the policy and practices conducted in the former Yugoslavia, “ethnic cleansing” has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices

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23 Ibid., 43.
constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.”

As US nominee and then Commission rapporteur Cherif Bassiouni attests, the broader political implication of that report vis-à-vis Eagleburger’s objection to the Vance-Owen peace plan was not only evident to the members of the 780 Commission but prominent in their deliberations:

“The last thing [supporters of the Vance-Owen venture] wanted was to have an activist Commission of Experts that could likely prove the accusations made by Secretary Eagleburger. The priority at that time was to achieve a political settlement—and justice was not viewed as an inducement to that end. Indeed, there was then great apprehension that the Commission might be an impediment to a political settlement.”

Yet, that was what made the work of 780 Commission entirely noteworthy and consequently suspect; the American administration had considerable influence over the Commission by virtue of the hand the State Department played in its phoenix-like rise from the winter of 1992-1993.

According to diplomatic ‘insider’ Michael Scharf, the State Department proposed the idea of a “War Crimes Commission” and championed its creation from as earlier as August 1992, pursing diplomatic negotiations and draft resolutions which ultimately established the “impartial Commission of Experts” under the aegis of Resolution 780. Later on, with the 780 Commission up-and-running, the US took the enhanced role of, first, ‘donating’ $500 000 USD to the Commission’s cash-starved budget in January 1993 and, then, when Bassiouni was made Chair in September 1993, facilitating the Commissions de facto move to DePaul University, Chicago, where Bassiouni taught law, through the provision of additional financing, dozens of secondments and, most notably, FBI protection. This all despite formal protest from the UN Legal Affairs Office that “private” assistance could not be

25 Ibid., 321.
26 Scharf, Balkan Justice, 44.
27 Ibid., 38-42.
28 Ibid., 45-47.
obtained in pursuit of a Security Council mandate and the fact that the US withheld millions of dollars in arrears from the UN as part of its pressure campaign to impose a “zero growth” UN budget.

1.2 Resolution 808: The Tribunal as Malady or Remedy?

The aforesaid context provides insight into the crucial climax which was Resolution 808; and, here, the analytical worth of conjoining political and legal factors in an interdisciplinary manner becomes apparent. Resolution 808 established the ICTY pursuant to Chapter VII of the United Nations Charter. Specifically, Articles 39 and 41 were the precise authority relied upon, and the factual trigger which enabled the Security Council to exercise that statutory power were widespread violations of international humanitarian law in the former Yugoslavia, the gravity of which constituted, as 808 specified, “a threat to international peace and security” under Article 39.

However, as Rachel Kerr discusses in her study of the ICTY’s legal origins, the resort to Chapter VII by the Security Council was not as straightforward as the veneer of Resolution 808 suggested. In fact, it was only by virtue of a profound reinterpretation of the meaning of “threat to international peace and security” under Article 39 that the Security Council gained its authority to create the ICTY pursuant to Chapter VII. As Kerr explains:

“Until the 1990s, a threat to the peace was found in only a handful of cases, and of these only two [Southern Rhodesia and South Africa] related to situations where human rights were being seriously threatened within the borders of a single state. [...] In both these instances the Security Council resolutions had a nexus with a military threat to international peace and security outside the borders of the state, which warranted the invocation of Chapter VII. Without this nexus, it would seem that the protection of human rights was outside the scope of the Security Council, at least in practice, until the 1990s.”

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29 Hazan, Justice in a Time of War, 27-29.
30 Scharf, Balkan Justice, 41.
31 Kerr, The International Criminal Tribunal for the Former Yugoslavia.
32 Article 24 of the Charter confers upon the Security Council “primary responsibility for the maintenance of international peace and security.” Article 25 states that Members of the UN “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
33 Kerr, The International Criminal Tribunal, 16.
Following this, Kerr notes, three further developments facilitated a more entrepreneurial approach to Chapter VII in situations involving international humanitarian law. First, the end of Cold War introduced a level of great power collaboration which enabled the Security Council to respond to publicized violations of humanitarian law. Second, the UN-led intervention into Iraq and Kuwait in 1991 later produced the watershed precedent of Security Council Resolution 688, which “found persecution of Kurd and Shi’a minorities in northern and southern Iraq to be a threat to international peace and security.”34 Third, and finally, it was the failure of Libya to surrender two suspects in the bombing of Pan-Am flight 103 over Lockerbie, Scotland, that the Security Council invoked Chapter VII in March 1992 with respect to international criminal responsibility. Specifically, the meeting of the Heads of Government of Current Security Council Members in New York on January 31, 1992 paved the way for this landmark restatement of Article 39:

“[T]he absence of war and military conflicts among states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”35

Now, one could stop easily there with the political convenience of Resolution 808’s stated ‘legality’, and find that the Security Council did make valid use of Chapter VII to constitute the ICTY. Yet, I argue this misses out on an important conjunction regarding how the “threat to international peace and security” came to be constituted both politically and historically: the proposed solution (a war crimes tribunal) and the very proponents behind it (the US and the international criminal justice movement) played a large hand in creating the actual “threat to international peace and security” which ultimately justified the establishment of an international tribunal pursuant to Article 39. How is that? Sound somewhat conspiratorial? Well, truly, it is all a matter of emphasizing the shrewd diplomacy and crisis engineering which was on vivid displayed in Geneva on December 16, 1992.

Recall the confluence of the Vance-Owen plan, the Geneva Conferences (e.g. the peace conference and its adjacent 780 Commission inauguration) and Eagleburger’s famous

34 Ibid., 17.  
35 Ibid., 18.
“naming names” speech, what was most curious about that configuration of events was the false controversy it fuelled vis-à-vis justice versus peace. It was a predicament stoked successfully by Secretary Eagleburger and his framing of ‘international justice’ as being at complete odds with the UN-EU peace initiative. In other words, the need for war crimes accountability was used to collapse the Vance-Owen peace plan and thus continue Bosnia’s bloody civil war and “ethnic cleansing”. What more, the ensuing political crisis, which was precipitated by this justice-peace conundrum, was then made the political and legal pretext (e.g. ‘threat to international peace and security’) for triggering Chapter VII, and Article 39, instituting “an international tribunal” that would “contribute to the restoration and maintenance of peace.”

In sum, the strategic manner and instrumental circumstances which led to the ICTY’s creation, as encapsulated by the fateful events of Geneva, cast a shadow over the court’s actual normative mission: the Tribunal’s standing as a bona fide juridical institution came into question by virtue of how its inception was used to scuttle the Vance-Owen peace plan. Then, upon the ashes of that ruined agreement, with the foreboding of continued bloodshed, the Tribunal was established in the name of ‘international peace and security.’ However the normative question which dogs the Tribunal is why ‘international justice’ had to be framed in antithesis to ‘international peace.’ Further, what effect would the Tribunal’s instrumental use, as a means to sabotage negotiated peace, have on the court’s later juridical legitimacy and credibility?

The official reply, righteously given at the time of Geneva and which today many Tribunal proponents still vigorously assert, was that negotiated peace in Yugoslavia could not have come in collusion with those suspected of grave humanitarian violations. Yet, in hindsight, subsequent years would reveal that assertion to be hollow as the later US-guided Dayton

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36 On February 3, 1993, Lord David Owen made the following statement recorded by the New York Times: “Against all odds, even against my own expectations, we have more or less got a settlement but have a problem. We can’t get the Muslims on board. And that’s largely the fault of the Americans, because the Muslims won’t budge while they think Washington may come into it on their side any day now… It’s the best settlement you can get, and it’s a bitter irony to see the Clinton people block it.” See New York Times, February 3, 1993, 1; and David Owen, Balkan Odyssey, (London: Victor Gollancz, 1995), 110.

Peace Accords (circa 1995), which made peace in Bosnia-Herzegovina, relied upon intense collusion\textsuperscript{38} with the very suspects Eagleburger denounced in Geneva—to only later have the same impugned ‘peace partners’ summarily indicted, arrested and tried by the ICTY in The Hague.

These normative contradictions cannot be viewed in isolation, nor can they be severed from the institutional and normative meaning of the ICTY. In fact, such discrepancies ring loud when thinking about how the ICTY’s inception was publicly presented and likely perceived. The diplomatic intrigue behind the ICTY’s creation was not performed in a 19\textsuperscript{th}-century cigar parlour or backroom, but rather publicized across the former Yugoslavia to a constituency which suffered ‘life and death’ consequences with each twist and turn in diplomatic posturing; a war-stricken population which followed public diplomacy with an intent and worried eye, as part of their everyday survival routine.

This captive audience witnessed the strategic and politicized circumstances which gave rise to a Tribunal that later proclaimed its eminence in law. Ironically, the same publicity which had helped expose the gross atrocities of Yugoslavia’s dissolution, to invoke such international outrage and action, would also work to undress the vestiges of juridical legitimacy which the ICTY had and letter demanded in adherence from its politically weary subjects. In short, despite the hail of altruism, the Tribunal’s origin was visibly implicated in a strategic context and this lent to the appearance that the ICTY’s normative mission was akin to ‘strategic’ justice.

2. **Strategic Scales? The Politics of ICTY Prosecution**

The response of liberal-legalism to the charge that the ICTY was conceived through strategic interest is to invoke a conceptual formulation of law and politics reflective of the public versus private dichotomy. While liberal-legalists concede that the Tribunal required politics for its institution, once established, the institutional mechanics of ‘justice’ enabled the Tribunal to

\textsuperscript{38} In fact, at the press conference which marked the formal signing of the Dayton Agreement in Paris on December 14, 1995, EU representative, Carl Bildt, spoke openly of how the intense diplomatic negotiations conducted at the Wright-Patterson Air Force Base near Dayton, Ohio, often adjourned for the evening with the participants fraternizing at the Base bar.
function as an “apolitical” judicial body. More pragmatic formulations however temper this essentialized dichotomy by acknowledging that politics did seep into the administrative workings of the Tribunal, but only to facilitate its judicial function. As Rachel Kerr aptly summarizes: “while the interaction of politics and law was central to the Tribunal’s ability to perform its judicial function, it did so independently of politics, which was crucial for its success….”

Thus, liberal-inspired analyses of the ICTY stress how judicial propriety curtailed the influence of politics on the Tribunal’s function and thus denied the appearance of undue political interference. In this way, the intersection of politics and law at the ICTY was claimed to be a one-way street: politics existed in so far as the Tribunal manipulated its political context to fulfill its mandate, but not vice versa.

Yet the aim here is to problematize that tidy rendition of the ICTY’s juridical integrity, where the court is said to rely on politics for its function but claimed immune from the reciprocal influence of political interest. In other words, the liberal narrative of the Tribunal’s function presents a remarkable story of how the Tribunal managed to defy the age-old maxim that ‘power corrupts absolutely.’ This section however questions that portrayal by arguing that politics did not stop with the ICTY’s creation; that strategic interests continued to influence the workings of the court and thus impinge upon the reputation of the ICTY as a self-defined ‘rule of law’ institution. The two most visible examples of this effect, to be reviewed now, are, first, the political controversy and later legacy of the ICTY’s first Chief Prosecutor and, second, the ICTY’s contentious and contradictory stance vis-à-vis the 1999 Kosovo war and NATO’s subsequent intervention. Both these historical episodes cast doubt upon the alleged impartiality and propriety of the ICTY, requiring thus further and concise consideration.

2.1 Resolution 827 and the Power of the Prosecutor

Whereas Resolution 808 established in principle an ad hoc international tribunal for the former Yugoslavia, the passage of Security Council Resolution 827, on May 25, 1993, gave the ICTY its actual operational shape and initiative. The terms of the ICTY’s Statute, enacted as part of 827, established the administrative parameters which governed the work

39 Kerr, The International Criminal Tribunal, 2.
and scope of the Tribunal. Key among these parameters were, one, that the Security Council had direct control over the choice of Prosecutor and, two, that the Tribunal could obtain direct support from any government and private (IO and NGO) organization in the form of “funds, equipment and services.”\textsuperscript{40} Put together, these provisions offered extraordinary potential for strategic interests to influence the ICTY through an adept combination of shrewd Prosecutorial appointments and “private” judicial financing.

The aforesaid framework perhaps explains why it took no less than 18 months for the Security Council to agree upon a candidate that would serve as the first Chief Prosecutor of the ICTY. This acrimonious struggle was rooted in what scholar Kingsley Chiedu Moghalu has described as a search not for “the best man or woman to do the job of prosecuting war crimes in the Balkans” but was rather to find the “lowest common denominator” which “would be acceptable to all the great powers.”\textsuperscript{41} Yet, this conclusion was somewhat of an understatement, as it obscured the extent to which the US influenced the Tribunal and made constant efforts to direct its work. The ensuing contest therefore was less a struggle over judicial ‘independence’ as it was a rearguard effort to check Washington’s ambitions to steer the court for its political purposes. At the core of the controversy was the Chief Prosecutor’s political significance: he or she had the discretion to decide which crimes to prosecute (when and how), and which to not.

2.1.1 ‘Habemus Papem’?

The dispute over the first Chief Prosecutor originated from the earlier formed 780 Commission and, specifically, the politics of its then Chair, Cherif Bassiouni. The Egyptian-born, naturalized US citizen, and friend of UN Secretary General Boutros Boutros-Ghali, was a well-published international law scholar, but his lack of political and diplomatic finesse proved problematic both with respect to the reputation of the 780 Commission and Bassiouni’s later candidature for the position of ICTY Prosecutor. In fact, Bassiouni was named the initial candidate for Prosecutor by the Islamic and non-aligned members of the


\textsuperscript{41} Moghalu, \textit{Global Justice}, 55.
Security Council, but this merely unleashed the controversy which the US nominee had attracted to himself, plunging the selection process into a perpetuating quagmire. What made Bassiouni so problematic?

For starters, Bassiouni expressed an ideological and sterile vision of international justice, which he placed at odds with his profane caricature of politics, and this led the DePaul professor to take an antagonistic stance toward European efforts to produce a negotiated peace in Bosnia, going so far as to frame the agenda of the 780 Commission as being in competition with EU-UN peace efforts led by Lord Owen. Bassiouni’s zealous approach spurred British and French diplomats at the UN to privately characterize Bassiouni as a “threat to the peace process”, “a fanatic who had too much information.” Yet, Bassiouni’s management of the 780 Commission also revealed its own problems regarding conflict of interest, Bassiouni’s willingness to seek out private money from American foundations to finance his own ambitions for the Commission meant that the US nominee not only enabled private groups to “buy justice” but also revealed his lack of concern for the Commission’s work moving beyond UN control.

It is no surprise therefore that when UN Secretary General Boutros-Ghali, with the support of then US Ambassador Madeleine Albright, formally nominated Bassiouni for the position of Prosecutor that the British and French greeted him with a veto. The US, responding in kind, vetoed out the British nominee, Scottish Attorney-General John Duncan Lowe, much to the private applause of Islamic and non-aligned council members—causing the level of diplomatic angst to rise. The next nominee, the former Indian Attorney-General, Soli

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42 Scharf, Balkan Justice, 75.
43 “There are certainly some members of the Security Council that are not too enthusiastic about have an aggressive prosecutor who is likely to disrupt political processes. They prefer a tame or manageable prosecutor to suit their political agenda. I’m obviously not one of those persons.” Cherif Bassiouni as quoted by Bass, Stay the Hand of Vengeance, 217-218.
45 Scharf, Balkan Justice, 76.
46 Bassiouni solicited donations in the amount of $1.4 million USD jointly from the Soros Foundation, Open Society Fund and John D. and Catherine T. MacArthur Foundation. See Bass, Stay the Hand of Vengeance, 211; Scharf, Balkan Justice, 47; and Hazan, Justice in a Time of War, 29.
47 “...[P]rofessor Bassioni’s personal contributions had a ripple effect far beyond what the creators of the 780 Commission had envisioned.” See: Scharf, ‘Cherif Bassiouni and the 780 Commission’, 11.
48 Hazan, Justice in a Time of War, 29
49 Scharf, Balkan Justice, 76.
Henhangir Soreabjee, was opposed by rival Pakistan. Subsequently, Boutros-Ghali named Venezuelan Attorney-General, Ramon Escovar, who was met—too much relief—with no objections, to seemingly resolve the stand-off; only to have Escovar later resign after recruiting Australian Graham Blewitt as his Deputy Prosecutor. Tensions then jumped to fever pitch when Russia rejected former US Attorney-General, Charles Ruff, and, subsequently, Canadian Christopher Amerasinghe, “recalling a deal not to name anyone from a NATO country for major international Bosnia jobs…”

After 15 months of public wrangling, the nascent ICTY remained stuck at its inception, the essential position of Chief Prosecutor left vacant due to a serious dispute between Security Council members over the exact and desired role of the ICTY. This strategic interplay however was not as fleeting as some legalists have suggested but rather inherent, as it reflected the political reality of a Tribunal that was constituted, as a ‘rule of law’ institution, by strategic influence. The delay over the first Chief Prosecutor was not an aberration or ill-tempered bonfire but instead a visible reflection of the strategic politics which had reared the ICTY in the first place.

The only way the Tribunal could get past the Prosecutorial deadlock therefore was to embrace its strategic essence and court—rather than patronize—the strategic players (e.g. Britain, France and Russia) which now obstructed its operational continuance. The strategic slight-of-hand required a distinct change in tactics, one which newly appointed ICTY President, Antonio Cassese, came across by chance or, more accurately stated, through the happenstance of a well-placed ‘French connection’, French national counsel Roger Errera. As Cassese recalls:

“He said to me, ‘Listen, my dear friend, you look sad.’ I answered, ‘I am very concerned. There is no light at the end of the tunnel for my tribunal.’ Errera asked me, ‘Do you know Goldstone?’ I answered, ‘Who’s he?’ ‘Goldstone, the South African, the chairman of the Commission on Violence [Commission of Inquiry regarding the Prevention of Public Violence and Intimidation] committed by the police under apartheid, a really good guy.’ ‘He’s Jewish?’ ‘Listen, we don’t ask that question.’ ‘But no, if he is Jewish, that goes down well. Everyone suspects everyone in the former Yugoslavia. So it’s better that he is neither Catholic, nor Orthodox, nor Muslim.’ […]

I called Goldstone myself. I understood very quickly that he was a very intelligent man. He seemed interested. I sent him a fax with a proposal, the conditions… Goldstone told me that he would soon be nominated to the [South African] Constitutional Court, but that it would be possible, maybe… Boutros called [President Nelson] Mandela, who gave him his consent on one confidential condition: ‘Goldstone will work for you for two years. After that he will rejoin the South African supreme court.’”

Despite concerns over his prosecutorial qualifications, Goldstone was a resounding success, driven foremost by political conveniences. First, Goldstone was “a liberal white South African judge—a Westerner from a non-Western country,” which worked to persuade—for different reasons—the British, Russian and Chinese diplomats. Second, his international appointment crowned a decades-long human rights struggle for a post-apartheid South Africa; which Mandela seized upon for positive publicity, encouraging Goldstone to take this “…first offer of a major international position after South Africa ceased to be a pariah.” Third, Ambassador Albright considered the symbolism of a white, anti-apartheid judge leading the ICTY Prosecution an irresistible stroke of public legitimacy. Fourth and finally, the French muted their concerns over Goldstone’s lack of francophone credentials, as Errera had effectively nominated the South African.

Thus, on July 8, 1994, at the formal suggestion of Tribunal President Cassese, the Security Council approved Richard Goldstone’s appointment as the ICTY’s first Chief Prosecutor by a vote of 15-0. Goldstone's selection was hailed a brilliant achievement which skillfully navigated strategic interests and preserved judicial integrity by elevating a judge, hallowed for

52 Interview with Antonio Cassese by Pierre Hazan, as cited in Hazan, *Justice in a Time of War*, 54-55.
53 Michael Scharf notes that Goldstone had received mixed reviews with respect to his handling of the South African judicial commission on Apartheid abuses: “Only one trial resulted from the three-year probe, and critics said Goldstone could have achieved more. In addition, Goldstone was trained in South Africa’s version of common law, and…a prosecutor more familiar with civil law was needed since the international tribunal would be employing a combination of the two.” See Scharf, *Balkan Justice*, 78-79. Moreover, one newspaper commentary proclaimed that: Goldstone’s principle qualification is the fact that he doesn’t come from a Western country.” See Stephen Handelman, ‘Point of War Crimes Tribunal Is To Try Persons, Not Nationalities,’ *Toronto Star*, July 10, 1994, F-9.
54 Mandel, *How America Gets Away with Murder*, 130.
55 Ambassador Albright described Goldstone as “a seasoned barrister and judge who, at great personal risk, insisted that the truth be known about cruel abuses committed under apartheid in South Africa.” See Scharf, *Balkan Justice*, 79.
his liberal credentials, from a country with “hardly any interests in the Balkans.”  It was a tantalizing profile that quelled the competing machinations of Security Council members and ostensibly met the imperative that ‘justice must be seen to be done.’ It seemed a rosy ending to what many had proclaimed “a ghastly nightmare.” Cassese even announced the news to his fellow ICTY judges using the Vatican salutation proclaiming a new pope: “Habemus Papem!” But was the excitement not overstated? Was the herald of altruism not somewhat misleading? Were the strategic thorns merely hidden from public view?

2.1.2 ‘Pope Goldstone’ and his Legacy of Penal Pragmatism

As the saga raged over the Chief Prosecutor’s selection, seizing media attention in both the United States and Western Europe, a key development at the ICTY Prosecutor’s Office managed to slip through the headlines. The Prosecutor’s office, while formally headless was nonetheless operational, owing to the appointment of Graham Blewitt as Deputy Prosecutor in February 1994. The bureaucratic vacuum created by the Prosecutor controversy allowed Blewitt to run and build the Prosecutor’s Office within his authority as Office Deputy. On June 13, 1994, Blewitt, acting as Interim Prosecutor and supported by ICTY President Cassese, made the fateful decision to accept twenty-two US government secondments as part of his prosecution staff. The secondments were no ordinary placements; they were a delegation of Pentagon military analysts, CIA intelligence specialists and State Department lawyers all placed at the disposal of the Tribunal for an initial period of two years and all paid for by Washington. The Americans kicked-in also a supply of new computers worth $3 million USD. The task assigned to the US personnel: build the core capacity of the Office before the new Chief Prosecutor was selected and installed.

Blewitt justified the US secondments on the grounds of financial necessity, arguing that the Office’s meager UN budget only allowed him to hire a staff, by June 1994, of eleven. Further, the Americans placements all signed fidelity agreements which committed them to

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58 Scharf, *Balkan Justice*, 78.  
respect the confidentiality of the ICTY and “not to obey a hierarchy external to that of the tribunal.” Yet, the secondments were undeniably career US military, intelligence and foreign service operatives, which remained on Washington’s payroll. Blewitt’s US partnership was an eyesore to European political and military leaders; who felt that the secondments had not only tarnished the independence of the Tribunal but had given weight to the suspicion of US influence over it. European foreign offices reacted with remarkable cynicism and critical candour: privately condemning the massive injection of American personnel into the Prosecutor’s Office as yet another seizure of the ICTY project; going even so far as to describe the undertaking as a US “coup” or, worse, a ‘CIA infiltration’.63

Goldstone’s venerated appointment, however, was expected to clear European doubts over US influence. Yet, nothing of the sort happened; upon his arrival, Goldstone welcomed the influx of American personnel and money and, further, set out to cement his Office’s relationship with the United States. The prospect that the Prosecutor “might wish to reorganize the Office” generated more heat for Blewitt than it did light for Goldstone, as the latter expressed his gratitude for the American intervention: “Nothing was further from my mind. […] The Americans were performing essential services that had enabled the initial investigations to begin even before my arrival.”64 In fact, the lack of ‘arms-length’ dealings by Judge Goldstone’s characterized his dealings with the Americans, as the Prosecutor later and frankly attested:

“…I was warmly welcomed by Madeleine Albright, who had played the leading role in having the tribunal established… She appointed one of her senior advisers, David Scheffer, to take special responsibility for moving the work of the tribunal forward. David became a friend and adviser to me, especially with regard to my contacts with the various branches of the United States administration. His commitment to the work of both tribunals was deep and supportive.”65

What more, the extent of Goldstone’s ‘special’ relationship knew no backroom, and this ironically added to the influence crisis which Goldstone’s appointment was suppose to

63 Hazan, Justice in a Time of War, 53.
64 Ibid.
66 Ibid., 78.
resolve. Goldstone’s public and “warm friendship” with Conrad Harper, State Department Legal Adviser, added fuel to this diplomatic image problem; as Harper supplied the ICTY with evidence from CNN and facilitated a ‘private’ contribution from George Soros, presented to Goldstone and three other ICTY judges in person at Soros’ Manhattan residence.\(^{67}\) The complaints over Goldstone’s association with the US government and political philanthropy prompted a direct intervention from the UN Secretary General:

> “Boutros-Ghali also informed me that some of the permanent representatives at the United Nations had complained that I spent too much time with the Americans, and he agreed with these sentiments… My attitude made it quite clear to the Secretary-General that I did not intend to change my policy.”\(^{68}\)

Yet, the admonition was just the tip of the iceberg, as the revolt over Goldstone’s collusive disposition spread to the ranks of the ‘true believers’ themselves, those which had championed the altruism of the Tribunal and once heralded Goldstone as its ‘Pope’. Piercing criticisms came from none other than, the outspoken, Tribunal President Cassese and former 780 Commission Chair, Cherif Bassiouni: both characterized Goldstone as a disappointing ‘pragmatist’ and ‘public relations show’,\(^{69}\) alleging that his fraternizing with the Americans, and later Europeans, only served to subordinate ‘justice’ and ‘instrumentalize’ the Tribunal.\(^{70}\) Cassese and Bassiouni based their claim on more than angry rhetoric; they actually had a point when considering Goldstone’s indictment record during his two-year contract, which expired in the summer of 1996: Goldstone had indicted mostly secondary and tertiary figures,\(^{71}\) leaving uncharged high-ranking officials ‘named’ on Eagleburger’s list and paramilitary leaders, such as Vojislav Seselj or Zeljko Raznijatovic “Arkan”, which had gained notoriety in the Western press.\(^{72}\)

However Goldstone remained steadfast in his position that “a bottom-up strategy” had to be pursued, which targeted the “big political fish” through working up the chain of command

\(^{68}\) Goldstone, *For Humanity*, 100.
\(^{69}\) Hazan, *Justice in a Time of War*, 57-60.
\(^{70}\) Ibid., 62-63.
and eventually reaching the summit; a proven and *bona fide* legal strategy used against organized crime, but which also coincided with diplomatic efforts that sought to make the ICTY leverage for a negotiated peace in Bosnia. Goldstone’s approach, thus, was not as legally pure as purported, it was also politically instinctive; something which earned Goldstone the reputation of being a ‘political animal’. In fact, Goldstone’s penchant for ‘penal pragmatism’ became the working order of the Prosecutor’s Office, and this earned the ire of ‘true believers’ such as Cassese and Bassiouni. Yet, this political-legal synergy became the operational signature of the ICTY in the years to come and the legacy of Goldstone, winning praise from previously skeptical ‘peace mediators’, such Lord David Owen, the EU representative, which applauded the Tribunal’s imparted sense of ‘strategic’ savvy:

“When I met Goldstone or the people close to the Tribunal, I did not recommend against indicting Milosevic or the others. [Such a recommendation] would not have been wise, since I did not have a word to say about whether he must or must not issue an indictment. On the other hand, I explained to them the detail of the negotiations, showed him the difficulties [we faced]. The conclusion, that they could easily draw, was that it would not be very wise to indict the heads of state if we wanted to arrive at a negotiated peace between them and with them. I believe that Goldstone and [his successor] Arbour had this pragmatic attitude, this judgment of good sense, and the tribunal only indicted Milosevic when the prosecutor understood that he was no longer an obstacle, politically. Because after Kosovo there were no more means to negotiate with Milosevic.”

2.2 Patrons Justice? The Kosovo War and its Legal Contradictions

The conclusion of Goldstone’s mandate brought with it a new Prosecutor, Canadian judge Louise Arbour, and, sometime later, a civil war in Kosovo, followed by an international conflict between NATO and Serbia. As indicated, stewardship at the Prosecutor’s Office revealed remarkable continuity despite the change of face. The constancy was attributable to the fact that Goldstone had recommended Arbour to Madeleine Albright as his successor. Goldstone believed Arbour was the right pick as her “sensibilities were somehow pitched in

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75 North Atlantic Treaty Organization.
76 Serbia, together with Montenegro, formed the two constituent republics of the then internationally recognized state, the ‘Federal Republic of Yugoslavia (FRY)’.
77 The intimate nature of Goldstone’s relationship with Albright, permitted him to refer to her as: “the mother of all the tribunals.” See Bass, *Stay the Hand of Vengeance*, 262.
the same key”. Albright likely found appeal in Arbour due to her lack of “clear-cut ideology” and “no history of [judicial] activism”. This made Arbour’s candidacy sellable to the remaining Security Council members: presenting her as an energetic, female, French-Canadian judge with a moderate legal reputation. Arbour’s profile offered no controversial frills, and thus her nomination made no diplomatic waves. It was a bland and deceiving induction for a Prosecutorial tenure that made legal history and provoked such political and normative controversy.

2.2.1 A New Prosecutor, A New War, A New Opportunity

Arbour assumed the role of ICTY Prosecutor, and Richard Goldstone’s successor, on October 1, 1996; nearly one year after Bosnia’s guns were silenced by the Dayton Peace Accords. When she assumed office, Arbour encountered a prosecutorial staff overwhelmed with futility and a Tribunal widely perceived as a spent force following Bosnia’s concluded peace agreement. A sense of foreboding gripped the office and the term ‘marginalization’ best described the ICTY’s standing in Post-Dayton international politics: few countries were willing to finance the work of the Tribunal; even less were prepared to arrest those which had been indicted by the Prosecutor; and far fewer thought the ICTY had a meaningful future.

The arrival of the Kosovo war, however, forcefully reversed that trend. In fact, the conflict was a boon for the Tribunal, which had been struggling to assert its relevance despite five years of existence. Arbour wasted little time in getting the ICTY straight into the action. Over the course of 1997, tensions between ethnic Albanians and Serb authorities in the province came to boil, spurred, on the one hand, by the Milosevic regime’s repressive measures and, on the other, by a flood of arms looted from arsenals during Albania’s

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80 Off, *The Lion, the Fox and the Eagle*, 289.
economic and political implosion in 1997. Sometime in late 1997, an ethnic Albanian insurgency, self-proclaimed the Kosovo Liberation Army (KLA), appeared, which by the summer of 1998 had seized control of nearly 40 per cent of Kosovo.

The response of the Milosevic regime was, true to its prior form, harsh and public. On February 28, 1998, four Serbian police officers were killed by the KLA while on patrol in the Drenica valley; this prompted a reprisal operation which, in three days, killed 24 ethnic Albanians said to be members of the KLA. The real drama came however in early March, when Serbian police went for the jugular and attempted to arrest Adem Jashari, leader of KLA forces in the Drenica Valley. What ensued was a fierce gun battle which led to the deaths of Jashari and 52 other members of his clan. The bloody fire-fight drew international media attention, raising Kosovo to the forefront of diplomatic concern.

On March 10, 1998, Louise Arbour announced that the ICTY had assumed formal jurisdiction over Kosovo, affirming that her office was “gathering information and evidence in relation to the Kosovo incidents.” Arbour’s announcement was immediately followed by complementary initiatives from the State Department. The next day, March 11, State Department spokesman James Rubin emphasized that ‘ethnic cleansing’ was underway in Kosovo and that Milosevic was responsible. On March 12, Secretary of State Madeleine Albright announced a $1 million USD donation to the Prosecutor’s Office to support ICTY investigators in Kosovo. Finally, some four days later, former American diplomat Morton Abramowitz told the Wall Street Journal that Milosevic’s indictment was the best way to punish the Yugoslav President personally and “get his attention better than anything short of a military strike.”

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85 Crampton, The Balkans Since the Second World War, 272.
86 Subsequent clashes between Serbian authorities and KLA guerrillas, in 1998, produced an estimated 300,000 internal displaced persons, and some 2,000 dead on both sides combined. See: Ibid., 272.
88 Hazan, Justice in a Time of War, 113.
The synchronicity between the Prosecutor’s Office and State Department on Kosovo continued through the fall of 1998 and into the fateful winter of 1999. On September 9, Arbour issued a public letter to then Tribunal President, and former US federal judge, Gabrielle Kirk McDonald, alleging that the Serbian regime had committed “war crimes and crimes against humanity” in Kosovo, and this obligated her to “launch an investigation” on behalf of “the international community.” Subsequently, in early October 1998, US envoy Richard Holbrooke met with Yugoslav President Milosevic to threaten NATO air strikes in support of UN Security Council Resolution 1199. Holbrooke’s diplomatic hard-line against Serbia received vocal buttress from the ICTY, both from Prosecutor Arbour and, most notably, Tribunal President McDonald, who gave an impassioned speech to the Security Council on October 2; an address atypical for a sitting member of the judiciary:

“No state should be permitted to act as if it is ‘above the law’ […] Therefore, it is imperative that the F.R.Y. [Federal Republic of Yugoslavia] be brought into the fold of nations who believe in world peace and respect the authority of the Security Council.

There comes a time when such defiance cannot be ignored. That time is now. The world community, embodied by the United Nations, must not allow this territory to revert to the catastrophe we watched begin and escalate in the early 1990s. We must learn from the lessons of the past, lest they be repeated.

[…] [T]he threat posed by the non-compliance of the F.R.Y. must be dealt with once and for all. The obstructionist actions of the F.R.Y. that taint the institution which you created with the expectation that peace, security and reconciliation would be achieved in the former Yugoslavia from the ashes of death and destruction must no longer be tolerated.”

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90 A précis of Judge McDonald’s career is set out by Michael Scharf, who establishes that McDonald was recruited to the ICTY bench by the Goldstone’s “warm” friend and State Department legal adviser, Conrad Harper. See Scharf, Balkan Justice, 65-66.


On October 13, 1998, Milosevic and Holbrooke agreed to a ceasefire which limited the number of Serbian forces in Kosovo and sent 2,000 OSCE observers to the province. But the truce was short-lived. US intelligence reported “that the Kosovo rebels intended to draw NATO into its fight...by provoking Serbian forces into further atrocities.” By January 1999, Serbian forces were alleged to have fulfilled their part of the prophesy during a counter-strike against a KLA stronghold. On January 15, in the village of Racak, the bodies of forty-five ethnic Albanians were discovered by OSCE mission chief and career State Department official, William Walker. In the ensuing days, Prosecutor Arbour lent credence to Walker's label of “a massacre” and “a crime against humanity” with her statements issued from, first, The Hague and, then, Skopje, FYROM:

“[January 16] I have launched an investigation into the most recent massacre in Kosovo. [...] I have spoken to Ambassador Walker and sought his assistance. [...] In light of the information publicly available, the recent massacre of civilians falls squarely within the mandate of the ICTY, and the Federal Republic of Yugoslavia is required to grant access to investigators from my office. [...]”

“[January 20] [...] In the course of the last 10 months the Security Council has called upon my Office several times to investigate crimes committed there that have shocked the conscience of the world. In doing so, the international community has raised expectations among those who are suffering in Kosovo that justice would be done. To the families of the victims of the massacre at Racak, and other atrocities committed in the previous months, I express my sincere regret that we are not able to bring, at this time, the comfort of truth and the expectation of justice.”

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95 Organization for Security and Cooperation in Europe.
97 Walker emphasized his credentials as “a serving career Foreign Service Officer” when introduced as the head of the OSCE observer mission in January 1999, see <www.state.gov/www/policy_remarks/1999/990108_walker_kosovo.html> (March 19, 2008). For a concise review of Walker’s diplomatic career in Central America during the 1980s, see Chomsky, New Military Humanism, 41-42.
98 Hazan, Justice in a Time of War, 119-122.
99 Former Yugoslav Republic of Macedonia.
Walker’s shattering allegations combined with Arbour’s supporting comments became the discursive spark and justification for subsequent Western military intervention. At the insistence of Secretary Albright, a ‘last-chance’ peace conference was convened in Rambouillet, France in February 1999, which according to State Department spokesperson James Rubin was less peace effort and more diplomacy “to build resolve at NATO to use force.” The Rambouillet ‘process’ proved truly controversial, as it reached political agreement but later failed over the details of the ‘implementation chapters’ vis-à-vis “the modalities of the invited international civilian and military presence in Kosovo.” Again, the ICTY demonstrated a public hand at this diplomatic juncture, as shown by the open letter of Tribunal President McDonald to the French and British foreign ministers, by insisting that no agreement should be made with Federal Republic of Yugoslavia in the absence of ICTY “justice”:

“[…] The repeated refusal of the Government of the F.R.Y. to obey the will of the international community by recognizing the competence of the Tribunal and facilitating its activities therefore renders it imperative that the agreement’s provisions concerning the Tribunal make explicit reference to its legal right to access to Kosovo and to conduct investigative activities there.

…

[…] I fear, therefore, that if there is not express reference to the matters I have mentioned, it could be well construed that, by omission, there is a tacit agreement that the Tribunal may be ignored. I urge you to use your influence as co-chairs of the peace talks not to allow this to occur.

It is axiomatic that there can be no peace without justice. […]”

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102 President Clinton provided the following justification for the impending NATO war in his address televised across the globe: “[…] We should remember what happened in the village of Racak back in January—innocent men, women, and children taken from their homes to a gully, forced to kneel in the dirt, sprayed with gunfire, not because of anything they had done, but because of who they were. […]” See: ‘Clinton Voice Anger and Compassion at Serbia Intransigence on Kosovo’, New York Times, 20 March 1999

103 Ignatieff, Virtual War, 56.

104 Two NATO demands, in particular, were seen as having collapsed the talks. First, that a referendum on sovereignty would be held in Kosovo after three years. Second, that NATO, rather than the UN, would be placed in control of Kosovo and given “free and unrestricted passage and unimpeded access” throughout the territory and facilities of the Federal Republic of Yugoslavia. See: ‘Contact Group Statement—Rambouillet, 23 February 1999’, Office of the High Representative Press Release, 23 February 1999

105 ‘Letter from President McDonald to Foreign Ministers Vedrine and Cook concerning the Kosovo Negotiations at Rambouillet, France’, ICTY Press Release JL/PU/383-E, The Hague, 23 February 1999
Justice McDonald got, more or less, what she demanded, albeit via a different route. Despite a NATO ultimatum that its draft of the Rambouillet agreement had to be accepted ‘as a whole’, which contained a controversial military annex that gave NATO “free and unrestricted passage” throughout Yugoslavia, Milosevic refused to concede his signature. Thus, with “no other recourse”, on March 24, 1999 NATO began, without Security Council authorization, its bombing campaign of Yugoslavia. The aerial war dragged on for 78-days, and only ended courtesy of diplomatic efforts by former Russian Prime Minister Viktor Chernomyrdin and former Finnish President Martti Ahtisaari. Paradoxically, the NATO intervention triggered a massive refugee crisis, inflicted civilian causalities and prompted a crisis of unity within NATO’s own ranks.

Nevertheless, the incursion was hailed a celebratory event where ‘international justice’ and the ‘rule of law’ finally seized history. On May 27, Prosecutor Arbour unveiled her sealed indictment of Yugoslav President Slobodan Milosevic, and four other high-ranking Serbian officials, for crimes against humanity in Kosovo. As Arbour pointed out, it was an unprecedented indictment of a sitting head of state, made on the basis of command responsibility and issued “during an on-going armed conflict.”

Furthermore, the indictment was made with the distinct and close assistance of NATO member states and intelligence operatives, then at war with Milosevic.

2.2.3 Pacta Sunt Servanda

Yet, this brings us to perhaps the historical and normative aspect of the ICTY’s behaviour which is curiously under-examined and under-discussed: the collusive and extraordinary comportment of the Tribunal vis-à-vis NATO after March 24. How was this notable and thus questionable? For starters, the ICTY was a Security Council organ constituted under Chapter VII of the UN Charter with a specific mandate of prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.”

NATO’s military intervention, by contrast, was done in

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contravention of the same UN Charter—the ICTY’s constitutive basis—and had, as of April 1999, conducted bombing raids of non-military or civilian targets which had drawn allegations of legal impropriety.\footnote{By mid-April, two NATO bombing raids had drawn particular attention and scrutiny. One involved the bombing of a civilian passenger train on April 12 (Grdelica bridge), killing 17 passengers, ranging in age from 6-65. The second, and more dramatic incident, occurred on April 14, where NATO aircraft attacked a refugee convoy on the Djakovica-Decane road, killing 73 civilians.}

The combined NATO actions, a \textit{de facto} ‘breach of the peace’ under Chapter VII and a bombing campaign that raised the prospect of humanitarian violations, should have drawn the guard and scrutiny of the ICTY as a UN-appointed guardian of international humanitarian law.

However, the public stances taken by the Tribunal, after the commencement of the bombing, were remarkable in that they truncated this obligation and compromised the perceived impartiality and neutrality of the court. For instance, in the 12 press releases issued by the ICTY during the course of the conflict, the public statements issued by the Tribunal were remarkably selective in character. The Tribunal did, pursuant to its mandate, issue direct and sharp warnings to President Milosevic and his senior officers regarding their obligations under international law; yet the Tribunal omitted to issue meaningful warnings to NATO commanders and leaders, who were involved in an aerial bombardment without UN sanction and outside international law.

In addition, the course of the war brought public appearances and joint initiatives between Tribunal and NATO officials which were not only imprudent, but actively fed the perception that the ICTY was no longer working as a UN judicial body. For instance, on April 5, Tribunal President Gabrielle McDonald gave an honorary address to the American Bar Association which praised the leadership of Madeleine Albright, a NATO leader and architect of the intervention, even citing the words of the Secretary of State as “eloquent.”\footnote{Remarks at the United States Supreme Court, Washington, D.C., by Her Excellency Judge Gabrielle Kirk McDonald, President, International Criminal Tribunal for the former Yugoslavia, On the Occasion of Receiving the ABA CEELI Leadership Award’, \textit{ICTY Press Release}, 5 April 1999 <www.un.org/icty/pressreal/SPE990405.htm> (March 19, 2008).}

Further, on April 19, the ICTY received and accepted from the State Department a public donation of $500 000 USD.\footnote{‘The United States Pledge USD 500,000 to Tribunal’s Outreach Project’, \textit{ICTY Press Release} JL/PIU/397-E, The Hague, 19 April 1999 <www.un.org/icty/pressreal/p397-e.htm> (March 18, 2008).} Third, on April 28, the Prosecutor’s Office announced the
arrival, from Washington, of new PR adviser and spokesman, Paul Risley.\textsuperscript{111} Finally, on May 7, when confronted with public calls that the ICTY investigate possible NATO violations,\textsuperscript{112} the tone and language of the Arbour’s reply betrayed any meaningful sense of Prosecutorial distance and normative “universality”:

“[…] …I am obviously not commenting on any allegations of violations of international humanitarian law supposedly perpetrated by nationals of NATO countries. I accept the assurances given by NATO leaders that they intend to conduct their operations in the Federal Republic of Yugoslavia in full compliance with international humanitarian law. […]”\textsuperscript{113}

Arbour’s comments were further not aided by subsequent rebuke from NATO spokesperson Jamie Shea when asked, by a reporter, whether NATO forces would be subject to an ICTY investigation and thus equal justice:

“[…] …I think we have to distinguish between the theoretical and the practical. I believe that when Justice Arbour starts her investigation, she will because we [NATO] will allow her to…. If her court, as we want, is to be allowed access, it will be because of NATO…. NATO countries are those that have provided the finance to set up the Tribunal…. I am certain that when Justice Arbour goes to Kosovo and looks at the facts she will be indicting people of Yugoslav nationality and I don’t anticipate any others at this stage.”\textsuperscript{114}

In the end, how do we construe the actions of the ICTY during the Kosovo war? Did the court truly seize history? Or, was that rhetoric masking the strategic politics behind ‘international justice’? If one believes official statements as fact, the former contention is likely to take the status of a normative fortress. Yet, if one applies a more critical eye to events, statements and actions, to discern between actual and stated meanings, the latter caricature suggests piercing contradictions which bring into doubt the hailed achievement of the ICTY as a self-defined ‘rule of law’ institution. To the surprise of many, this was the


\textsuperscript{112} By May 7, civilian deaths caused by NATO bombs had grown in both actual number and public visibility. Notable incidents included: the bombing of Serbian State Television in Belgrade on April 23, killing 16; the bombing of a residential neighbourhood in Surdulica on April 27, killing 11; the attack on a civilian bus near Luzane on May 1, killing 39; a cluster bomb attack on the Nis marketplace on May 7, killing 14; and, on the same day, the bombing of the Chinese Embassy in Belgrade, killing 3.


conclusion of long-time ICTY champion Michael Scharf, as critically expressed in his October 3, 1999 op-ed piece for the *Washington Post*:

“From the beginning, the Security Council’s motives in creating the tribunal were questionable. During the negotiations to establish the court—talks in which I participated on behalf of the U.S. government—it became clear that several of the Security Council’s permanent members considered the tribunal a potential impediment to a negotiated peace settlement. […]

[…] America’s chief Balkans negotiator at the time, Richard Holbrooke, has acknowledged that the Tribunal was widely perceived within the government as little more than a public relations device and as a potentially useful policy tool. […] Indictments also would serve to isolate offending leaders diplomatically, strengthen the hand of their domestic rivals and fortify the international political will to employ economic sanctions or use force. Indeed, while the United States and Britain initially thought an indictment of Milosevic might interfere with the prospects of peace, it later became a useful tool in their efforts to demonize the Serbian leader and maintain public support for NATO’s bombing campaign against Serbia, which was still underway when the indictment was handed down.”

3. The Normative Contradictions of an *Ad Hoc* Ideal: Implications for Compliance Research

A key and formative assumption behind structuralist interpretations of compliance politics is that norms are (relatively) *self-evident* and *stable*. The aim of this paper has been to take a more grounded and case-centred look at that crowning postulate, to expose the analytical and empirical ‘gap’ created when such an axiomatic stance is adopted. The problem of ICTY (non)compliance across the states of the ex-Yugoslavia aptly prompts such reflection as its overarching norm, ‘the rule of law’, provides a rhetorical zeal that is perhaps unmatched in contemporary political speech and debate. Simply put, it is hard for anyone to credibly and persuasively contest the legal and normative imperative that domestic and international politics should be subject to the ‘rule of law’. Yet, the problem with such an ideal, as this paper has attempted to illustrate, is not its rhetorical salience but rather how that norm is actually specified and politically enacted at both its point of inception and later application. In sum, a norm, such as ‘the rule of law’ or ‘justice’, simultaneously means everything and nothing in absolute terms. Hence, how the norm of ‘justice’ is contextualized

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over time, within what particular circumstances and with what interpretation, becomes central for legal and political meaning.

That is why this paper engaged a narrative approach for study of normativity in the context of the ICTY, which problematizes the central and starting axiom of conventional linear theorizing: the ubiquity of normative prescription. The presumption that compliance norms are somehow self-evident and ‘structuring’, I argue, effaces the politics which constitutes the meaning and substance of prescribed norms in particular circumstances. In this way, uncritical adherence to the linear and liberal model of ‘norm diffusion’ effectively truncates our perception and analysis of compliance politics via a stylized assertion that politics begins after a norm is miraculously prescribed; to refer to metaphor, it is a portrayal of normative prescription as a kind of Immaculate Conception.

The empirical work of this paper however has attempted to challenge such theoretical presumption by revealing, in the case of the ICTY, how norms (e.g. the rule of law, justice) does not precede politics but rather emerge from and are constituted by politics, meaning that politics are present before, during and after the initial formulation of a norm as actors continually endeavour to shape stated and practical meanings. Thus, to characterize a norm as stable and straightforward from the word ‘go’ is to effectively mask its constructed and malleable quality and, what is more, to deny an investigation into the politics which substantiates its meaning across time and in specific contexts. In other words, the parsimony afforded by structuralist theory performs a disservice in that it effaces the constitutive and conceptual politics inherent in so-called ‘norm diffusion’ processes; blinding us to the crucial politics of substance and meaning that inform compliance norms from the outset.

Hence, the object here has been to empirically problematize the assumption that ‘the rule of law’ is a relatively straightforward and self-evident norm—ready for “export”, to use the term of one prominent liberal scholar. This paper sought to do so by looking at the ICTY in two related ways: first, as a constructed normative ideal and, second, as a contested political project. In the former instance, we examined the ‘making’ of the ICTY as a strategic enterprise. Here, the inquiry was historical and the object was to challenge the notion that the Tribunal’s genesis enacted a sweeping ‘judicial’ imperative for international politics.
Closer political scrutiny revealed that the Tribunal’s inception was in fact marked by contingent and expedient diplomacy which denied normative consensus and ubiquity. In fact, competing actors struggled openly and readily over the details of the ad hoc court’s actual mission and operation. Thus, while rhetorically inspiring, the ICTY’s initial constitution in fact failed to exhaust contention over its operational purpose and hence lacked the self-evident, stable and altruistic quality presumed of norms by conventional ‘norm diffusion’ theorizing.

This lack of normative ubiquity and completeness from the ICTY’s outset, I argue, has profound implications when relating the ICTY’s own ‘compliance’ mission to the framework of conventional ‘norm diffusion’ theory. In particular, it points to the constrained insight of the linear model when applied to contested normative projects such as the ICTY. The conjoined assumptions of linearity and ubiquity, I claim, ride roughshod over the central conundrum of ICTY justice and compliance: the struggle over what ‘justice’ actually means in concrete instances and over the course of time and action. For mainstream theoreticians and practitioners, this emphasis might seem curious as ‘modellised’ analyses hardly address the substance of actual compliance norms; instead they bracket the meaning of norms as ‘exogenous’ and subsequently define the locus of compliance politics as a ‘mechanical’ matter of linear implementation. Flowing from this, neo-liberal language and axioms are cast to fit a ‘sticks and carrots’ narrative of compliance politics.

Yet, as has been shown, this mechanical caricature of compliance politics becomes profoundly misleading as its emphasis on compliance as a stylized ‘bargaining process’ obfuscates the problem of normative meaning which is at the conceptual core of ‘contested’ cases such ICTY ‘compliance’. It follows therefore that more conceptual and fine-grained studies of contested projects, such as the ICTY, are required, which do not aim to consolidate an a priori and ex ante norm definition but rather to trace the historical development of a ‘contestable’ norm from its beginnings through the course of compliance experience and practice. In this way, the ultimate call of this paper is for an analytical study of normative compliance where the empirical emphasis is historically directed and explores the contingent politics of norm conceptualization over the politico-constitutional life of a compliance project.