Resolution 977 the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania.[8] Initial suggestions for expanding ICTY jurisdiction to incorporate Rwandan crimes failed because a number of States feared this would lead to a permanent international criminal court. Instead, the Council expedited matters further by establishing the ICTR without demanding a prior report from the Secretary General as in the case of the ICTY.[9] Both institutions are, nonetheless, interrelated not only because they are subsidiary organs of the Security Council, but also because they share a common Appeals Chamber[10] and prosecutor.[11] The intention behind these common institutions was the development of a balanced and coherent jurisprudence, which has evidently been achieved. It should be noted that although the ruling Rwandan Government that overthrew the Hutu extremists responsible for the genocide in that country had, itself, proposed the creation of the ICTR, it finally voted against Resolution 955 because, *inter alia*, it had envisaged both control over the Tribunal as well as wide temporal jurisdiction, well before the January 1994 boundary fixed by the Security Council.[12]

In 1995 the Appeals Chamber of the ICTY was seized by an appeal against a Trial Chamber decision regarding, amongst other issues, the legality of its establishment by the Security Council and its authority, as a subsidiary organ thereto, vis-à-vis the Council to determine the legality of its mandate. The Appeals Chamber, presided over by Antonio Cassese, in a cornerstone decision for the development of international law, ruled that in the case of the ICTY the Security Council intended to establish not just any subsidiary organ, but a special organ with judicial functions; a tribunal.[13] It further affirmed that international law at the time – as indeed now – dictated that each tribunal be set up as a self-contained system whose jurisdictional powers may be limited by its constitutive instrument, although this does not mean that the judicial character of these tribunals may be jeopardised.[14] More importantly, the Appeals Chamber expressly confirmed the inherent or incidental jurisdiction of any judicial body to determine its own competence, whether this is provided for in its constitutive instrument or not (that is, the so-called doctrine of 'Kompetenz-Kompetenz').[15]

8 SC Res 977 (22 Feb 1995).

9 P Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', 90 *AJIL* (1996), 501, p 502.

10 ICTR Statute, Art 12(2).

11 Ibid, Art 15(3).

12 Op cit, Akhavan, note 9, pp 504–05.

13 *Prosecutor v Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadic* Appeals Jurisdiction Decision) (2 Oct 1995), para 15.

14 Ibid, para 11.

15 Ibid, para 18. Reference was made to Cordova J's dissenting opinion in the International Court of Justice (ICJ)'s *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO* (1956) ICJ Reports 77, p 163 (dissenting opinion of Judge Cordova).

Before we proceed to examine the substantive provisions and rich jurisprudence that has emanated from both Tribunals, it is useful to investigate the possible interpretative means by which to construe their Statutes. Although these are not *stricto sensu* international agreements, it is reasonable to subject them to the rules of interpretation available for treaties,[16] since they constitute legal instruments with the attributes of international agreements as defined by Art 2(a) of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).[17] The applicability of the interpretative rules of the Vienna Convention is further supported by the status of the ICTY and ICTR as subsidiary organs of the Security Council and, thus, directly linked to the constituent instrument of the UN, its Charter. Therefore, since Art 5 of the 1969 Vienna Convention applies to treaties which are the constituent instruments of an international organisation and treaties adopted within an international organisation, it would seem appropriate that, by extension of the powers vested in the Security Council by the UN Charter, the rules of treaty interpretation apply also to the ICTY and ICTR Statutes.

Thus, the ICTY Chambers' primary reliance on a 'literal' construction of their Statute, followed by 'teleological', logical' and 'systematic' methods of interpretation as secondary means.[18] is consonant with Art 31(1) of the 1969 Vienna Convention, according to which treaties are to be interpreted in accordance with their ordinary meaning and in the light of their object and purpose, as well as Art 32 which allows for supplementary means when literal interpretation does not clarify the meaning of a provision. It should be stated that although humanitarian and human rights instruments warrant an interpretation which ensures their widest possible effectiveness in accordance with their object and purpose,[19] the so-called 'evolutionary' method of interpretation,[20] according to which contemporary developments in international law are to be incorporated into the relevant provisions of humanitarian treaties, should not generally apply to the ICTY or ICTR because of their ad hoc character, their specific mandate to apply customary law and the possible

16 *Prosecutor v Tadic*, Decision on Protective Measures for Victims and Witnesses (10 Aug 1995) (1997) 105 ILR 599, para 18.

17 1155 UNTS 331. Article 2(a) provides that the term 'treaty' means 'an international agreement concluded between States in written form and governed by international law, whether

violation of the principle of certainty belying criminal proceedings. The only possible exception could perhaps lie in those rules of procedure that are more favourable to the accused. Finally, although the issue of intra-ICTY precedent has been a problematic one, especially as regards the classification of armed conflicts by the various Chambers, it now seems settled that decisions of the Appeals Chambers should be followed, except where cogent reasons in the interests of justice require a departure. Such a departure is justified where the previous decision was decided on the basis of a wrong legal principle or wrongly decided on account of the judges' misconstruction of the relevant law.[21]

20.2 FORMATIVE YEARS OF THE AD HOC TRIBUNALS

Unlike the ICTR, where a large number of accused were already apprehended by the new government, the ICTY did not in its early years enjoy the co-operation of States on whose territory the alleged offenders had taken refuge. This was due to a large degree to the fact that the various conflicts in the Republic of Bosnia and Herzegovina officially terminated as late as 14 December 1995 with the conclusion of the General Framework Agreement for Peace (GFAP, otherwise known as Dayton Peace Agreement).[22] Although the signatory former Yugoslav Republics undertook an obligation after 1995 in accordance with the Dayton Agreement to co-operate with the Tribunal, such co-operation was not forthcoming, especially from Croatia[23] and more so from the Federal Republic of Yugoslavia (now Serbia).[24] Another complicating factor was the division of the Republic of Bosnia and Herzegovina into two autonomous entities, an ethnic Serbian (Republika Srpska) and a Moslem one (Federation of Bosnia and Herzegovina), governed, however, by a common presidency.[25] Republika Srpska has refused to render much assistance to the Tribunal on account of its leaders' alliance to a number of those indicted by the ICTY.

21 *Prosecutor v Aleksovski*, Appeals Chamber Judgment (24 March 2000), paras 101–15; *Prosecutor v Kordic and Cerkez*, Trial Chamber Judgment (26 Feb 2001) (*Kordic and Cerkez* judgment), para 148.

22 35 ILM (1996) 75. Although the GFAP was signed in Paris, the A[illegible]

With an empty docket, the ICTY faced an imminent danger of redundancy and oblivion by the very international community that created it, since it was no secret that by early 1995 a substantial number of States were growing weary of funding a judicial institution which had no accused to try.[26] During this time the prosecutor was busy establishing liaisons and investigative teams in order to collect evidence and identify potential witnesses, not only in the former Yugoslavia but across the globe, since a large number of witnesses and victims had subsequently sought refuge abroad. Endowed with the authority to formulate their own Rules of Procedure,[27] the ICTY judges adopted the first ever comprehensive code of international criminal procedure, adapted to the special needs of the Tribunal and based on a combination of both common law and civil law elements. For example, as regards examination of individuals, the adversarial system was preferred, while the almost unlimited admission of evidence, including hearsay, as long as it was deemed to have probative value,[28] reflects, rather, civil law criminal practice.

Rule 61 is of particular relevance to the present discussion. This rule permits the prosecutor to submit his or her evidence against an accused to a Trial Chamber in order for the latter to review the indictment in cases where a warrant of arrest has not been executed and personal service of the indictment has not been effected despite sincere efforts by the prosecutor. If, thereafter, the Trial Chamber ascertains there are reasonable grounds for believing that the accused committed any or all of the crimes charged, it is empowered to make a formal declaration to that effect[29] and issue an international arrest warrant, which is then transmitted to all UN Member States.[30] If any State fails to execute the contents of the warrant, the ICTY President may notify the Security Council.[31] Five cases were brought before a Trial Chamber by the Prosecutor under r 61 proceedings, the most prominent of which was that against the political leader of the Bosnian Serbs, Radovan Karadzic and the Chief of Staff of the Bosnian Serb Army, Radko Mladic,[32] where an abundance of testimony and other documentation evinced the existence of a policy of 'ethnic cleansing' against non-Serbs and whose planning, at least, was attributed to the two accused. In each of these cases, the judgment stressed that r 61 proceedings were intended to serve as public reviews of indictments and did not constitute trials *in absentia*, a guarantee

26 'The judges of the ICTY express their concern regarding the substance of their programme of judicial work for 1995', ICTY Doc CC/PIO/003-E (1 Feb 1995).
27 ICTY Statute, Art 15. The first version of the rules is reprinted in 33 ILM (1994), 484.
28 ICTY Rules, r 89(C).
29 Ibid, r 61(C).
30 Ibid, r 61(D).

prescribed under Art 21(d) of the ICTY Statute. They did not culminate in a verdict, nor deprive the accused of their right to contest the charges in person. Furthermore, it was pointed out that such proceedings provided an opportunity for victims to be heard in a public hearing and become part of history.[33] Indeed, the publicity that followed these proceedings, and especially the detailing of the horrific crimes that were found to have been perpetrated, sustained the impetus for international justice and instigated efforts for effective enforcement.

Despite the clear obligation under Art 29(2) of the ICTY Statute to arrest, detain or surrender accused persons to the Tribunal, Trial Chamber orders or requests to this effect were largely disobeyed by the independent former Yugoslav Republics and all the prosecutor and judges could do was inform the Security Council on an *ad hoc* basis, as well as through the ICTY President's Annual Report to the Council. This stalemate was ultimately resolved on account of two factors: international pressure on recalcitrant States[34] and amelioration of the Tribunal's image which led to the voluntary surrender of a significant number of accused; and increased willingness on the part of the North Atlantic Treaty Organisation (NATO)-led Stabilisation Force (SFOR) – legal successor to IFOR under Security Council mandate – to co-operate in the arrest of accused persons residing in the territory of Bosnia. Likewise, some central European States had begun exercising universal criminal jurisdiction over persons accused of having violated the laws or customs of war in the course of the Yugoslav armed conflicts.[35] One such criminal proceeding initiated in the Federal Republic of Germany, against Dusan Tadic, was deferred to the jurisdiction of the ICTY after an official request, despite the accused's pleas to the contrary.[36] Tadic, although only a guard at the Bosnian Serb Omarska prisoner and detention facility, was the first person physically brought before the jurisdiction of the ICTY and was utilised as a vehicle for initiating prosecutions and developing a coherent jurisprudence, upon which both the ICTY and ICTR relied and further elaborated in future cases.

The obligation to co-operate with the Tribunal under Art 29 of its Statute is addressed only to States, not to international organisations or peace-keeping

33 See *Prosecutor v Nikolic* (*Nikolic* decision) r 61 Decision (20 Oct 1995), 108 ILR 21.

34 It is instructive that one of the most significant reasons for Croatia's failed attempt

or peace enforcement entities. Accordingly, the ICTY, having no enforcement mechanisms of its own, was forced to rely on the co-operation of individual States and the goodwill of peace-keeping forces. In a meeting on 19 January 1996 between the ICTY President and the Secretary General of NATO, it was agreed that, within the limits of its resources and mandate, SFOR would not only assist in ICTY investigations, but would also detain any indicted persons whom it came across in the ordinary conduct of its duties.[37] Although it was initially doubted that NATO forces entertained the political or military will to make any arrests, such clouds soon disappeared as SFOR has since proceeded to detain a substantial number of accused in Bosnia.[38] This task has been considerably facilitated by the fact that since 1997 the prosecutor has pursued only high-ranking officials and has applied a sealed indictment policy, thereby allowing for the element of surprise and relative safety of NATO operations in their pursuit of indicted persons.

There has also been much speculation over the existence, during the ICTY's early years, of a secret bargain between the leaders of the warring factions and the third party instigators of the Dayton Agreement to the effect that the former would be excluded from the prosecutorial ambit of the ICTY. It is alleged that this was the price for achieving peace and ending the war.[39] Even if this allegation contains some truth vis-a-vis the drafters and sponsors of the Dayton Agreement, it certainly carries no weight as far as the Office of the Prosecutor is concerned. In fact, not only has the prosecutor carried out a meticulous investigation against former Bosnian Serb leaders Karadzic and Mladic, which culminated in a detailed indictment, an r 61 review and an international arrest warrant, but also the Office of the Prosecutor went as far as charging an acting Head of State, President Slobodan Milosevic of the Federal Republic of Yugoslavia (FRY) for a number of offences allegedly ordered or tolerated by him during the civil unrest in Kosovo in 1999.[40] At the same time that the indictment against Milosevic was confirmed by a Trial Chamber, the prosecutor requested the freezing of all assets of the accused, upon which a subsequent order to all UN Members was duly issued by the Tribunal.[41] The accused was later transferred to the jurisdiction of the ICTY and the indictment was amended to encompass crimes committed during the civil war in Bosnia and Croatia. However, Milosevic passed away before the

37 See 'The Position of SFOR and ICTY' (1996) *ICTY Bulletin* No 2, 22 Jan