



Provided by the author(s) and University of Galway in accordance with publisher policies. Please cite the published version when available.

Title	The Completion Strategies of the International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone
Author(s)	Donlon, Teresa Fidelma
Publication Date	2012-06-29
Item record	http://hdl.handle.net/10379/3107

Downloaded 2024-04-26T08:31:12Z

Some rights reserved. For more information, please see the item record link above.



IRISH CENTRE FOR HUMAN RIGHTS
SCHOOL OF LAW
NATIONAL UNIVERSITY OF IRELAND GALWAY

**THE COMPLETION STRATEGIES OF THE INTERNATIONAL
CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA,
RWANDA AND SIERRA LEONE**

PhD Thesis Submitted By:

TERESA FIDELMA DONLON

JUNE 2012

SUPERVISOR
PROFESSOR WILLIAM A. SCHABAS

ACKNOWLEDGEMENTS

To my mother Patricia and in loving memory of my father Billie. Their wisdom, courage, love and strength will always guide me.

This thesis is inspired by my work in the field of international criminal justice. The assistance of many colleagues in the various international tribunals, most notably the Bosnian War Crimes Chamber, as well as those in the Irish Centre for Human Rights and the Grotius Centre for International Legal Studies is greatly appreciated.

In particular I wish to express my sincere gratitude and thanks to my supervisor Professor William A. Schabas. Throughout the process of writing this work his wise advice and critical comments have proven invaluable. I feel honoured to have been mentored by such a distinguished scholar.

I am also fortunate to have many wonderful friends who have contributed in a variety of ways to the completion of my PhD. My heartfelt thanks go to Niamh Hayes, Dr. Eadaoin O'Brien, Dr. Michelle Farrell, Joseph Powderly and Yvonne Mc Dermott. Over the years their friendship, advice and support has been essential. I am indebted to Niamh Hayes, Dr. Eadaoin O'Brien and Dr. Michelle Farrell who proof read this work, provided me with constructive criticisms and generously gave their time to assist with editing.

I remain eternally grateful to my family who are a constant source of love and encouragement. My greatest appreciation goes to my parents Billie and Patricia and my siblings and in-laws Lorna, Michael, Nessa, Cariosa Damian, Owen, Sally, Eunan, Liam and Cecelia. Last but not least my special thanks to my magnificent nieces and nephews Oisín, Grainne, Ailbhe, Dáire, Molly, Finn, Redmond, Ceola and Liam.

CONTENTS

ACKNOWLEDGEMENTS	2
CONTENTS.....	3
INTRODUCTION	6
CHAPTER I – CREATION OF THE TRIBUNALS: RELATIONSHIP TO NATIONAL CRIMINAL JURISDICTIONS AND THE SENIORITY CRITERION.....	20
Introduction	20
A. The Policy: Intentions of the Security Council, Bosnia, Rwanda and Sierra Leone	32
(1) The Creation of the ICTY.....	32
(2) The Creation of the ICTR.....	38
(3) The Creation of the SCSL	44
B. The Law: Jurisdiction and Primacy of the Tribunals.....	49
(1) The Legal Basis for the Establishment of the Tribunals	49
(2) Territorial, Temporal and Personal Jurisdiction of the Tribunals	52
C. The Practice: Original Prosecution Strategies	60
(1) The Initial Prosecution Strategy of the ICTY.....	60
(2) The Initial Prosecution Strategy of the ICTR.....	68
(3) The Initial Prosecution Strategy of the SCSL	72
Conclusion.....	74
CHAPTER II – THE COMPLETION STRATEGIES OF THE TRIBUNALS.....	77
Introduction	77
A. The Origins and Evolution of the Completion Strategies.....	79
(1) The Completion Strategies of the ICTY and the ICTR	79
(2) The Completion Strategy of the SCSL.....	86
B. Rule 11bis: The Far-Reaching Case Referral Mechanism Created by the Judges.....	88
(1) The Purpose and Intent of the Rule 11bis Referral Mechanism.....	88
(2) Rule 11bis Procedure: The Referral of Indictments to National Courts.....	94

C. ICTY Rule 28(A): A New Oversight Role for the Judges of the Yugoslavia Tribunal.....	114
Conclusion.....	119
CHAPTER III – RULE 11BIS CASE REFERRALS: GUIDING PRINCIPLES OF SELECTION FOR INTERNATIONAL PROSECUTIONS.....	121
Introduction	121
A. Assessment of the Charges	123
B. Assessment of the Level of Responsibility.....	129
C. Assessment of the Gravity of Crimes	142
D. The Impact of Rule 11bis Principles on ICC Gravity Testing.....	153
Conclusion.....	165
CHAPTER IV – RULE 11BIS CASE REFERRALS: POSITIVE COMPLEMENTARITY IN PRACTICE	167
Introduction	167
A. The Completion Strategy – Catalyst for Bosnian Reform.....	172
B. The Bosnian War Crimes Chamber	183
C. The Law on Transfer of Cases and Evidence: A model national legal framework for ‘reverse’ cooperation	186
(1) The International and National Procedural Regimes.....	186
(2) The Law on Transfer of Cases and Evidence	191
D. Positive Complementarity and Reverse Cooperation in practice: the Srebrenica trials in Bosnia	198
(1) Prior ICTY statements and testimony of the accused.....	199
(2) Prior ICTY statements and testimony of witnesses.....	203
(3) Judicial notice of proven facts	205
(4) Forensic evidence and expert reports from the ICTY Srebrenica trials	208
Conclusion.....	211
CHAPTER V – THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE	213
Introduction	213
A. The Residual Mechanisms.....	219
(1) Establishment of the Mechanisms	219
(2) Structure of the Residual Mechanisms	224

(3) Functional and Jurisdictional Continuity between the Tribunals and the Mechanisms	229
B. The Residual Functions	236
(1) Defining the Residual Functions	236
(2) The Trial of High-Level Fugitives	237
(3) The Referral of Cases to National Jurisdictions	239
(4) The Review of Judgments	240
(5) The Trial of Contempt Cases.....	242
(6) Witness Protection and Support	244
(7) The Preservation and Management of the Archives.....	246
(8) The Provision of Assistance to National Authorities	253
(9) The Supervision of Sentences: Early Release, Pardon or.....	256
Commutation of Sentence	256
Conclusion.....	259
CONCLUSION.....	261
BIBLIOGRAPHY	266
MONOGRAPHS	266
CHAPTERS IN EDITED VOLUMES.....	268
ARTICLES	270
CASES	277
Court of Bosnia and Herzegovina	277
European Court of Human Rights	277
International Criminal Court	278
International Court of Justice	278
International Criminal Tribunal for Rwanda	278
International Criminal Tribunal for the former Yugoslavia	281
Special Court for Sierra Leone	284
INTERNATIONAL CONVENTIONS AND INSTRUMENTS.....	286

INTRODUCTION

Bringing perpetrators of unconscionable atrocities, which ‘explode the limits of law’, to justice, if they are brought to justice at all, is a fraught process involving legal, diplomatic, political and financial stakeholders.¹ It is equally difficult to decide which offenders to prosecute and whether an international, national or hybrid court is the appropriate forum for trials.² In the case of concurrent criminal jurisdictions, defining the relationship and ensuring the interaction between the various courts involved also raises considerable challenges. The problems associated with deciding whom, where, or indeed whether, to prosecute are by no means new. During World War II, the Allied governments’ policy discussions on the punishment of the major Nazi war criminals did not always involve a judicial solution. As early as 1942, opinion circulated that the fate of the highest-rank enemy leaders should be decided as a political question since their guilt was ‘so black that they fall outside the scope of any judicial process.’³ Despite years of discussions, as the Second World War drew to a close, the Allies still had not reached agreement on how to punish the major war criminals. The British supported summary

¹ The expression ‘explode the limits of law’ was used by Hannah Arendt to describe the monstrous nature of the Nazi crimes. For these crimes, she observed that no punishment was severe enough: See: Hannah Arendt, Letter to Karl Jaspers of 17 August 1946, in *Hannah Arendt, Karl Jaspers: Correspondence, 1926-1969*, Florida: Harcourt Brace & Company, 1992, p.54. For a discussion in relation to the legal, political and diplomatic struggles involved in holding military and political leaders accountable for mass atrocities, see: Geoffrey Robertson, ‘Ending Impunity: How International Criminal Law Can Put Tyrants on Trial’, (2005) 38 *Cornell International Law Journal* 649. For the numerous functions which criminal accountability can serve, see also: Neil J. Kritz, ‘Coming to terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, (1996) 59 *Law and Contemporary Problems* 127, p.128. Kritz argues that prosecutions can provide victims with a sense of justice and catharsis. He also argues that they can provide a public forum for the judicial confirmation of the facts and can establish an understanding that aggressors will be held accountable. In addition, he argues that, from the perspective of long-term reconciliation, trials make a statement that specific individuals rather than entire ethnic or religious or political groups committed atrocities for which they need to be held accountable, thus counteracting the threatening of collective guilt and possible acts of retribution.

² See generally: Frederic Megret, ‘Global or Local Justice: Who Should Try Ousted Leaders?: In Defense of Hybridity, Towards a Representational Theory of International Criminal Justice’, (2005) 38 *Cornell International Law Journal* 725, pp.750-751.

³ In 1942, the British Foreign Secretary, Anthony Eden, advised the government to draw a distinction between the highest-ranking enemy leaders and other enemy nationals. In relation to the highest-ranking leaders, he stated that ‘[t]he guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process.’ Quoted in Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC: University of North Carolina Press, 1998, p.29.

execution of a limited number of arch-criminals, the Soviets supported the trial of major war criminals, while Washington was still struggling over a policy toward war criminals.⁴

In the early 1990s, those governments once again had to grapple with complex questions related to the prosecution of war criminals during the United Nations Security Council's deliberations on measures to bring to justice the persons responsible for the atrocities committed in the territory of the former Yugoslavia and in Rwanda. Yugoslavia 'did not die a natural death...it was deliberately and systematically killed off by men who had nothing to gain and everything to lose from a peaceful transition from state socialism and one-party rule to free-market democracy.'⁵ Countless persons were brutally murdered during the Balkan wars: they were the victims of deliberate, widespread and systematic campaigns of ethnic cleansing hallmarked by acts of persecution and torture.⁶ Almost three years after the start of the war in Croatia, horror descended upon Rwanda and 'the fastest, most efficient killing spree of the twentieth century' commenced.⁷ During the 1994 Rwandan genocide, between 500,000 to 1 million Tutsi and politically moderate Hutu were slaughtered.⁸ In addition to the conflicts in the former Yugoslavia and Rwanda, following the Revolutionary United Front's invasion of the eastern diamond fields of Sierra Leone from Liberia in 1991,⁹ a 10 year civil war ensued in the small West African country that was characterized by the use of child soldiers and the extensive commission of ferocious acts of mutilation and sexual violence.¹⁰

⁴ See generally: Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005, pp.36-48.

⁵ Laura Silber and Alan Little, *The Death of Yugoslavia*, London: Penguin Books, 1996, p.25.

⁶ For details of the ethnic cleansing campaigns carried out in Bosnia and Herzegovina, see: *Krajišnik* (IT-00-39-T), Judgment, 27 September 2006; *Stakić* (IT-97-24-A), Judgment, 22 March 2006; *Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001; *Kunarac et al.* (IT-96-23 &23/1-A), Judgment, 12 June 2002; *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005.

⁷ Samantha Power, '*A Problem from Hell': America and the Age of Genocide*', New York: Harper Perennial, 2003, p.334. For a detailed history of the genocide, see: Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, London: C. Hurst & Co., 1995.

⁸ *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 110.

⁹ See generally: David M. Crane, 'Terrorists, Warlords, and Thugs', (2005-2006) 21 *American University International Law Review* 505, pp.505-516.

¹⁰ For a description of the crimes committed during the conflict, see *Fofana and Kondewa* (SCSL-04-14-A), Judgment, 28 May 2008; *Brima et al.* (SCSL-04-16-A), Judgment, 22 February 2008; *Sesay et al.* (SCSL-04-15-A), Judgment, 26 October 2009. For the history of the civil war, see generally: John L. Hirsch, *Diamonds and the Struggle for Democracy*, Boulder, CO: Lynne Rienner Publishers, 2001.

Images of emaciated detainees in Bosnian concentration camps and mutilated corpses on the streets of Kigali conveyed to the world the depravity of the respective conflicts. The harrowing footage also bolstered efforts to hold those responsible for genocide, crimes against humanity and war crimes, accountable for their crimes.¹¹ In 1993, the United Nations Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).¹² The following year the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR) was created by the Council.¹³ During the early years of the *ad hoc* Tribunals' work, many valuable lessons were learned by the members of the Security Council regarding the resources required by the ICTY and the ICTR to effectively function as international criminal courts and the scope of perpetrators to be investigated and brought to trial. The Tribunals experienced a number of structural, administrative and financial problems which in turn generated the discussion as to whether there was a more effective justice model to combat impunity for international crimes.¹⁴

By 2000, because of the scale and costs of the *ad hoc* Tribunals, decision makers had begun to consider other judicial models that would be 'quicker, more cost effective, and could better address the needs of the citizens of the post-conflict societies that desperately needed assistance'.¹⁵ The Security Council was not willing to create additional international criminal tribunals under Chapter VII of the United Nations Charter. Instead the focus shifted to the United Nations Secretariat 'to develop a model

¹¹ See generally: Payam Akhavan, 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order', (1993) 15 *Human Rights Quarterly* 262. The author pleaded for justice for the ongoing atrocities in the former Yugoslavia.

¹² UN Doc. S/RES/827 (1993).

¹³ UN Doc. S/RES/955 (1994).

¹⁴ Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals', (2004) 2 *Journal of International Criminal Justice* 541, pp.541-545.

¹⁵ See David Cohen , "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', (2007) 43 *Stanford Journal of International Law* 1, p.6, for a discussion in relation to the cost of the *ad hoc* tribunals and the development of hybrid alternatives.

similar in form, substance, and international legitimacy to the *ad hoc* tribunals, but one which respects a nation's vision of justice, its choice of means of bringing it about, and its ownership, at least in part, of the judicial process'.¹⁶ In 2000, the President of Sierra Leone requested the Security Council to establish 'a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace' in the country and the West African sub region.¹⁷ The United Nations was hesitant to increase the financial burden on its Member States by creating another international tribunal as a subsidiary organ of the Security Council.¹⁸ Instead the Special Court for Sierra Leone (SCSL) was created by agreement between the United Nations and the Government of Sierra Leone.¹⁹ The formal agreement establishing the Special Court was signed in Freetown by the United Nations and the Government of Sierra Leone on 16 January 2002.²⁰

The *ad hoc* Tribunals and the Special Court for Sierra Leone are not permanent institutions.²¹ Rather the United Nations created the three tribunals either by Security Council resolution or by treaty as temporary courts designed to respond to specific conflicts.²² Less than eight years after the creation of the ICTY and the ICTR, the

¹⁶ Daphna Shrava, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions in Internationalized Criminal Courts and Tribunals', in Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts*, Oxford: Oxford University Press, 2004, p.15. See also: José E. Alvarez, 'Crimes of Hate/Crimes of State', (1999) 24 *Yale Journal of International Law* 365, p.370. Alvarez argues that international processes should mediate rather than dictate the forms of criminal accountability. In his opinion, international processes for accountability need to encourage and adapt to local processes directed toward the same end.

¹⁷ 'Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council', UN Doc. S/2000/786.

¹⁸ See: Daphna Shrava, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford: Oxford University Press, 2004, p.15.

¹⁹ 'Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone', 16 January 2002.

²⁰ *Ibid.*

²¹ See: Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/1993/25704, Annex, p.36 and UN Doc S/RES/827 (1993) (hereinafter ICTY Statute); Statute of the International Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex p.3 (hereinafter ICTR Statute); and the Statute of the Special Court for Sierra Leone (hereinafter SCSL Statute), annexed to the 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone', Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II to Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council.

²² For an analysis of the creation of the tribunals by Security Council resolution or negotiated agreement between the United Nations and the Government of Sierra Leone, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.5-9.

Security Council adopted an initial set of measures to expedite the conclusion of the work of the Tribunals at the earliest possible date.²³ By 2003, the Council had set the parameters of the Completion Strategy. In Resolution 1503 the ICTY and the ICTR were called upon to complete all investigations by the end of 2004; all first instance trials by the end of 2008, and all work in 2010.²⁴ To achieve these timelines the Security Council directed the Tribunals to concentrate trials on the most senior leaders and to expedite the completion of their work by referring cases involving intermediary- and lower-rank accused to competent national courts for trial. The dates envisaged in the Completion Strategy were not met by the *ad hoc* Tribunals. The ICTY and the ICTR were therefore directed to complete all their remaining work no later than 31 December 2014.²⁵ Yet, in advance of that date, the Security Council decided to establish the International Residual Mechanism for Criminal Tribunals (IRMCT) which is mandated to function in parallel with, and progressively assume responsibilities from, the *ad hoc* Tribunals until they close in 2014.²⁶ According to Resolution 1966, the ICTR branch of the Mechanism shall commence work on 1 July 2012 and the ICTY branch on 1 July 2013. Perhaps the Council's decision to set up the IRMCT while the *ad hoc* Tribunals are still functioning instead of waiting until closer to their actual completion date in 2014 was a direct consequence of the failure of the ICTY and the ICTR to meet the 2010 timeline initially set out in the Completion Strategy. Since Resolution 1966 provides that during a transitional period between 2012 and 2014, the IRMCT shall assume the competencies of the Tribunals, this may well accelerate the downsizing and closure of the ICTY and the ICTR.

In 2004, the SCSL received a one-off subvention grant from the United Nations to finance the third year of the Court's operations.²⁷ In Resolution 58/284, the General Assembly authorized the Secretary-General to supplement the financial resources of the institution and called on the Special Court to adopt a Completion Strategy.²⁸ In 2005, the

²³ UN Doc. S/RES/1329 (2000). Under the Resolution, the Security Council amended the Statutes to establish a pool of *ad litem* judges in the ICTY and increased the number of judges in the Appeals Chambers of the Tribunals.

²⁴ UN Doc. S/RES/1503 (2003), Preamble.

²⁵ UN Doc. S/RES/1966 (2010), para. 3.

²⁶ *Ibid.* and Annex 2 entitled 'Transitional Arrangements'.

²⁷ 'Special Court for Sierra Leone Annual Report 2004-2005', p.28.

²⁸ UN Doc. A/RES/58/284 (2004), paras. 2 and 6.

SCSL presented its Completion Strategy to the Secretary-General.²⁹ The Special Court's initial Strategy estimated that all trials and appeals would be completed by early to mid-2007.³⁰ The revised SCSL Completion Strategy forecast its closure in 2012. Although the Special Court did not meet the timelines originally envisioned in its Completion Strategy, unlike the *ad hoc* Tribunals, the Agreement between the United Nations and the Government of Sierra Leone establishing the Residual Special Court for Sierra Leone (RSCSL) does not incorporate transitional arrangements when the SCSL and the RSCSL will function in parallel.³¹ Instead after the completion of the proceedings against Charles Taylor, which is the Court's last trial, the SCSL will transition to the RSCSL.

Commenting on the closure of the Yugoslavia Tribunal, the former ICTY President, Judge Patrick Robinson, remarked to the Security Council: 'Great is the art of beginning, but greater is the art of ending.'³² The lessons identified from the detailed analysis of the Completion Strategies and the transition of the *ad hoc* Tribunals and the Special Court to their residual mechanisms³³ will be instructive for other temporary courts that will complete their mandates in the future, as well as the permanent International Criminal Court (ICC).³⁴ In terms of combating impunity for international crimes, the ICC is designed to be 'complementary to national jurisdictions'.³⁵ It remains the duty of every State to prosecute the offences³⁶ and the Rome Statute envisions that the effective trial of cases 'must be ensured by taking measures at the national level by

²⁹ 'Identical Letters dated 26 May 2005 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council (Special Court for Sierra Leone Completion Strategy)', 18 May 2005, UN Doc. S/2005/350.

³⁰ *Ibid.*, para.31.

³¹ 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone', August 2010.

³² UN Doc. S/PV.6134 (2009), p.6. Judge Robinson was citing the words of the American poet Henry Wadsworth Longfellow.

³³ For the International Residual Mechanism for Criminal Tribunals, see: UN Doc. S/RES/1966 (2010); for the Special Court, see: 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone', August 2010.

³⁴ Other temporary courts that will end their mandates in the future include the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). For the STL see: UN Doc. S/RES/1757 (2007); and for the ECCC, see: UN Doc. A/RES/57/228 B, 'Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea', 2003 and Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006. For the ICC, see: Rome Statute of the International Criminal Court, UN Doc. A/CONF.183.9 (hereinafter 'Rome Statute').

³⁵ Rome Statute, Art. 1.

³⁶ Rome Statute, Preamble para. 6.

enhancing international cooperation.³⁷ In this regard the prosecution strategies and procedural laws underpinning the Completion Strategies are profoundly relevant to the enforcement of international criminal law by the ICC, national and hybrid courts.³⁸ In particular, as a consequence of the *ad hoc* Tribunals' completion policies, the prosecution strategies of the ICTY and the ICTR have evolved to increase the role of national Courts in Bosnia and Rwanda in the trial of intermediary and lower level offenders. The referral of accused in accordance with the terms of Rule 11bis³⁹ has resulted in enhanced cooperation between the *ad hoc* Tribunals and national courts. The far-reaching referral process has also triggered key programmes of judicial reform in the affected countries, including the creation of War Crimes Chamber within the Court of Bosnia and Herzegovina⁴⁰ and the adoption of legislation to allow for the admission of evidence collected by international Tribunals before Bosnian and Rwandan courts.⁴¹ Therefore, the objective of this thesis is to determine the relevance of the Completion Strategies to ongoing transitional and post-conflict justice projects with a view to identifying lessons

³⁷ Rome Statute, Preamble para. 4

³⁸ Hybrid tribunals typically apply a mix of national and international law; they have a mixed staff composition in which international judges, prosecutors and experts work with their national counterparts; and, generally they are located in the country where the atrocities were committed. For a detailed discussion on hybrid tribunals see: Fidelma Donlon, 'Hybrid Tribunals', in Schabas and Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Abingdon, Oxon: Routledge Publishers, 2011, p.85.

³⁹ See: ICTY Rules of Procedure and Evidence, UN Doc. IT/32/REV.45 (hereinafter ICTY RPE), Rule 11bis; and ICTR Rules of Procedure and Evidence, UN Doc. ITR/3/Rev.1 (1995) (hereinafter ICTR RPE), Rule 11bis.

⁴⁰ In December 2004, the laws required to create the Chamber were adopted by the Bosnian parliament. The laws created: 'Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina'; the 'Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina; and the international Registry for Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina. The 'War Crimes Chamber' is hereinafter the term used to describe the hybrid components of the various Bosnian institutions. See: Law on Court of Bosnia and Herzegovina-Consolidated Version-, Official Gazette of Bosnia and Herzegovina, No. 49/09. Also see: Law on the Amendments to the Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 61/04; Agreement between the High Representative and the Bosnian Presidency on the establishment of the Registry, Official Gazette of Bosnia and Herzegovina, International Agreements, No. 12/04.

⁴¹ See: 'Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence collected by ICTY in Proceedings before the Courts in BiH', Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06 (hereinafter Bosnian Law on Transfer of Cases and Evidence). Also see: Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, as amended by Organic Law No.3/2009 modifying and complementing the Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 26 May 2009.

that could reinforce efforts to prosecute international crimes before international and national courts. This study aims to trace the relationship between the national and international systems of justice since the creation of the Tribunals in order to identify and examine the enhanced cooperation that has evolved between the various concurrent jurisdictions. This thesis will study the law supporting the Completion Strategies. In addition, it will consider the catalysing effects the closure of the international tribunals has had on national courts. Finally, it will explore the closing chapter in the history of the Tribunals – their transition to their respective residual mechanisms – by examining the establishment and jurisdiction of the International Residual Mechanism for Criminal Tribunals and the Residual Special Court for Sierra Leone.

With these objectives in mind, Chapter I will evaluate the political background to the creation of the Tribunals to ascertain the intention of the member States of the Security Council; the States of the former Yugoslavia; Rwanda; and Sierra Leone in relation to the appropriate forum for trials and the seniority of the accused to be prosecuted. In particular, the reports of the Secretary-General together with the statements of representatives during Security Council meetings will be analysed to discuss the following question: was it the specific intention of the member States of the Security Council to set up the Tribunals to prosecute the most senior political and military leaders responsible for the atrocities committed or were the Tribunals designed to divert attention away from increasing criticisms related to the lack of intervention by the States to stop the conflicts? The Chapter will analyse the Statutes of the Tribunals in terms of their personal, temporal, territorial and subject matter jurisdiction to identify the statutory relationship between the international and national courts. It will also examine the prosecution strategies of the respective Tribunals from their inception to closure. The impact of the strategies, in relation to both the number of perpetrators to be tried and the development of the international criminal Tribunals' Completion Strategies, will be discussed.

Shortly after the ICTY was created, its' judges drafted a set of international criminal procedural rules in the form of the Rules of Procedure and Evidence.⁴² The first

⁴² ICTY Statute, Art. 15 and ICTR Statute, Art. 14 provide that the judges of the Tribunals shall adopt rules of procedure and evidence for the conduct of pre-trial proceedings, trials and appeals, the admission of

version of the ICTR Rules was copied from the ICTY regulations. Pursuant to Article 14 of the SCSL Statute, the Rules of Procedure and Evidence of the ICTR applied *mutatis mutandis* to proceedings before the Court at the time of its establishment. Subsequently, the judges of the *ad hoc* Tribunals and the SCSL have frequently amended the Rules of the respective institutions to best cater for the unique demands of international trials. As one observer has noted, ‘the legacy of procedure at the ICTY has been a process of essential, though imperfect, experimentation and evolution towards the creation of an international criminal procedure designed to address the particular needs and limitations of international war crimes trials.’⁴³ Accordingly, it is no surprise that the jurisprudential legacy of the Tribunals together with the essential legislative contribution made by the judges is widely focused upon by practitioners and academics.⁴⁴ Much less analysed, however, is the instrumental and intriguing role played by the judges in relation to the closure of the Tribunals, in particular the ICTY and the ICTR. Therefore, Chapter II will discuss whether the comprehensive Completion Strategy designed to conclude the Tribunals’ mandates can in fact be attributed to the judges. In addition, as the procedural lawmakers of the Tribunals, the judges have not only defined the regulations required for the conduct of fair criminal trials, by amending Rule 11bis of the Rules of Procedure and Evidence; the judges have, in addition, created one of the most critical legal mechanisms required to implement the Completion Strategy. In accordance with Rule 11bis, they have empowered the Tribunals to refer the cases of intermediary- and lower-level indictees to the authorities of a willing and adequately prepared State for trial. In so doing, the judges have also taken on a new and intriguing role – before ordering the referral of a case the judges must adjudicate whether a State will afford an accused internationally recognised human rights standards during trial. Accordingly, Chapter II will scrutinise the far-reaching Rule 11bis referral mechanism of the Tribunals.

evidence, the protection of victims and witnesses and other appropriate matters. Rule 6(A) of the ICTY and ICTR RPE provides that the Rules may be amended if agreed to by not less than ten permanent judges at a plenary meeting, or, in accordance with Rule 6(B), an amendment may otherwise be adopted if it is unanimously approved by the permanent judges.

⁴³ Alex Whiting, ‘The ICTY as a Laboratory of International Procedure’, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, p.107.

⁴⁴ For an in-depth study of the jurisprudential legacy of the Tribunals, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006.

A pivotal policy issue, which has been deliberated upon since the creation of the Tribunals, is which perpetrators of the heinous crimes committed during the Balkan wars; the Rwandan genocide; and the protracted conflict in Sierra Leone should appropriately be tried before the ICTY, the ICTR and the SCSL. The former Prosecutor, Carla Del Ponte, has remarked that defining the persons who bear the highest level of responsibility for atrocities is crucial to any prosecution strategy.⁴⁵ The terms ‘persons who bear the highest level of responsibility’ or the ‘most senior leaders most responsible for the crimes committed’ are broad and imprecise. Due to the nature of the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, there are the obvious supreme political and military leaders who orchestrated the carnage; however, there are also hundreds of other people who were leaders and directed murderous campaigns at a local level. For many years, the terms were used by the various prosecutors as an indication of the individuals they intended to target for prosecution, but the principles applied in determining which offenders fell into the most senior leader category were largely undocumented.

Ironically, as a consequence of the ICTY completion strategy, the most transparent principles pertaining to the assessment of the gravity of crimes and the level of responsibility of the accused are explained in the Rule 11bis proceedings related to the transfer of cases to national courts rather than in the cases of the 161 persons charged by the ICTY. Unlike the ICTR Rule 11bis, the ICTY rule declares the judges should ‘consider the gravity of the crimes charged and the level of responsibility of the accused’ when determining whether to refer a case to the authorities of a competent State.⁴⁶ Therefore, in the course of the ICTY proceedings, the principles were developed, discussed and applied to categorize accused as the most senior or intermediary level suspects. There has been very little scrutiny of the Rule 11bis jurisprudence and existing academic work on the issue of gravity predominantly considers the matter in the context of the principles applied in sentencing judgments and the ICC. However, the judges of the *ad hoc* Tribunals, referred to by Alexander Zahar and Goran Sluiter as ‘the free-wheeling architects of international criminal law’, have established, in Rule 11bis proceedings, clear principles to be applied in determining the gravity of crimes and the

⁴⁵ Carla Del Ponte, ‘Prosecuting the Individuals Bearing the Highest Level of Responsibility’, (2004) 2 *Journal of International Criminal Justice* 516.

⁴⁶ ICTY RPE, Rule 11bis(C).

level of responsibility of the accused.⁴⁷ Although some of the principles applied are the same as those used in sentencing judgments; the Rule 11bis jurisprudence provides a very comprehensive set of principles, which will be evaluated in Chapter III, to guide the appropriate level of seniority of accused to be tried at international level. As such, the Rule 11bis gravity and level of responsibility principles are a very solid precedent for other international and national tribunals to use for the selection of perpetrators for trial. Arguably, the principles may assist the development of future combined prosecution strategies by providing clear criteria to be applied in the selection of perpetrators to be tried at both the international and national level. In this regard, Chapter III will explore whether international prosecution policies are increasingly underpinned by the concentration on the most senior military, paramilitary, political and civilian leaders who orchestrate conflicts rather than the direct perpetrators who commit the crimes during them. Thus, in addition to canvassing the prosecution strategies of the ad hoc Tribunals and the SCSL, this work will examine the assessment of gravity in the selection of situations and cases by the International Criminal Court Prosecutor. The authoritative International Criminal Court Appeals Chamber judgment in *Ntaganda* will be reviewed to consider issues of gravity in the context of the admissibility of a case and the influence of the law and practice regulating the Completion Strategy on developments at the International Criminal Court.⁴⁸

The International Court of Justice has referred to ‘the international consensus that the perpetrators of international crimes should not go unpunished’. This aim, according to the International Court of Justice ‘is being advanced by a flexible strategy in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.’⁴⁹ As a result of the Completion Strategy, Bosnia and Herzegovina assumed a new role in terms of the trial of persons indicted by the ICTY. Rwanda also stands ready to conduct proceedings against persons indicted by the ICTR. On 9 March 2005, 10 years after the conflict ended, the War Crimes Chamber within the Court of

⁴⁷ Alexander Zahar and Goran Sluiter, *International Criminal Law*, Oxford: Oxford University Press, 2008, p.259.

⁴⁸ *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006.

⁴⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, para.51.

Bosnia and Herzegovina was inaugurated.⁵⁰ The philosophy underpinning the creation of the Chamber was that holding the perpetrators of the serious violations of international law which occurred during the war accountable for their crimes ultimately remained the responsibility of the people of Bosnia.⁵¹ Thus, to build the sustainable capacity of the Bosnian institutions and the police to try war crimes cases in accordance with international standards, the government and international community agreed to create the hybrid War Crimes Chamber. Chapter IV will question whether the Completion Strategy was a catalyst for judicial reform in Bosnia and Herzegovina. It will consider if the predominant impetus for the creation of the War Crimes Chamber was the need to advance the ICTY Completion Strategy rather than a commitment to domestic war crimes prosecutions for their own sake. The innovative structure of the War Crimes Chamber and the legal regime governing its operations will also be discussed. A coordinated approach to the prosecution of international crimes is also foreseen by the first International Criminal Court Prosecutor, Luis Moreno Ocampo. He has advanced the concept of positive complementarity stating:

The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.⁵²

As an integral part of the Completion Strategy, the *ad hoc* Tribunals have developed comprehensive prosecution strategies selecting which cases should be prosecuted before the Tribunals and which cases should be transferred to national courts for trial. Chapter IV will explore whether this division of labour between the ICTY and the War Crimes

⁵⁰ Law on Court of Bosnia and Herzegovina-Consolidated Version-, Official Gazette of Bosnia and Herzegovina, No. 49/09; Law on the Amendments to the Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 61/04; and, Agreement between the High Representative and the Bosnian Presidency on the establishment of the Registry, Official Gazette of Bosnia and Herzegovina, International Agreements, No. 12/04.

⁵¹ See: The Registry of the Court of Bosnia and Herzegovina, 'Project Implementation Plan Progress Report', October 2004, p.4.

⁵² ICC, Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor', 2003, p.3.

Chamber, in particular regarding the trial of Srebrenica cases, is an example of a two-tiered approach to ensure accountability at international and national level and, thus, whether it can be advanced as an example of positive complementarity in practice. Another element of the ICC positive complementarity regime is the intention of the Office of the Prosecutor to encourage states to adopt complementary implementing legislation to create a legal framework to give national authorities the required laws to combat impunity.⁵³ The introduction and use of evidence collected by the ICTY has played a pivotal part in the Srebrenica trials. Before the War Crimes Chamber commenced operations, it was clear that the use of the ICTY's evidence could help the new court avoid the time consuming and costly examination of witnesses who had already testified before the Tribunal about the events that took place in Srebrenica. Moreover, the Chamber could benefit from the extensive investigative work already done by the ICTY. Since the ICTR Appeals Chamber has upheld the Court's first decision to refer an accused to Rwanda for trial, the use of evidence collected by the Rwandan Tribunal in the national trial will no doubt be equally important.⁵⁴ Although Rwanda has adopted an Organic Law regulating the transfer of cases from the ICTR, the Law has not yet been applied in national trials.⁵⁵ Consequently, Chapter IV will examine the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence collected by the ICTY in Proceedings before the Courts in Bosnia⁵⁶ as a model national legal framework for the implementation of a cooperation regime which allows for the introduction of evidence collected by an international tribunal to be used in national trials while fully adhering to the protection of the right of the accused to a fair trial.

⁵³ See generally: Christopher Keith Hall, 'Developing and Implementing an Effective Positive Complementarity Prosecution Strategy', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.220.

⁵⁴ *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011; *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

⁵⁵ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, as amended by Organic Law No.3/2009 modifying and complementing the Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 26 May 2009.

⁵⁶ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06.

In relation to the closure of the ICTY, Judge Fausto Pocar has remarked that one should ‘always keep a view to the broader picture of where the institution comes from and, especially, of where it intends to go.’⁵⁷ When one analyses the completion of the work of the ICTY, the ICTR and the SCSL in the context of the wider history of the Tribunals it seems that the term ‘completion’ is in many ways deceptive. Although the completion strategies prescribe the means for the Tribunals to finish trials and appeals within certain timelines and then close down,⁵⁸ when the judicial proceedings of the international tribunals are over, it does not necessarily follow that all the functions of the Tribunals will permanently stop.⁵⁹ For example, nobody can definitively determine if or when the remaining fugitives from the ICTR and the SCSL will be arrested. Nor can a clear plan of how often or how many proceedings related to the issuance or variation of witness protective measures, the review of judgments or the trial of contempt cases be prepared. Commenting on the closure of the Special Court, one observer noted that when the institution was established little attention was paid to the reality that one ‘cannot simply padlock the doors...and walk away’ after the completion of trials.⁶⁰ This succinct remark is equally applicable to the Tribunals for the former Yugoslavia and Rwanda. Therefore, Chapter V will identify the residual functions of the Tribunals and study the International Residual Mechanism for Criminal Tribunals and the Residual Special Court for Sierra Leone.

⁵⁷ Fausto Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *Journal of International Criminal Justice* 655, p.656.

⁵⁸ For a discussion in relation to the three interlocking components of the completion strategies of the ICTY and the ICTR see: Larry Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 158.

⁵⁹ Gabriël Oosthuizen and Robert Schaeffer, ‘Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL’, (2008) 3 *Hague Justice Journal* 48, p.50.

⁶⁰ Valerie Oosterveld, ‘International Criminal Justice, Politics and the Special Court for Sierra Leone’, (2008) 102 *American Society of International Law Proceedings* 19, p.19.

CHAPTER I – CREATION OF THE TRIBUNALS: RELATIONSHIP TO NATIONAL CRIMINAL JURISDICTIONS AND THE SENIORITY CRITERION

INTRODUCTION

After World War I, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was created by the Allies to investigate the responsibility for the start of the war; violations of the laws of war; and what tribunal would be appropriate for trials.¹ The Commission focused on the seniority of accused when it contemplated the prosecution of the most senior officials responsible for the war and also envisioned a division of labour between a High Tribunal and national courts. The Commission intended to hold high officials, regardless of their rank, accountable for offences against the laws and customs of war or the laws of humanity.² In a report submitted to the Preliminary Peace Conference, on 29 March 1919, the Commission recommended the creation of a High Tribunal to try Kaiser Wilhelm II.³ The report stated that ‘the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished.’⁴ Others in positions of high authority would be prosecuted by military or national courts of an Allied State.⁵

¹ For general information on the Commission, see: M. Cherif Bassiouni, ‘World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System’, (2002) 30 *Denver Journal of International Law and Policy* 244.

² See: ‘Report of the Commission to the Preliminary Peace Conference’, (March 29, 1919), reprinted in (1920) 14 *American Journal of International Law*, p.117. It is noteworthy that the American members of the commission objected to the concept of prosecuting a Head of State, stating that: ‘But the law to which a head of State is responsible is the law of his own country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act,’; see p.136. Nevertheless, commenting on sovereign immunity, the majority of the Commission remarked that ‘...even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.’ The Commission further stated that a bar against prosecuting Heads of States who had allegedly committed war crimes and crimes against humanity ‘would shock the conscience of the civilized world’; see p.116.

³ *Ibid.*, p.116-117 and p.123.

⁴ *Ibid.*, p.117.

⁵ *Ibid.*, p.121.

The recommendations of the Commission were mirrored in the four articles on war crimes included in the Treaty of Versailles, signed in May 1919.⁶ Article 227 provided for the creation of a special tribunal to try William II ‘for a supreme offence against international morality and the sanctity of treaties.’⁷ This was a critical innovation in international law: for the first time in history the principle of the individual criminal liability of a Head of State was incorporated into a treaty.⁸ The trial of other war criminals before military courts of the Allies was envisaged in Articles 228-230. Article 228 obliged the German Government to hand over all accused, specified either ‘by name or by the rank, office, or employment which they held under the German authorities’, to the Allies for trial.⁹ Article 228 also seems to reflect the principle of primacy by prioritising cases before the international tribunals. It stipulated that the German Government recognised the right of the Allied Powers to bring accused persons to trial notwithstanding any proceedings before a German court or any other tribunal in the territory of her allies.¹⁰ Yet, despite the guarantees of accountability expounded by the Allies, including the provisions of the Treaty of Versailles and the infamous promises of Lloyd George to ‘hang the Kaiser’, the ‘special tribunal’ was never created and the Emperor never tried, or hung. After abdicating the throne, the Kaiser sought refuge and was granted asylum in the Netherlands. To implement Article 227 of the Versailles Treaty, therefore, his extradition would have been required. The Dutch Government

⁶ Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Art. 227-230. Also see: Annex IV, 'Report of the Commission to the Preliminary Peace Conference', (29 March 1919), reprinted in (1920) 14 *American Journal of International Law*, pp.153-154, for the proposed provisions for insertion in treaties with the enemy governments. One provision related to the creation of the High Tribunal. The provision was subsequently incorporated in the 1920 peace agreement with Turkey, the Treaty of Sèvres. Art. 226 of the Treaty recognised the right of the Allied Governments to bring suspects before military tribunals. However, the Treaty was never ratified. It was replaced by the Treaty of Lausanne of 1923 which declared an amnesty for all offences committed between 1914 and 1922.

⁷ Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Art. 227.

⁸ Opinion of M. Cherif Bassiouni in M. Cherif Bassiouni, 'World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System', (2002) 30 *Denver Journal of International Law and Policy* 244, p.267.

⁹ Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Art. 228.

¹⁰ See Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2001-2002) 23 *Michigan Journal of International Law* 869, p.872. El Zeidy points out that Article 228 echoes the notion of primacy and seems to emphasize the supremacy of international tribunals over national tribunals.

believed the charges against the accused consisted of retroactive criminal law and, thus, refused to extradite the Kaiser for trial.¹¹

Regarding the trial of German military personnel, in 1920, pursuant to Article 228 of the Treaty of Versailles, the Allies presented the German Government with a list of 895 suspected war criminals.¹² Various military and political leaders were named including the Chief of Staff of the army, General E. Ludendorff, and the former Chancellor, Bethmann-Hollweg.¹³ Yet, in Germany, the trial of the most senior military and political figures was severely opposed. The government warned the Allies that the surrender of senior military leaders and politicians could destabilise the Weimar Republic.¹⁴ Ultimately, to avoid such a situation, a compromise was reached with the Germans; they would try suspects before the national Supreme Court in Leipzig based on a list of 45 suspects prepared by the Allies.¹⁵ In the end, however, only 12 minor suspects were tried in the so called Leipzig trials in 1921.¹⁶ Six of the accused were acquitted; the other six accused were convicted. Leading commentators have expressed a variety of opinions in relation to the legacy of the trials. Noting the jurisprudential legacy of the Leipzig cases, William A. Schabas has pointed out that the *Dover Castle* and *Llandovery Castle* judgments ‘are cited to this day as precedents on the scope of the defence of superior orders’.¹⁷ In spite of this positive contribution to international law, another distinguished scholar has strongly criticized the trials suggesting that the Allies manipulated justice for political ends. M. Cherif Bassiouni has stated:

¹¹ See: William A. Schabas, *An Introduction to the International Criminal Court*, 4th edn., Cambridge: Cambridge University Press, 2011, p.3.

¹² See: Antonio Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003, p.328.

¹³ *Ibid.*

¹⁴ For a discussion in relation to the position of the German government, see: M. Cherif Bassiouni, ‘World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System’, (2002) 30 *Denver Journal of International Law and Policy* 244, p.281. See also: Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, (2006) 100 *American Journal of International Law* 551, p.557.

¹⁵ See: Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005, p.34.

¹⁶ See: James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982.

¹⁷ William A. Schabas, *An Introduction to the International Criminal Court*, 4th edn., Cambridge: Cambridge University Press, 2011, p.4.

Thus, apart from helping to lay the legal foundations for international criminal justice in the future, the Allies' experiment in retributive justice following the First World War was a dismal failure. Despite ample Allied resources, the availability of the exhaustive investigative findings of the Commission, and an enemy prostrate from war, hunger, and internal revolution, very few prosecutions were ever undertaken, and of those that were, the sentences handed down were either comparatively light or never fully executed. The value of justice had not penetrated the practices of *realpolitik*.¹⁸

Robert Cryer has identified another consequence of the Leipzig trials. In his insightful work examining the prosecution of international crimes, he referred to their broader legacy as '...the fear that a State is unlikely to engage in active prosecution of its own nationals before its own courts, and that therefore international supervision or proceedings are needed, or prosecution before another State's courts.'¹⁹ To this day the concern that a State will not hold its citizens accountable for international crimes has influenced policy decisions regarding the creation of international and hybrid courts and the selection of perpetrators for prosecution.²⁰

The outcome of the Leipzig trials was not forgotten when it came to formulating policy on the punishment of war criminals during World War II. It is reported that the British Prime Minister, Winston Churchill, viewed the cases as 'proof of the folly of entrusting a political problem to legal methods'.²¹ Although, as early as 1942, the governments-in-exile called for the punishment of those guilty of the crimes committed during the Nazi reign of terror, the Allied powers were hesitant to act.²²

¹⁸ M. Cherif Bassiouni, 'World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System', (2002) 30 *Denver Journal of International Law and Policy* 244, p.290.

¹⁹ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005, p.35.

²⁰ See generally: Fidelma Donlon, 'Hybrid Tribunals', in Schabas and Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Abingdon, Oxon: Routledge Publishers, 2011, pp.85-106.

²¹ Quoted in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press, 2000, p.105.

²² See: Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*, Boston: Bedford Books, 1997, pp.18-20. On 13 January 1942, at St. James' Palace in London, the exiled governments – the Czechs, Poles, Norwegians, Belgians, Dutch, Luxembourgers, French, Greeks, and Yugoslavs – issued a joint declaration. The so-called 'Inter-Allied Declaration' emphasised that one of the principal war aims of the governments-in-exile was 'the punishment, through the channel of organized

To appease the exiled governments, on 20 October 1943, the British and Americans announced the creation of the United Nations War Crimes Commission (UNWCC).²³ The Commission was comprised of the United Kingdom, United States, China, Australia, India and the nine governments-in-exile. The UNWCC was primarily a fact-finding body, mandated to investigate and collect evidence of war crimes; however, it was provided with very little resources to do so.²⁴ It had no investigatory staff and relied on the information provided by national war crimes offices established in many countries that were still under German occupation.²⁵ In addition, the Commission was established without the support of the Soviets and, as one observer has noted, due to the divisions between the Allied governments, it ‘remained a weak instrument rather than an active forum for the elaboration of Allied policy on war criminals.’²⁶

In fact, the only substantive agreement reached by the Allies during the war years is found in the Moscow Declaration of 1 November 1943. Two broad categories of war criminal defined in terms of their seniority were referred to in the agreement: major criminals and other intermediary-level offenders – those German officers, civilians and politicians who participated in the monstrous crimes committed.²⁷ A general framework for the punishment of the latter category of war criminal underpinned by the territoriality principle was defined in the agreement.²⁸ The declaration stated:

German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order

justice, of those guilty of or responsible for [the atrocities], whether they have ordered them, perpetrated them, or participated in them.'

²³ See: M.E. Bathurst, ‘The UN War Crimes Commission’, (1945) 39 *American Journal of International Law* 565.

²⁴ On the lack of political support for the UNWCC, see: Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, pp.26-28.

²⁵ See: Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press, 2000, p.149.

²⁶ Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*, Boston: Bedford Books, 1997, p.20.

²⁷ Moscow Declaration, ‘Declaration of the Four Nations on General Security’, (30 October 1943), quoted in Marrus, *ibid.*, pp.20-21.

²⁸ For an examination of the ‘traditional’ heads of jurisdiction, see: Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, pp.40-44.

that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein.²⁹

Thus the Allies intended that cases would be adjudicated before courts in the territories where the crimes were committed in accordance with national law.³⁰ However, Roosevelt, Stalin and Churchill did not agree to punish the most senior criminals by judicial means under the terms of the Moscow Declaration. Instead the declaration stated that ‘the major criminals whose offences have no particular geographical location...will be punished by a joint decision of the Governments of the Allies.’³¹

The joint decision on the punishment of the major war criminals was, nevertheless, not forthcoming until the war ended. Instead the Allied governments disputed not only who constituted a major war criminal but also and more rigorously how these offenders would be dealt with.³² At the 1945 Yalta Conference, however, Churchill, acting on the advice of the Foreign Office, favoured speedy punishment: he argued that the summary execution of the major war criminals was the best solution.³³ To supplement the Moscow Declaration, Churchill had developed a plan which entailed the compilation of a list of between 50-100 major German, Italian and Japanese war

²⁹ *Ibid.*

³⁰ For a general discussion regarding the criterion for the trial of cases under the Moscow Declaration, see: Maria Chiara Malaguti, ‘Can the Nuremberg Legacy Serve any Purpose in Understanding the Modern Concept of “Complementarity”?’ in Politi and Gioia (eds.), *The International Criminal Court and National Jurisdictions*, Aldershot, Hampshire: Ashgate Publishing, 2008, p.115.

³¹ *Ibid.*, p.21.

³² See the so-called ‘Morgenthau Plan’ and the Henry L. Stimson Memorandum Opposing the ‘Morgenthau Plan’, reproduced in Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*, Boston: Bedford Books, 1997, pp.24-27. The United States Secretary of the Treasury, Henry Morgenthau Jnr., presented a memo on 5 September 1944 to President Roosevelt. The memo suggested that once the ‘arch-criminals’ of the war were identified they ‘shall be put to death forthwith by firing squads made up of soldiers of the United Nations.’ All members of the S.S., the Gestapo, high officials of the police and security organisations, all high government and Nazi party officials, and all leading public figures associated with Nazism were to be detained until their guilt was determined. However, the Secretary of War, Henry L. Stimson, did not agree with the Morgenthau proposals in relation to the punishment of war criminals. In a memo dated 9 September 1944, he objected to the Morgenthau plan and argued that any procedures dealing with war criminals ‘must embody...at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defence.’ Stimson was supported by Murray Bernays, a colonel in a special projects unit of the War Department. Ultimately, Roosevelt was guided at the Yalta conference in 1945 by the Stimson-Bernays proposal that the Allies should establish national and international war crimes tribunals to prosecute war criminals.

³³ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, p.31.

criminals to be declared by the United Nations as outlaws.³⁴ Once captured, the outlaws would be summarily executed.³⁵ Anxious to prepare a list which appeared systematic and not arbitrary, the Foreign Office struggled to use ‘hard and fast criteria’ to determine who was a major war criminal. It had prepared a list which ‘was confined to persons whose positions or reputation was such that public opinion would not object to their guilt being taken for granted without a hearing by any form of legal proceedings.’³⁶ The lack of transparent criteria for the selection of perpetrators for prosecution at international level has contemporary relevance; by no means is it a problem exclusive to the Nuremberg proceedings. For example, the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals do not explicitly refer to any criteria which might guide the Prosecutors’ selection of perpetrators for trial. The lack of clear selection criteria runs the risk of decisions initiating international prosecutions being perceived as politically motivated rather than independent and fair.³⁷ The ICTY, the ICTR and the SCSL have all, like the Nuremberg tribunal, faced this challenge.

The question of the major war criminals remained open until the London Conference in 1945. Finally, all of the Allies agreed to the trial rather than the summary execution of the perpetrators. The London Agreement declared: ‘There shall be established...an International Military Tribunal for the Trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.’³⁸ The Nuremberg International Military Tribunal was the institutional foundation stone of the Allied prosecution policy based on a complementary relationship between the Tribunal,

³⁴ See: Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC: University of North Carolina Press, 1998, p.73.

³⁵ At Yalta, Stalin strongly opposed Churchill’s position, noting: ‘[t]here must be no executions without a trial otherwise the world would say we were afraid to try them.’ Quoted in Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, p.31.

³⁶ *Ibid.*, p.78.

³⁷ For consideration of whether a public debate on prosecutorial guidelines could contribute to the perception of international trials and also for recommendations, see: Geert-Jan Alexander Knoops, ‘Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective’, (2004) 15 *Criminal Law Forum* 365.

³⁸ ‘Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)’, (1951) 82 UNTS 279, Art. 1.

military authorities and national courts.³⁹ Major war criminals would be tried by the International Military Tribunal. The trial of other war criminals was regulated by Control Council Law No.10 empowering Allied military commanders to conduct trials and to permit German courts to try cases when the crimes were committed against Germans, or stateless persons.⁴⁰ As one leading commentator has remarked the allocation of cases under the Nuremberg model created ‘a clear system of complementarity that relies on effective co-operation on the basis of distribution of functions and the level of responsibility of the accused.’⁴¹ When it came to selecting the defendants to be indicted there was a focus on the seniority of persons. The British presented their list of leading Nazis which had been prepared in 1944 to support the plan for summary execution.⁴² Since the U.S. military held most of the potential accused in their custody, the Americans, as a result, proved very influential during the process of selecting perpetrators and drafting the indictment.⁴³ Their prosecution strategy was concentrated on the most senior leaders – the Americans intended to try the highest-ranking Nazis available together with leading representatives of groups or organisations to be deemed criminal pursuant to Article 9 of the Charter of the International Military Tribunal.⁴⁴ Eventually, 24 defendants were indicted. In his epic opening address before the Nuremberg Tribunal, Robert Jackson characterised the senior leaders and justified why the prosecution strategy was interwoven around them saying:

These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders without whose evil

³⁹ See generally: Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford: Oxford University Press, 2008, pp.61-64.

⁴⁰ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No.3, 31 January 1946, pp.50-55.

⁴¹ Mohamed M. El Zeidy, ‘From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the *ad hoc* Tribunals’, (2008) 57 *International and Comparative Law Quarterly* 403, pp.410-411. See also, Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, (2001-2002) 23 *Michigan Journal of International Law* 869.

⁴² See: Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, p.85.

⁴³ See: Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*, Boston: Bedford Books, 1997, p.56.

⁴⁴ ‘Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)’, (1951) 82 UNTS 279, Art. 9.

architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war [...]⁴⁵

Like the Nuremberg Charter, the Charter of the International Military Tribunal for the Far East concentrated its jurisdiction on major war criminals.⁴⁶ The majority of the 28 Japanese defendants tried before the Tokyo Tribunal had held very senior political, military or diplomatic posts. Other less senior war criminals were tried by military commissions or national courts.⁴⁷ Discussing the creation of the Nuremberg and Tokyo Tribunals, the eminent scholar B.V.A. Roling remarked:

Human affairs are always rather confused, with positive and negative elements mixed together. Positive developments in history are seldom caused only by honest and noble motives. It is true that both trials had sinister origins; that they were misused for political purposes; and that they were somewhat unfair. But they also made a very constructive contribution to the outlawing of war and the world is badly in need of a fundamental change in the political and legal position of war in international relations.⁴⁸

Despite the vast criticism of both Tribunals, the Nuremberg and Tokyo trials did set the precedent for the enforcement of international criminal law by both international and national tribunals. Describing the legacy of the Nuremberg trials, Theodor Meron has remarked that the proceedings have had ‘an almost incalculable effect on normative international law, and their success went far toward ending impunity of political and military leaders around the world.’⁴⁹ The Nuremberg International Military Tribunal convicted nineteen Nazi major war criminals of crimes against peace, war crimes and crimes against humanity. In Tokyo, the International Military Tribunal for the Far East

⁴⁵ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, 42 vols. (Nuremberg, International Military Tribunal, 1947), 2:98.

⁴⁶ Charter of the International Military Tribunal for the Far East, 19 January 1946, TIAS No.1589.

⁴⁷ B.V.A Roling and Antonio Cassese, *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993, p.2.

⁴⁸ *Ibid.*, p.89.

⁴⁹ Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, (2006) 100 *American Journal of International Law* 551, p.577.

sentenced 25 major war criminals to death or imprisonment.⁵⁰ Yet, the unprecedented achievements of the Nuremberg and Tokyo Tribunals ‘remained cloistered in the historical memory as examples of victor’s justice and the world moved on, preoccupied by the cold war, decolonization and the threat of nuclear extinction.’⁵¹

Although proposals circulated in the early 1990s on the creation of an international criminal tribunal to try Saddam Hussein for crimes committed during the Iraqi invasion of Kuwait, the court was not established.⁵² Nevertheless, during that decade, the practice and enforcement of international criminal law was revived by the formation of the Yugoslavia and Rwanda international tribunals. The Charters of the Nuremberg and Tokyo tribunals imposed a statutory limit on the seniority of accused to be tried. The military tribunals were created to prosecute “major war criminals”. Likewise, pursuant to Article 1 of the SCSL Statute, the Special Court is empowered to prosecute ‘persons who bear the greatest responsibility’ for the serious violations of international law committed in the country since 1996.⁵³ Unlike the Nuremberg and Tokyo precedent, the *ad hoc* Tribunals can theoretically prosecute any person for serious violations of international humanitarian law. There is no jurisdictional limitation in terms of the seniority of accused that can be brought to trial before the Courts. Noting that the perpetrators of mass atrocity are not a standardised group, Mark A. Drumbl has suggested that the offenders fall into three broad categories: the ‘conflict entrepreneurs’ who fuel discriminatory divisions for their own political gain; other leaders who, while exercising authority over their subordinates, remain subject to authority themselves; and, finally, the actual killers.⁵⁴ Perpetrators from all three categories are responsible for the extreme violations of international law committed in the Balkan wars, Rwanda and Sierra Leone. The conflicts were the result of comprehensive criminal policies formulated by

⁵⁰ For information in relation to the 28 Japanese defendants who stood trial before the International Military Tribunal for the Far East, see: B.V.A Roling and Antonio Cassese, *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993, pp.2, 4, 33.

⁵¹ Ralph Zacklin, ‘The Failings of Ad Hoc International Tribunals’, (2004) 2 *Journal of International Criminal Justice* 541.

⁵² M. Cherif Bassiouni and Michael Wahid Hanna, ‘Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein’, (2006-2008) 39 *Case Western Reserve Journal of International Law* 21.

⁵³ SCSL Statute, Art. 1.

⁵⁴ Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge: Cambridge University Press, 2007, p.25.

comparatively few people – the most senior political and military leaders. Their policies were implemented by many others - the intermediary leaders, who supervised, ordered, directed and in many instances participated in the direct commission of the crimes. To varying degrees, the intermediary leaders exercised authority over the hundreds of thousands of lower-level perpetrators who directly committed the atrocities.

Contemplating the scale of the crimes committed in the former Yugoslavia, Rwanda and Sierra Leone, the harsh reality emerges that there are immeasurable numbers of perpetrators and the majority of them will go unpunished. Due to the limited resources available to the Tribunals, international prosecutors must pick the suspects who they consider to be the most important for investigation and trial. Many factors influence the selection of the suspects to be prosecuted by international tribunals – the jurisdiction of the courts, the seniority of the accused, the gravity of the crimes, the cooperation of States, the resources available to the prosecutor, the strength and cogency of evidence and the likelihood of securing a conviction.⁵⁵ At the national level, there is a body of precedents to guide prosecutors when they are selecting suspects for trial; at the international level, the precedents are still emerging. Moreover the objective of the international tribunals to contribute to the restoration and maintenance of peace in the regions further complicates the work of an international prosecutor. As the former Chief of Investigations of the ICTY has remarked, ‘translating the broadly defined mandate of the tribunal into a workable law enforcement strategy requires somewhat political choices as to the purpose of international criminal justice in the aftermath of mass atrocities.’⁵⁶

Many distinguished scholars agree that the ICTY’s and the ICTR’s prosecutions should focus on the most senior leaders most responsible for the crimes committed in the former Yugoslavia and Rwanda. This consensus takes into account the fact that the perpetration of widespread and systematic international crimes generally involves hundreds or thousands of perpetrators. As noted by the pre-eminent judge, Antonio Cassese, a degree of selectivity is required when determining whom to prosecute. Cassese

⁵⁵ See: Hassan B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, (2005) 3 *Journal of International Criminal Justice* 53, p.150.

⁵⁶ John H. Ralston and Sarah Finnin, ‘Investigating International Crimes: A Review of International Law Enforcement Strategies Expediency v Effectiveness’, in Blumenthal and McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Leiden: Martinus Nijhoff Publishers, 2008, p.50.

believed ‘[i]nternational courts should thus go for those who, although perhaps not having killed anybody, masterminded and planned large-scale crimes.’⁵⁷ Bassiouni also shares this opinion. Whilst it may be important to prosecute lower level actors in order to generate evidence against higher level officials, he has remarked that, ‘as a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors’.⁵⁸ International prosecutions are, almost certainly, an avenue to try the masterminds of conflicts who might otherwise obstruct and elude justice. As the former Prosecutor of the *ad hoc* Tribunals, Louise Arbour, pointedly noted, the creation of the ICTY and the ICTR was a huge achievement to bring to justice some of the ‘worst human predators’ in modern history.⁵⁹ She stated that ‘clothed with the impenetrable veneer of state sovereignty’; they believed themselves to be immune from prosecution.⁶⁰ Examining the deterrent factor of international criminal law, another important commentator on the work of the Tribunals has questioned whether the dread of discovery and being found guilty might induce people to abide by the law. Richard Goldstone has supported the prosecution of senior leaders, maintaining that the trial of high level offenders may have a preventive effect. He posited that other leaders may be deterred from committing international crimes if they believe the probability of being tried and punished for their acts is high.⁶¹

⁵⁷ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585, p.595.

⁵⁸ M. Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, 59 *Law and Contemporary Problems* 9, p.20.

⁵⁹ Louise Arbour, ‘The Prosecution of International Crimes: Prospects and Pitfalls’, (1999) 1 *Washington University Journal of Law and Policy* 13, p.14.

⁶⁰ *Ibid.*

⁶¹ Richard Goldstone, ‘Conference Luncheon Address’, reproduced in (1997) 7 *Transnational Law and Contemporary Problems* 2. For consideration of the preventative value of prosecuting the most senior leaders by the International Criminal Court Appeals Chamber, see: *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006.

A. THE POLICY: INTENTIONS OF THE SECURITY COUNCIL, BOSNIA, RWANDA AND SIERRA LEONE

(1) THE CREATION OF THE ICTY

Commenting on the creation of the *ad hoc* Tribunals, former Prosecutor Goldstone has adeptly stated ‘[...] it’s all about politics. Without politics you wouldn’t have international criminal justice at all. Without politicians and without politics, these things don’t happen and won’t happen.’⁶² The opinions of the member States of the Security Council in relation to the seniority of accused to be prosecuted by the ICTY and ICTR can to an extent be determined by an examination of their attitudes towards the establishment of the Tribunals.

Throughout 1992, the violence in Bosnia increased and continued unabated. Unwilling to intervene militarily, major world powers pushed for a political settlement to end the war.⁶³ But endless reports of widespread atrocities and the use of ‘ethnic cleansing’ campaigns to gain and maintain control of territory pushed criminal accountability onto the international agenda. The prosecution of Serb senior leaders was suggested by the United States Secretary of State in his speech at the 1992 Geneva peace talks. Lawrence Eagleburger called for charges against Slobodan Milošević, Radovan Karadžić, and Ratko Mladić for crimes against humanity, as well as the Serb paramilitary leader, Željko Ražnatović (Arkan). In October 1992, under increasing international pressure, the Security Council requested the Secretary-General to establish a Commission of Experts to determine if evidence existed of ‘grave breaches of the Geneva Conventions and other violations of international humanitarian law’ in the former Yugoslavia.⁶⁴ On 16 January 1993, the Commission presented its interim report to the Security Council, calling for the establishment of an international tribunal.⁶⁵ Additional support for the creation of a tribunal came from the UN Commission on Human Rights⁶⁶ and also from

⁶² Richard Goldstone, ‘Historical Evolution – From Nuremberg to the International Criminal Court’, (2007) 25 *Penn State International Law Review* 763, p.766.

⁶³ For NATO negotiations on air strikes and the collapse of the so-called Vance-Owen peace plan in 1993, see: Laura Silber and Alan Little, *The Death of Yugoslavia*, London: Penguin Books, 1996, pp.276-288.

⁶⁴ UN Doc. S/RES/780 (1992).

⁶⁵ ‘Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’, UN Doc. S/25274 (1993).

⁶⁶ UN Docs. A/47/666 and S/24809 (1992).

the United States Secretary of State, Warren Christopher, who announced that his government would support an international war crimes court.⁶⁷ In February 1993, having considered the interim report of the Commission and expressing its serious concern at continuing reports of widespread atrocities, the Security Council agreed. As clearly stated in Resolution 808, the intention of the Council was to create an international tribunal to put an end to the atrocities and bring to justice the persons responsible for them.⁶⁸ The resolution did not specify, however, the seniority of the accused to be brought to trial. The US Permanent Representative to the UN, Madeleine Albright, linked the creation of the tribunal to post-war reconciliation, remarking that '[b]old tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom or if we hope to encourage the emergence of peaceful multi-ethnic democracies, our answer must be a resounding no.'⁶⁹

Post-war reconciliation and the search for justice were, however, not the only factors motivating the member States. With the collapse of the Vance-Owen plan and no agreement between the United States and Europe to intervene militarily, it was an opportune moment to deflect attention from these failed efforts to stop the Balkan wars. As noted by the first President of the ICTY, '[t]he establishment of a Tribunal was thus seized upon during the conflict not only as a belated face-saving measure but also in the pious hope that it would serve as a deterrent to further crimes.'⁷⁰ In May 1993, acting under Chapter VII of the UN Charter, the Security Council established the ICTY,⁷¹ which was operational by 1994 and issued its first indictment later that year. Although France and Britain were not bold enough to vote against Resolution 827, they regarded the issue of war criminals as a possible obstacle to making peace in ex-Yugoslavia, 'binding the hands of policymakers who might have to cut deals with criminal leaders.'⁷² Reports in the media hinted at the unwillingness of 'authoritative persons' at the United Nations to

⁶⁷ For a detailed analysis of the establishment of the ICTY, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.13-34.

⁶⁸ UN Doc. S/RES/808 (1993).

⁶⁹ UN Doc. S/PV.3175 (1993).

⁷⁰ Antonio Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003, p.336.

⁷¹ UN Doc. S/RES/827 (1993), p.13.

⁷² Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton: Princeton University Press, 2002, p.211.

investigate senior leaders like Milošević or Karadžić.⁷³ Many diplomats were concerned that the arrests of the senior political and military leaders could trigger violence, or turn the attitude of the Bosnian Serbs even more bitterly against NATO.⁷⁴ Thus, it appears that the ICTY was intended by many countries to distract from their inaction rather than to prosecute the most senior leaders most responsible for the conflict in the former Yugoslavia. Even Madeline Albright did not seem convinced that the most senior leaders would be arrested and tried. She noted that the Tribunal would issue indictments whether or not suspects could be taken into custody. Even if they were not arrested, the senior political and military perpetrators would become ‘international pariahs’.⁷⁵

None of the former Yugoslav Republics were members of the Security Council when the ICTY was created in 1993. They were not consulted and played no role in the negotiation of the Yugoslavia Tribunal’s Statute. It was assumed that the former Republics would not want their nationals or senior leaders tried by an external tribunal. Therefore, the Security Council created the ICTY under Chapter VII to create an obligation on the new States emerging from the former Yugoslavia to cooperate.⁷⁶ Although the new States did not participate in deliberations on the formation of the ICTY, their efforts to secure the prosecution of the architects of the war in the former Yugoslavia can be investigated from another perspective – the review of the negotiations at the November 1995 Balkan peace conference held in Dayton, Ohio. The provisions relating to war criminals proposed by the former Republics for inclusion in the peace agreement and the role played by the Serbian President Slobodan Milošević, in the negotiations shed some light on the attitudes of States towards the arrest and trial of senior leaders.

The most senior Bosnian Serbs, Karadžić and Mladić, did not attend the 1995 peace conference. Their non-attendance was not due to the recently issued ICTY indictments against them; instead it resulted from the American delegation’s strategy for the peace negotiations. The delegation wanted to deal directly with the leader of Serbia, Slobodan Milošević, and pressure him to control the two Bosnian Serb leaders.

⁷³ Roy Gutman, *A Witness to Genocide*, New York: Macmillan Publishing Company, 1993, pp.150-156.

⁷⁴ Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton: Princeton University Press, 2002, p. 7.

⁷⁵ UN Doc. S/PV.3217 (1993).

⁷⁶ For the use of Chapter VII by the Security Council to create obligations on states, see: Roy S. Lee, ‘The Rwanda Tribunal’, (1996) 9 *Leiden Journal of International Law* 37, p.44.

Milošević, rather than the other two indicted war criminals, was considered the valuable interlocutor. As a leading commentator has noted, ‘Milošević was vital, and could not be kept at arm’s length, let alone branded as a war criminal.’⁷⁷ It was apparent that the primary objective of the Dayton negotiations was to compel Milošević to sign the peace agreement.⁷⁸ To avoid any risk of alienating him, the Europeans tried to avoid the mention of war criminals.⁷⁹ Noting that the international community’s determination to bring the political and military leaders responsible for the Bosnian war to trial would hang over the peace negotiations, Anthony D’Amato questioned whether it was ‘realistic to expect them to agree to a peace settlement in Bosnia if, directly following the agreement, they may find themselves in the dock?’⁸⁰ In advance of the peace conference, D’Amato considered what incentive the Bosnian leaders actually had to sign a peace treaty and pondered whether it was conceivable that, in return for peace, some form of assurance may have been given to the leaders in the former Yugoslavia that the war crimes trials would not take place.

During the Dayton Peace Conference, the Bosnian delegation had a detailed agenda in relation to war criminals. The delegation wanted all parties to the peace agreement, as well as the international community, to be obliged to arrest, detain, and transfer to the custody of the ICTY all indicted war criminals. The Bosnians suggested that economic and other sanctions should be applied against the parties for non-compliance with the obligation to cooperate with the Tribunal.⁸¹ These provisions were fully supported by the ICTY Prosecutor who had insisted that the peace agreement should regulate the turning over of war crimes suspects to the Tribunal.⁸² The delegation drew particular attention to suspected war criminals that remained in positions of responsibility in military and police forces after the war. To remove the suspected war criminals from

⁷⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton: Princeton University Press, 2002, p.238.

⁷⁸ Paul R. Williams and Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, Maryland: Rowman & Littlefield Publishers, 2002, p.152.

⁷⁹ *Ibid.*

⁸⁰ Anthony D’Amato, ‘Peace vs. Accountability in Bosnia’, (1994) 88 *American Journal of International Law* 500.

⁸¹ For the negotiations and the provisions suggested by the parties at the Dayton Peace Summit, see: Paul C. Szasz, ‘The Dayton Accord: 1997 The Balkan Peace Agreement’, 30 *Cornell International Law Journal* 759, pp.762-768.

⁸² Paul R. Williams and Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, Maryland: Rowman & Littlefield Publishers, 2002, p.163.

influential positions, the Bosnians suggested the creation of a joint EU/NATO international vetting mechanism. The mandate of the proposed institution would be to vet and remove persons reasonably suspected of war crimes from military and police forces. The vetting mechanism proposal was ultimately rejected.⁸³ Unsurprisingly, Milošević contested the legality and jurisdiction of the ICTY during the negotiations. The Serbian delegation objected to the inclusion of any provisions which would require the parties to exclude from the military or public office any indicted war criminals.

The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) was signed in Paris on 14 December 1995.⁸⁴ The Dayton Peace Agreement is composed of a General Framework Agreement and 12 Annexes including the Constitution of Bosnia and Herzegovina. Although the Bosnian delegation pushed for a robust plan to deal with the perpetrators of the atrocities committed during the war, the prosecution of the culpable senior political and military leaders was not high on the agenda at the Dayton peace conference. Rather the issue was dealt with in very general terms in the peace agreement. Although the Dayton Peace Agreement did establish elaborate mechanisms and institutions for protecting human rights into the future in Bosnia,⁸⁵ it did not create any specific national institutions for the prosecution and trial of war criminals. Instead, under Article IX(1) of the Constitution of Bosnia and Herzegovina, which is an integral part of the Dayton Peace Agreement, any person serving a sentence imposed by the ICTY or indicted by the Tribunal is prohibited from holding any appointive, elective or other public office in Bosnia.⁸⁶ As Payam Akhavan has noted, ‘there is only an implied reference’ to the ICTY in the General Framework Agreement itself.⁸⁷ Pursuant to Article IX, the parties are obliged to cooperate fully with anyone authorised by the Security Council to investigate or prosecute war crimes and

⁸³ *Ibid.*, p.165.

⁸⁴ The General Framework Agreement for Peace in Bosnia and Herzegovina (1995), UN Doc. S/1995/999, commonly known as the Dayton Peace Agreement. The Peace Agreement is an international treaty concluded between the three ex-Yugoslav states: Croatia, the Federal Republic of Yugoslavia and the Republic of Yugoslavia.

⁸⁵ *Ibid.*, Annex 6 – Agreement on Human Rights. For a detailed discussion in relation to the human rights provisions included in the Agreement, see: Paul C. Szasz, ‘The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia’, 90 *American Journal of International Law* 301, pp.301-316.

⁸⁶ *Ibid.*, Annex 4 – Constitution of Bosnia and Herzegovina, Article IX.

⁸⁷ Payam Akhavan, ‘The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond’, (1996) 18 *Human Rights Quarterly* 259, p.275.

other violations of international humanitarian law.⁸⁸ Before the Security Council, the representative from Bosnia and Herzegovina warned those who committed atrocities that there would be no refuge from justice. In this regard he declared:

[T]he commitment to the pursuit of justice through the international war crimes Tribunal must be unwavering on our part and on the part of all members of the international community. Without justice, there shall be no reconciliation. Without reconciliation, this peace may not endure.⁸⁹

The Agreement on the Military Aspects of the Peace Settlement contained in Annex 1A of the Dayton Peace Agreement, together with Resolution 1031 adopted by the Security Council on 15 December 1995, formed the legal basis for the creation and use of armed force by a multinational implementation force (IFOR).⁹⁰ Article X of Annex 1A explicitly refers to the parties' cooperation with the International Tribunal for the Former Yugoslavia.⁹¹ Pursuant to Resolution 1031, IFOR was authorized to use necessary force to ensure compliance with Annex 1A of the Peace Agreement.⁹² The US representative told the Security Council that her Government considered Resolution 1031 as a welcome addition to the responsibilities stemming from Resolution 827 which had created the ICTY. Madeline Albright emphasised the obligation of all parties to cooperate with the Tribunal and recognised that the empowerment of IFOR to detain and transfer indicted suspects to the custody of the Yugoslavia Tribunal would reaffirm this duty.⁹³ On 21 December 1995, the Security Council adopted Resolution 1034 in response to the Secretary-General's report on the violations of international humanitarian law committed

⁸⁸ General Framework Agreement for Peace in Bosnia and Herzegovina, Article IX.

⁸⁹ UN Doc. S/PV.3607 (1995), p.3.

⁹⁰ UN Doc. S/RES/1031 (1995), paras. 12-25.

⁹¹ General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A – Agreement on the Military Aspects of the Peace Settlement, Article X.

⁹² UN Doc. S/RES/1031 (1995), para.15. For a discussion regarding the power of the multinational force in Bosnia to arrest persons indicted by the ICTY, see: Paola Gaeta, 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?', (1998) 9 *European Journal of International Law* 174, pp.174-181.

⁹³ UN Doc. S/PV.3607 (1995), p.20.

in Srebrenica, Zepa, Banja Luka and Sanski Most.⁹⁴ From the deliberations on Resolution 1034, it seems there was political consensus among the members of the Security Council that all parties support the work of the ICTY.⁹⁵ The Tribunal's indictments against Radovan Karadžić and General Ratko Mladić for the atrocities committed in Srebrenica were referred to in Resolution 1034.⁹⁶ Although the Council demanded that all States fully cooperate with the ICTY, in Resolution 1034 it did not directly call for the arrest and transfer of the most senior Bosnian Serb political and military leaders to the custody of the Yugoslavia Tribunal. It has been noted that, after IFOR's deployment, the multinational force adopted a policy of non-action due to concerns that the arrest of war criminals would shatter the fragile peace in the region.⁹⁷ In 1996, from the ski slopes on Mount Jahorina, General Mladić warned that IFOR would suffer serious consequences if any attempt was made to arrest him.⁹⁸ Finally, over 15 years after the Dayton Peace Agreement was signed, the notorious Ratko Mladić was arrested in Serbia and transferred to the custody of the ICTY.⁹⁹

(2) THE CREATION OF THE ICTR

Cynics suggest that the ICTR 'was born of the sheer guilt of having done little more than count the hundred days that it took for half a million people to be killed by their countrymen somewhere in Africa.'¹⁰⁰ Despite frantic calls for assistance, the international community was unwilling to take the necessary steps to stop the slaughter.¹⁰¹ Like the ICTY, the creation of the Rwanda Tribunal was preceded by a

⁹⁴ Report of the Secretary-General Pursuant to Security Council Resolution 1019 (1995) on Violations of International Humanitarian Law in the Areas of Srebrenica, Zepa, Banja Luka and Sanski Most, 27 November 1995, UN Doc. S/1995/988.

⁹⁵ UN Doc. S/PV.3612 (1995).

⁹⁶ UN Doc. S/RES/1034 (1995), Preamble and para.7 respectively.

⁹⁷ Michael P. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', (1999-2000) 49 *DePaul Law Review* 925, p.959.

⁹⁸ 'Shrugging Off Indictment, Bosnian Serb General Skis', New York Times, 11 March 1996. In an interview with the Greek Mega Network, it is reported that he said, 'They have to understand one thing, that I am very expensive and that my people support me.'

⁹⁹ ICTY Press Release (OTP/1412e), 'Statement of the Office of the Prosecutor on the arrest of Ratko Mladić', 26 May 2011.

¹⁰⁰ Louise Arbour, 'The Prosecution of International Crimes: Prospects and Pitfalls', (1999) 1 *Washington University Journal of Law and Policy* 13, p.15.

¹⁰¹ For information in relation to the politics behind the creation of the ICTR, see: Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for Rwanda', (1996) 7 *European Journal of International Law* 501.

report prepared by an impartial Commission of Experts mandated by the Security Council to investigate evidence of grave violations of international humanitarian law, including possible acts of genocide.¹⁰² Diplomats wanted to know how the perpetrators would be brought to justice.¹⁰³ The first interim report of the Commission provided a possible answer. The experts advised the Security Council to take all action necessary to ‘ensure that the individuals responsible...are brought to justice before an independent and impartial international criminal tribunal’.¹⁰⁴ To secure the most efficient allocation of resources, the experts suggested expanding the jurisdiction of the ICTY to incorporate cases from Rwanda.¹⁰⁵ Although the United States and New Zealand prepared the draft resolution using the Yugoslavia Tribunal as a model, they proposed the creation of an independent tribunal for Rwanda.¹⁰⁶ The court would have its own trial chambers but share an Appeals Chamber and Prosecutor with the ICTY. Similar to the Statute of the ICTY, the draft ICTR Statute did not declare a jurisdictional limitation in terms of the seniority of the accused to be prosecuted.

Unlike the Federal Republic of Yugoslavia which opposed the creation of the ICTY, the Rwandan Government actually proposed the establishment of an international court in 1994.¹⁰⁷ The new government was a coalition dominated by the Rwandese Patriotic Front who had militarily defeated the party responsible for the genocide; thus, its enthusiasm for an international court to prosecute the architects of the genocide was not surprising.¹⁰⁸ Apparently, in its first proposal to establish an international tribunal, the Government had conceived an institution that would be under its control but would feature an international component.¹⁰⁹ According to Payam Akhavan, the Government’s desire to retain sovereignty was in part due to the perception that an international tribunal might be open to manipulation or be rendered ineffective by states with connections to

¹⁰² UN Doc. S/RES/935 (1994).

¹⁰³ UN Doc. S/PV.3377 (1994).

¹⁰⁴ ‘Preliminary Report of the International Commission of Experts established in accordance with Security Council Resolution 935 (1994)’, UN Doc. S/1994/1125, para.148.

¹⁰⁵ *Ibid.*, para.149.

¹⁰⁶ Roy S. Lee, ‘The Rwanda Tribunal’, (1996) 9 *Leiden Journal of International Law* 37, pp.37-61.

¹⁰⁷ Daphna Shraga and Ralph Zacklin, ‘The International Criminal Tribunal for Rwanda’, (1996) 7 *European Journal of International Law* 501, p.501-518.

¹⁰⁸ See generally: William A. Schabas, ‘Justice, Democracy, and Impunity in Post-Conflict Rwanda: Searching for Solutions to Impossible Problems’, (1996) 7 *Criminal Law Forum* 523.

¹⁰⁹ Payam Akhavan, ‘The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’, (1996) 90 *American Journal of International Law* 501, p.505.

the previous regime.¹¹⁰ During the Security Council's deliberations on the establishment of the tribunal, the Rwandese delegate explained four main reasons why his Government supported the creation of an international court.¹¹¹ Firstly, the genocide was viewed by the Rwandan Government as a 'crime against humankind' which needed to be suppressed by the international community as a whole. Secondly, the Government wanted to avoid allegations of 'speedy, vengeful justice': it considered that trials before an international tribunal would be perceived to be neutral and fair.¹¹² Thirdly, the Government believed that the creation of an international tribunal was required to challenge the culture of impunity which had characterised Rwandan society since 1959. It is apparent that the tribunal was part of the Government's plan to build a strong state and to achieve the national reconciliation of the Rwandese. As the Rwandan representative told the Security Council, '[t]he Tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice.'¹¹³ Finally, unlike the architects of the war in the former Yugoslavia, the leading Rwandan perpetrators of the genocide were on the defeated side. After the genocide, many senior Rwandan Hutu officials found refuge in Kenya and the former Zaire.¹¹⁴ The Government of Rwanda was aware that the creation of the ICTR under Chapter VII was necessary to ensure the cooperation of third States, particularly countries where former leaders and the main planners of the genocide sought refuge.¹¹⁵ In an address to the General Assembly, President Bizimungu urged the adoption of a

¹¹⁰ *Ibid.*

¹¹¹ UN Doc S/PV.3453 (1994), p.14.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ For the political motivations of Kenya and the former Zaire for supporting the Hutu leaders, see: Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal*, Aldershot, Hampshire: Ashgate Publishing, 2000, p.51.

¹¹⁵ On the question of refugees and security in Rwanda, see: 'Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the President of the Security Council', UN Doc. S/1994/1115. Calling for the creation of an international tribunal, the Government explained that the refugees fell into different categories, including criminals who feared being brought to justice by the new Government. Also see: Neil J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', (1996) 59 *Law and Contemporary Problems* 127, p.129. Kritz points out that even if the majority of senior planners and perpetrators have left the territory where atrocities have been committed, or if they are otherwise inaccessible for arrest by the national authorities (as was the case in both Rwanda and Bosnia), an international tribunal stands a better chance than a national court of obtaining custody and extradition.

resolution under Chapter VII of the United Nations Charter to create an international tribunal to be located in Rwanda. Regarding the authority of the future court, the President referred to the mandate of the former United Nations Assistance Mission for Rwanda (UNAMIR) and the fact that genocide was carried out in the presence of the international community.¹¹⁶ He declared:

Rather than presiding over peace and harmony among the Rwandese, the troops, misled by the authors of the apocalypse – the Rwandese authorities at the time – were, alas, forced to serve as witnesses to the carnage. We regret that their mandate prevented them from acting effectively at the moment of the tragedy. Based on this experience, we encourage the United Nations to furnish the international tribunal to be created in Rwanda with the means to function as it should, in order to spare us further disappointments and tragedies.¹¹⁷

Rwanda wanted the ICTR to prosecute the most senior leaders responsible for the genocide and, in the Government's opinion, the creation of an international tribunal would make it 'easier to get at those criminals who have found refuge in foreign countries.'¹¹⁸ From the deliberations on the adoption of Resolution 955, it seems that other member states of the Council shared this opinion. The Brazilian representative pointed out that, for the work of the ICTR to be effective, it would be essential that states hand over suspects to the court.¹¹⁹ To ensure a robust cooperation regime between the international tribunal and States, the British representative pointed out that domestic extradition procedures would need to be amended to enable States to comply with a request or order for the surrender or transfer of an accused to the Rwanda Tribunal.¹²⁰

Despite the general support of the Government of Rwanda for the Tribunal, there were considerable differences of opinion between it and the Council regarding the jurisdiction and competence of the ICTR.¹²¹ The Security Council created the ICTR and adopted its Statute in Resolution 955. Rwanda, however, which was serving a two-year

¹¹⁶ UN Doc. A/49/PV.21 (1994), p.4.

¹¹⁷ *Ibid.*, p.5.

¹¹⁸ *Ibid.*

¹¹⁹ UN Doc. S.PV/3453, p.10.

¹²⁰ *Ibid.*, p.6.

¹²¹ For the objections raised by Rwanda, see: Madeline H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', (1997) 7 *Duke Journal of Comparative and International Law* 349, p.353-357.

term as an elected member of the Security Council, cast the only vote against the resolution. The Government disagreed with the dates set for the temporal jurisdiction in the draft ICTR Statute from 1 January 1994 to 31 December 1994.¹²² In negotiations on the draft resolution, the Rwandan delegation had proposed to other members of the Council a temporal jurisdiction stemming from 1 October 1990 to 17 July 1994. The 1990 start date was intended to encompass the planning of the genocide and the massacres, referred to by the Rwandan representative as the ‘pilot projects’, which preceded it.¹²³ Regarding the end date for the tribunal’s jurisdiction proposed by the delegation, it seems that the Government did not want the international court to have jurisdiction over crimes committed by the Rwandese Patriotic Front. The interim report submitted to the Security Council by the Commission of Experts for Rwanda reported that persons from both sides of the armed conflict had committed serious breaches of international humanitarian law in Rwanda.¹²⁴ This information implicated senior members of the Rwandese Patriotic Front, some of whom became members of the new coalition Government. Thus, as Daphna Shraga and Ralph Zacklin have remarked, the desire to limit the temporal jurisdiction of the tribunal, and fix an end date of 17 July 1994, was designed to ensure that ‘only acts of genocide and other crimes against humanity committed by the previous Hutu regime would have been included in the jurisdiction of the Tribunal.’¹²⁵

Another reason for the dissenting vote was the opinion of the Government that the Tribunal would not have sufficient resources to prosecute the thousands of detainees in Rwanda. The member States of the Council were called on to amend the draft ICTR Statute to increase the number of Trial Chamber judges and to give the ICTR its own Appeals Chamber and prosecutor.¹²⁶ The Government did not intend the ICTR to focus its prosecution strategy only on a limited number of the most senior leaders responsible for the genocide. As noted by leading observers, the Rwandese had an unrealistic expectation that the Tribunal would undertake the prosecution of the thousands of

¹²² UN Doc. S/PV.3453 (1994), p.15.

¹²³ *Ibid.*

¹²⁴ ‘Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994)’, UN Doc. S/1994/1125, paras. 146-149.

¹²⁵ Daphna Shraga and Ralph Zacklin, ‘The International Criminal Tribunal for Rwanda’, (1996) 7 *European Journal of International Law* 501, p.507.

¹²⁶ UN Doc. S/PV.3454 (1994), p.15.

detainees.¹²⁷ During the negotiations on the draft resolution, the Rwandan delegation had proposed a division of work between the international tribunal and national courts based on subject-matter jurisdiction. In the Government's opinion the jurisdiction of the Tribunal should only have consisted of the crime of genocide. The other categories of offences – crimes against humanity and war crimes - would be tried by courts in Rwanda.¹²⁸ The Government was vehemently opposed to the potential use of the Tribunal's limited resources for the prosecution of crimes that fell under the jurisdiction of its national courts.¹²⁹ In quite a harsh statement, the Rwandese delegate told the Security Council that 'the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular.'¹³⁰

Another point of contention related to the location of the Tribunal. The Government of Rwanda considered that the ICTR would contribute to the fight against impunity and help promote national reconciliation. To achieve these goals, the Government was determined that the seat of the Tribunal should be in Rwanda. The Security Council was also told that, by locating the Tribunal on Rwandese soil, the harmonisation of international and national jurisprudence would be promoted.¹³¹ During deliberations on the adoption of Resolution 955, the delegation expressed its surprise that the authors of the draft Statute hesitated to confirm the future seat of the ICTR. It has been reported that the primary concern of the Council was whether a Tribunal located in Rwanda would be able to operate without bias and independently.¹³² Rather than specifying the seat of the Tribunal in Resolution 955, the Council decided that the location of the court would be selected having regard 'to considerations of justice and fairness as well as administrative efficiency, including access to witnesses and

¹²⁷ For the position of the Rwandese Government, see: Daphna Shrava and Ralph Zacklin, 'The International Criminal Tribunal for Rwanda', (1996) 7 *European Journal of International Law* 501, pp.504-508.

¹²⁸ Roy S. Lee, 'The Rwanda Tribunal', (1996) 9 *Leiden Journal of International Law* 37, pp.50-51.

¹²⁹ UN Doc. S/PV.3454 (1994), p.15.

¹³⁰ UN Doc. S/PV.3453 (1994), p.15.

¹³¹ *Ibid.*, p.16.

¹³² Roy S. Lee, 'The Rwanda Tribunal', (1996) 9 *Leiden Journal of International Law* 37, p.48.

economy.¹³³ In 1995, the Secretary-General advised the Security Council that the Tribunal should be located in Arusha in Tanzania.

Finally, Rwanda withdrew its support for the resolution creating the ICTR due to the regulations governing the punishment of persons contained in the draft Statute.¹³⁴ The Council members took the position that the death penalty should not be imposed by the ICTR. However, capital punishment was provided for under the Rwandese Penal Code. The Rwandese delegate expressed concerns that this would create a disparity in sentences. Senior leaders appearing before the Tribunal who ‘devised, planned and organized the genocide...may escape capital punishment,’ whereas lower level perpetrators who had implemented their plans would potentially be subjected to the death penalty before courts in Rwanda.¹³⁵ Once again, the Council was informed that the situation was not conducive to national reconciliation.

(3) THE CREATION OF THE SCSL

The development of the Special Court for Sierra Leone began in earnest in mid-2000.¹³⁶ At that time, President Kabbah requested the Security Council to establish ‘a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace’ in Sierra Leone and the West African sub-region.¹³⁷ A framework for the Special Court was annexed to the letter sent to the Council.¹³⁸ The President did not ask the Council to create a court with jurisdiction over the senior leaders of all the parties to the protracted 10-year conflict. Instead the Security Council was asked to support the establishment of a court solely to prosecute the Revolutionary United Front leadership and their accomplices. The President’s selectivity in terms of persons to be prosecuted appears to be justified on the basis of the kidnapping of United Nations peacekeepers by

¹³³ UN Doc. S/RES/955 (1994), para.6.

¹³⁴ For the objections of the Rwandan Government regarding the jurisdiction and location of the ICTR, see: Lilian A. Barria and Steven D. Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’, (2005) 9 *International Journal of Human Rights* 349, p.355.

¹³⁵ UN Doc S/PV.3453 (1994), p.16.

¹³⁶ See generally: Laura A. Dickinson, ‘The Promise of Hybrid Courts’, (2003) 97 *American Journal of International Law* 295, pp.295-310; Robert Cryer, ‘A “Special Court” for Sierra Leone?’ (2001) 50 *International and Comparative Law Quarterly* 435, pp. 435-447.

¹³⁷ ‘Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council’, UN Doc. S/2000/786.

¹³⁸ *Ibid.*, Enclosure Framework for the Special Court for Sierra Leone, para.2.

the Revolutionary United Front and the ongoing atrocities committed after the signing of the Lomé Peace Agreement in July 1999.¹³⁹ Section IX(2) of the Lomé Peace Agreement declared that ‘[a]fter the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement’.¹⁴⁰ In his letter to the Security Council, the President of Sierra Leone noted that the Revolutionary United Front leadership had ‘reneged’ on the Lomé Peace Agreement and, thus, they had to be held accountable for their crimes. From the framework for the Special Court suggested by Sierra Leone, it seems the Government accurately assessed the mood of the member States in relation to the growing costs of the *ad hoc* Tribunals. Referring to the mandate of the proposed institution, the President highlighted that, by limiting the personal jurisdiction of the court to the leadership of the Revolutionary United Front, it would allow the court to be ‘quick and efficient in its tasks of doing justice while at the same time breaking the command structure of the criminal organization responsible for the violence.’¹⁴¹

One commentator has observed that ‘[m]embers of the Security Council acted jointly, unanimously, and as a coherent group in developing a common approach to the nature, jurisdiction and organizational structure’ of the Special Court.¹⁴² On 14 August 2000, the Council responded to the request from the Government with the adoption of Resolution 1315. The Resolution directed the Secretary-General to negotiate an agreement with the Government of Sierra Leone with a view to establishing an independent special court.¹⁴³ The Council did not limit the personal jurisdiction of the proposed court to the leadership of the Revolutionary United Front as requested by the Government. Rather Resolution 1315, which was adopted unanimously by the Council,

¹³⁹ UN Doc. S/1999/777, Annex – Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front, 7 July 1999.

¹⁴⁰ At the time of the signature of the Lomé Peace Agreement, the United Nations Special Representative for Sierra Leone attached a disclaimer stating that the amnesty provision in Article IX shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

¹⁴¹ UN Doc. S/2000/786, Enclosure Framework for the Special Court for Sierra Leone, para.2.

¹⁴² See: Daphna Shrava, ‘The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions’, in Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford: Oxford University Press, 2004, p.20.

¹⁴³ UN Doc. S/RES/1315 (2000), para.1.

recommended that the court ‘should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes [...], including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone’.¹⁴⁴ In his report on the establishment of the Special Court, the Secretary-General noted that he understood the term ‘persons who bear the greatest responsibility’ as a limitation on the number of suspects to be tried by reference to their position in a military or political hierarchy and the gravity and scale of the crime. The Secretary-General, however, suggested the use of the more general term ‘persons most responsible’ to broaden the personal jurisdiction of the court to include political and military leaders as well as persons who held command positions at lower-levels of a given hierarchy. He advised that the term ‘most responsible’ denoted ‘both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.’¹⁴⁵ In spite of the Secretary-General’s recommendation, the members of the Security Council adhered to the opinion that the Special Court should concentrate on persons who played a leadership role. The Council directed that the term ‘persons who bear the greatest responsibility’ as expressed in Resolution 1315 should be included in the draft Special Court Statute to define the personal jurisdiction of the court.¹⁴⁶

Two key issues were at play in debates regarding the start date of the temporal jurisdiction of the Special Court. Firstly, in addressing the question, the Secretary-General was required to consider the validity of the amnesty granted under the Lomé Peace Agreement of 7 July 1999. If the Lomé amnesty was considered valid, then the temporal jurisdiction of the Special Court would be limited to offences committed after the agreement was signed. If the sweeping amnesty was considered invalid, then the jurisdiction could stretch back to 1991 when the decade-long civil war commenced in Sierra Leone. When the Lomé Peace Agreement was signed, the Special Representative of the Secretary-General appended to his signature a statement that the United Nations understood that the amnesty provisions did not apply to the crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian

¹⁴⁴ UN Doc. S/RES/1315 (2000), para.3. See also: UN Doc. S/PV.4186 (2000).

¹⁴⁵ ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.30.

¹⁴⁶ UN Doc. S/2000/1234, para.1.

law.¹⁴⁷ Moreover, in his report on the establishment of the Special Court, the Secretary-General rejected the Lomé amnesty for international crimes. During the negotiations on the Statute of the Special Court, the Government of Sierra Leone agreed with the position of the United Nations that an amnesty granted to any suspect of international crimes falling within the jurisdiction of the Special Court would not be a bar to prosecution.¹⁴⁸ Thus, the temporal jurisdiction of the court could start in 1991. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 was, however, not considered realistic by the Secretary-General.¹⁴⁹ Therefore, in his report on the creation of the Special Court, he proposed various dates as options for a beginning date for the temporal jurisdiction of the Court. In deciding on a start date for the temporal jurisdiction of the Court, the Secretary-General was guided by three main principles.¹⁵⁰ Firstly, he considered that the jurisdiction should be reasonably limited in time to avoid overburdening the Prosecutor and the Special Court. Secondly, it was the Secretary-General's opinion that the start date should correspond to a specific event in the conflict, for example, the conclusion of the Abidjan Peace Agreement in November 1996. Shortly after the Peace Agreement was signed, it collapsed and widespread hostilities resumed. Finally, he held that the temporal jurisdiction should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. The parties agreed that the Special Court's temporal jurisdiction should commence at 30 November 1996, the date of the Abidjan Peace Agreement.¹⁵¹ This decision was justified on the grounds that it would ensure that the most serious crimes

¹⁴⁷ See: *Kallon and Kamara* (SCSL -2004-15-AR72(E) and SCSL-2004-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004. The SCSL Appeals Chamber ruled that amnesties granted in accordance with the terms of the Lomé Peace Agreement to members of warring factions in the Sierra Leone were not a bar to prosecution before the SCSL. For a detailed examination of the Lomé Amnesty and consideration of the issue by the SCSL, see: William A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', (2004-2005) 11 U.C. Davis *Journal of International Law and Policy* 145.

¹⁴⁸ 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, para.24.

¹⁴⁹ *Ibid.*, para.26.

¹⁵⁰ *Ibid.*, para.25.

¹⁵¹ For a general discussion in relation to the temporal jurisdiction of the SCSL, see: Robert Cryer, 'A "Special Court" for Sierra Leone?', (2001) 50 *International and Comparative Law Quarterly* 435, pp.442-443.

committed by all parties and armed groups involved in the civil war would be encompassed within the jurisdiction.¹⁵²

The formal agreement establishing the Special Court was signed in Freetown on 16 January 2002.¹⁵³ Pursuant to Article 1(1), the parties agreed to establish the Special Court ‘to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.’¹⁵⁴ Implementation of the agreement in Sierra Leone required its incorporation into national law. Consequently, in March 2002, the Parliament of Sierra Leone enacted the Special Court Agreement (Ratification) Act. It provides a legal framework for the activities of the Court within the country. Section 11(2) of the Act has been interpreted by the Supreme Court of Sierra Leone as putting beyond all doubt the intention of the Parliament to create the Special Court independent of the national judiciary.¹⁵⁵

There is a general consensus in academic material examining the creation of the ICTY and the ICTR that the Tribunals were created ‘more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice.’¹⁵⁶ The Yugoslavia Tribunal has been referred to as a ‘fig leaf’ for the international community behind which it could hide its shame for not intervening in the Balkan wars.¹⁵⁷ Likewise, the shame felt by the international community for failing to prevent the Rwandan genocide contributed to the creation of the ICTR.¹⁵⁸ Unlike the Special Court, the seniority of the accused to be prosecuted by the ICTY and the ICTR was not considered in detail by the member States of the Security Council during deliberations on the

¹⁵² ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.27.

¹⁵³ ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’, Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II.

¹⁵⁴ *Ibid.*, Art. 1(1).

¹⁵⁵ Sesay, Kondewa & Fofana – v – The President of the SCSL, The Registrar of the SCSL, The Prosecutor of the SCSL and The Attorney General and Minister of Justice, Supreme Court of Sierra Leone, SC No. 1/2003.

¹⁵⁶ Ralph Zacklin, ‘The Failings of Ad Hoc International Tribunals’, (2004) *Journal of International Criminal Justice* 541, p.542.

¹⁵⁷ Richard Goldstone, ‘Assessing the Work of the UN War Crimes Tribunals’, (1997) 33 *Stanford Journal of International Law* 4, p.5.

¹⁵⁸ Payam Akhavan, ‘The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’, (1996) 90 *American Journal of International Law* 501.

creation of the Tribunals. Most likely, the States considered the selection of perpetrators as a task for the prosecutor that they would appoint in the future. Years later, however, this situation changed dramatically when negotiations commenced regarding the completion of the work of the Tribunals. The seniority of accused appropriate for trial by the international tribunals was a central theme in the deliberations on the closure of the ICTY and the ICTR.

B. THE LAW: JURISDICTION AND PRIMACY OF THE TRIBUNALS

(1) THE LEGAL BASIS FOR THE ESTABLISHMENT OF THE TRIBUNALS

Established pursuant to Article 29 of the Charter of the United Nations, the ICTY and ICTR are subsidiary organs of the Security Council.¹⁵⁹ As noted by the Appeals Chamber when creating the ICTY, ‘...the Security Council not only decided to establish a subsidiary organ..., it also clearly intended to establish a special kind of “subsidiary organ”: a tribunal.’¹⁶⁰ The Council created the ICTY in a two-stage process.¹⁶¹ Resolution 808 established the Tribunal and, months later, the Statute was adopted. Applying the Yugoslavia model, the ICTR was created and its Statute adopted in

¹⁵⁹ Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter UN Charter). Acting under Chapter VII of the Charter, entitled ‘Action with Respect to Threats to the Peace, Breaches of The Peace, and Acts of Aggression’, the Security Council decided to create the ICTY. Article 41 of the Charter provides that the Council may decide what measures not involving armed force are to be employed to give effect to its decisions. The Tribunal was created as a measure to contribute to the maintenance of peace and security in the Balkans. Article 29 of the Charter states: ‘The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.’ For the advice of the Secretary General on creating the tribunal as a subsidiary organ within the terms of Article 29, see: ‘Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)’, UN Doc. S/1993/25704, paras. 28-29. Regarding the authority of the Security Council to invoke Chapter VII and establish a subsidiary organ with judicial powers, see: *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.15; *Milošević* (IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, paras.5-11; *Kanyabashi* (ICTR-96-15-T), Decision on the Defence Motion on Jurisdiction, 18 June 1997, para.27. For an analysis of *Tadić* and whether the Appeals Chamber has *Kompetenz-Kompetenz*, see: Jan Klabbers, ‘A Introduction to International Institutional Law’, 2nd ed., Cambridge: Cambridge University Press, 2009, pp.166-169.

¹⁶⁰ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.15.

¹⁶¹ For a detailed account of the two-stage process see: Roy S. Lee, ‘The Rwanda Tribunal’, (1996) 9 *Leiden Journal of International Law* 37.

Resolution 955. As the parent organ, the Security Council can give general policy guidelines to the Tribunals without having to amend the Statutes.¹⁶²

Although not a Chapter VII court, the SCSL was created as a result of a Security Council initiative – Resolution 1315 - which directed the Secretary-General to negotiate the creation of a Special Court by way of a treaty between the United Nations and the Government of Sierra Leone. Pursuant to Article 24 (1) of the United Nations Charter, the primary responsibility for the maintenance of international peace and security is conferred on the Security Council.¹⁶³ In Resolution 1315, the Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security.¹⁶⁴ The Resolution further recognised that ‘in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.’¹⁶⁵ Thus, as Cryer has remarked, the Resolution followed the trend of Security Council Resolutions 827 and 955, which provided the legal basis for the creation of the ICTY and the ICTR, by linking accountability for international crimes with the restoration and maintenance of peace.¹⁶⁶

The precise legal nature of the Special Court was a pivotal issue in the case against the former President of Liberia, Charles Taylor. Taylor sought to have his indictment quashed. He argued that as a head of State at the time criminal proceedings were initiated against him, he enjoyed absolute immunity from criminal prosecution.¹⁶⁷ The former Liberian President maintained the Special Court was without jurisdiction: it did not derive its authority from Chapter VII of the United Nations Charter, thus, it could

¹⁶² See generally: Larry Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 2005 158, p.165.

¹⁶³ UN Charter, Article 24 (1) ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’ Pursuant to Chapter VII, Article 39: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

¹⁶⁴ UN Doc. S/RES/1315 (2000), Preamble.

¹⁶⁵ *Ibid.*

¹⁶⁶ See: Robert Cryer, ‘A “Special Court” for Sierra Leone?’ (2001) 50 *International and Comparative Law Quarterly* 435, p.436.

¹⁶⁷ *Taylor* (SCSL-2003-01-I), Decision on Immunity from Prosecution, 31 May 2004, para. 6.

be characterised as a national court. Pointing out that the International Criminal Court, which does not have Chapter VII powers, denies immunity to heads of State for international crimes, the Prosecutor observed that the lack of such powers did not affect the Special Court's jurisdiction. In addition, the Prosecutor noted that customary international law permits international criminal courts to indict acting heads of State in an international court. In its judgment, the Special Court Appeals Chamber definitively characterised the institution as an international criminal court. The Chamber declared:

We come to the conclusion that the Special Court is an international criminal court. The constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable.¹⁶⁸

Consequently, the Chamber held that Taylor's official position as head of State at the time the proceedings were initiated against him was not a bar to his prosecution. As Schabas has remarked, the Special Court 'is a close relative of the 'hybrid tribunals', but is more accurately classified with the *ad hoc* tribunals because it is a creature of international law, not domestic law.'¹⁶⁹ As a 'treaty-based *sui generis* court of mixed jurisdiction and composition', the Special Court is not anchored fully in either the United Nations or the Sierra Leonean constitutional systems.¹⁷⁰ Pursuant to Article 7 of the Agreement, the Management Committee was created to 'provide advice and policy direction on all non-judicial aspects of the operation of the Court'.¹⁷¹ The Secretary-General represents the Security Council in the Management Committee thus ensuring an internal administrative control of the Council over the Special Court.¹⁷²

¹⁶⁸ *Ibid.*, para. 42.

¹⁶⁹ For the legal nature of the tribunal, see William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda, and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.6.

¹⁷⁰ 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, paras.9 and 39.

¹⁷¹ For a detailed examination of the creation and structure of the Management Committee, see: Phakiso Mochochoko and Giorgia Tortora, 'The Management Committee for the Special Court for Sierra Leone', in Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts*, Oxford: Oxford University Press, 2004, p.141.

¹⁷² *Hinga Norman* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004.

(2) TERRITORIAL, TEMPORAL AND PERSONAL JURISDICTION OF THE TRIBUNALS

Article 1 of the ICTY Statute stipulates that the court ‘shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’.¹⁷³ According to Article 7 of the ICTR Statute, the scope of its territorial jurisdiction extends to Rwanda as well as the ‘territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens’.¹⁷⁴ Article 1 of the Statute of the Special Court establishes jurisdiction for the SCSL over crimes committed ‘in the territory of Sierra Leone’.¹⁷⁵ The ICTY is authorized to prosecute grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity.¹⁷⁶ The subject matter-jurisdiction of the ICTR covers three categories of crimes: genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.¹⁷⁷ One of the hybrid characteristics of the Special Court is that it derives its subject-matter jurisdiction from both international and national law. Articles 2-4 of the SCSL Statute prescribe the subject-matter jurisdiction of the Court for international crimes.¹⁷⁸ Article 2 defines crimes against humanity; Article 3 covers violations of common Article 3 to the Geneva Conventions and of Additional Protocol II. Article 4 of the Statute enumerates other serious violations of international humanitarian law. Article 5 authorises the Court to prosecute persons under the Sierra Leonean Prevention of Cruelty to Children Act, 1926 and the Malicious Damage Act, 1861.

The temporal scope of the ICTR covers crimes committed from 1 January 1994 to 31 December 1994.¹⁷⁹ Although the language used in the ICTY Statute allows for an open-ended temporal jurisdiction, the instrument is annexed to Resolution 827 which

¹⁷³ ICTY Statute, Art. 1. For a detailed analysis of the subject matter jurisdiction of the ICTY, the ICTR and the SCSL, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.151-285.

¹⁷⁴ ICTR Statute, Art. 7.

¹⁷⁵ SCSL Statute, Art. 1.

¹⁷⁶ ICTY Statute, Arts. 1-5.

¹⁷⁷ ICTR Statute, Arts. 1-4.

¹⁷⁸ SCSL Statute, Arts. 2-4.

¹⁷⁹ ICTR Statute, Art. 7.

authorises the Tribunal to prosecute cases between ‘1 January 1991 and a date to be determined by the Security Council upon the restoration of peace’.¹⁸⁰ Under Article 1(1) of the Special Court Statute, the start date of the Court’s temporal jurisdiction is prescribed as 30 November 1996.¹⁸¹ Like the ICTY, the temporal scope of the SCSL’s jurisdiction was left open-ended. The report of the Secretary-General on the establishment of the SCSL pointed out that the lifespan of the Court would be determined by ‘a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources.’¹⁸² In the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the SCSL, in a distinct provision entitled ‘Termination’, the Agreement can be terminated ‘by agreement of the Parties upon completion of the judicial activities of the Special Court.’¹⁸³

Resolution 827 which established the ICTY and its Statute prescribe that the Yugoslavia Tribunal has personal jurisdiction over ‘persons responsible for serious violations of international humanitarian law’.¹⁸⁴ The ICTR has jurisdiction over persons responsible for genocide and other systematic, widespread and flagrant violations of international humanitarian law.¹⁸⁵ The SCSL has jurisdiction over ‘those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.’¹⁸⁶ Thus, the key difference between the personal jurisdiction of the *ad hoc* tribunals and the Special Court is that, unlike the SCSL, the Security Council did not impose a statutory limit on the seniority of accused to be tried by the ICTY and the ICTR. Cassese has noted that the

¹⁸⁰ UN Doc. S/RES/827 (1993), para.2.

¹⁸¹ SCSL Statute, Art. 1(1).

¹⁸² ‘Report of the Secretary General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.28.

¹⁸³ ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’, Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II, Art. 23.

¹⁸⁴ ICTY Statute, Art. 1.

¹⁸⁵ ICTR Statute, Arts. 1-4.

¹⁸⁶ SCSL Statute, Art. 1 (1).

Statutes do, however, ‘set out some general guidelines, if only implicit, by suggesting that [the Tribunals] must prosecute the most serious international crimes.’¹⁸⁷

The *ad hoc* Tribunals and the SCSL do not have exclusive jurisdiction over the crimes that they are authorised to prosecute. The relationship of the international tribunals with national courts is defined in the Statutes of the three Courts. Article 9 of the ICTY and the ICTR Statutes declare that the Tribunals and national courts shall have concurrent jurisdiction to prosecute crimes but the *ad hoc* Tribunals ‘shall have primacy’ over the national courts.¹⁸⁸ Thus, although the Council created the Tribunals for the former Yugoslavia and Rwanda to exercise concurrent jurisdiction with national courts, the ICTY and the ICTR Statutes prescribe that they ‘shall have primacy’ over those courts.¹⁸⁹ Following the adoption of the ICTY Statute annexed to Resolution 827, the interpretative statements made by some Security Council members regarding Article 9(2) of the Statute show that there was a lack of consensus among member States regarding the scope of the Tribunal’s primacy. Article 9(2) of the ICTY Statute defines a broad principle of primacy which provides that ‘[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence. Although the primacy of the ICTY enshrined under Article 9 of the Statute is not defined in terms of Article 10 entitled ‘Non-bis-in-idem’, several States believed that the Tribunal should only assert its primacy if the situations covered by Article 10(2) were present. Article 10(2) declares:

A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or

¹⁸⁷ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585, p.587.

¹⁸⁸ ICTY Statute, Art. 9 declares that the ICTY shall have primacy over national courts whereas, more precisely, Art. 8 of the ICTR Statute declares that the Rwanda tribunal shall have primacy over the national courts of all States.

¹⁸⁹ ICTY Statute, Art. 9; ICTR Statute, Art. 9.

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

The United States and French representatives supported a qualified form of primacy and stated that the Tribunal should only intervene in the situations covered by Article 10(2).¹⁹⁰ The representative from the United Kingdom expressed the view that the primacy of the ICTY ‘relates primarily to the courts in the territory of the former Yugoslavia: elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10(2) that primacy should be applicable.’¹⁹¹ Therefore, as noted by one observer, the United Kingdom envisaged ‘two different standards of primacy: a true and effective primacy over the courts of States within the territory of the former Yugoslavia, and a weaker qualified primacy’ over all other courts.¹⁹² On the other hand, the Russian Federation understood that Article 9(2) denoted the duty of a State to seriously consider a request from the Tribunal for the deferral of a case but the primacy regime did not mean that States had a duty to automatically defer proceedings to the ICTY.¹⁹³ As Mohamed El Zeidy has argued, the statements show that at least some of the Security Council member States envisioned a more ‘lenient regime of complementarity’ which would only be triggered if the requirements listed in Article 10(2) of the ICTY Statute are met.¹⁹⁴ Although it has been argued that the Security Council’s adoption of the ICTR Statute in 1994, which grants the Rwanda Tribunal ‘primacy over all States’, showed a stronger consensus on primacy among member States than when the Council adopted the ICTY Statute a year earlier,¹⁹⁵ El Zeidy maintains that the stronger language ‘reflected a one-time response to the particular crisis that existed in Rwanda at the time and not a consensus on primacy.’¹⁹⁶ By 2000, consensus had emerged among member States that

¹⁹⁰ UN Doc. S/PV.3217 (1993), p.11 and p.16.

¹⁹¹ *Ibid.*, pp.18-19.

¹⁹² Bartram S. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, (1998) 23 *Yale Journal of International Law* 383, p.401.

¹⁹³ UN Doc. S/PV.3217 (1993), p.46.

¹⁹⁴ Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, (2001-2002) 23 *Michigan Journal of International Law* 869, p.886.

¹⁹⁵ Bartram S. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, (1998) 23 *Yale Journal of International Law* 383, p.383.

¹⁹⁶ Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, (2001-2002) 23 *Michigan Journal of International Law* 869, p.885.

the International Tribunals needed to expedite the conclusion of their work at the earliest possible date.¹⁹⁷ Although the concurrent relationship of the ICTY and the ICTR was still the subject of discussion among members of the Security Council, the focus had shifted away from the scope of the Tribunals primacy to the ability of the ICTY to suspend indictments in favour of national proceedings.¹⁹⁸

Unlike the *ad hoc* Tribunals, the SCSL does not have primacy over the courts of third States since it was created by a treaty between the United Nations and Sierra Leone rather than under Chapter VII of the United Nations Charter.¹⁹⁹ Instead the primacy of the Court is limited to Sierra Leonean courts. Article 8(2) of the Special Court Statute speaks of ‘primacy over the national courts of Sierra Leone’.²⁰⁰ Also, unlike the Yugoslavia and Rwanda Tribunals, the Special Court Statute established a scheme of complementarity between the SCSL and the national courts of the sending states of peacekeepers. Article 1(2) prescribes:

Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.²⁰¹

Article 1(2) was included in the Statute to reflect the belief of the Security Council that it was the responsibility of Member States who sent peacekeepers to Sierra Leone to prosecute any crimes they allegedly committed.²⁰² The Council also decided, however, that the Special Court would have jurisdiction over crimes committed by peacekeepers if it decided that the Member State was not acting appropriately. Thus Article 1(3) of the

¹⁹⁷ UN Doc. S/RES/1329 (2000), Preamble.

¹⁹⁸ *Ibid.*, para.8, which recalls that the ICTY Rules of Procedure and Evidence permitted a Trial Chamber to decide to suspend an indictment to allow for a national court to deal with the case.

¹⁹⁹ See: ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.10. The Secretary-General advised the Security Council that the primacy of the Special Court is limited to the national courts of Sierra Leone and does not extend to third States.

²⁰⁰ SCSL Statute, Art. 8(2).

²⁰¹ SCSL Statute, Art. 1(2).

²⁰² UN Doc. S/2000/1234, para.1.

SCSL Statute provides that, if a sending State ‘is unwilling or unable to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.’ The language of Article 1(3) mirrors the text of Article 17 of the Rome Statute which provides that the International Criminal Court may only exercise jurisdiction over cases where a State is ‘unwilling or unable genuinely to carry out the investigation or prosecution.’²⁰³ As noted by Cryer, although Articles 1(2) and (3) of the SCSL Statute sets up a complementary relationship between the SCSL and national courts of sending States, the hurdles for the Special Court to assume jurisdiction are high, ‘not least because the required positive decision of the Security Council would be subject to a veto.’²⁰⁴

The judges of the international tribunals for the former Yugoslavia, Rwanda and the Special Court adopt and amend the Rules of Procedure and Evidence.²⁰⁵ In the event of corresponding or competing prosecutions in national courts, if the *ad hoc* Tribunals invoke their primacy, the Rules of Procedure and Evidence do provide a mechanism for the deferral of cases to their jurisdiction.²⁰⁶ Since the primacy of the Special Court is limited to Sierra Leone the Court’s Rules of Procedure and Evidence prescribe the mechanism for the deferral of cases from the Sierra Leonean authorities.²⁰⁷ A review of the criteria to be applied by the Prosecutors when determining whether to request the deferral of a case from a national jurisdiction shows that the judges endorsed a broad basis for the assertion of primacy by the Tribunals. Rule 9 of the *ad hoc* Tribunals’ Rules of Procedure and Evidence establishes the general condition that in the event of investigations or criminal proceedings in the courts of any State, the Prosecutor, under certain circumstances, may propose to the Trial Chamber that a formal request be made for the deferral of the case to the competence of the Tribunal. Rule 10 spells out the procedure for a deferral application. The circumstances to be considered by the Prosecutor when deciding whether to request the deferral of a case differ between the

²⁰³ Rome Statute, Arts. (17)(1)(a) and 17(1)(b).

²⁰⁴ Robert Cryer, ‘A “Special Court” for Sierra Leone?’, (2001) 50 *International and Comparative Law Quarterly* 435, pp.440-441.

²⁰⁵ ICTY Statute, Art. 15; ICTR Statute, Art. 14; SCSL Statute, Art. 14.

²⁰⁶ See: ICTY RPE, Rules 9 and 10; ICTR RPE, Rules 9 and 10.

²⁰⁷ SCSL RPE, Rules 9 and 10.

Tribunals.²⁰⁸ The criteria applicable under ICTY Rule 9 are mostly derived from the incapacity of a state to legitimately prosecute an accused person for international crimes. Thus, under ICTY Rule 9, if it appears that the act being investigated is characterised as an ordinary crime, if the proceedings are partial or designed to shield the accused from international criminal responsibility or if the case involves significant factual or legal questions which have implications for investigations by the Tribunal, the competent Trial Chamber can request the State to defer to the competence of the Tribunal.²⁰⁹ On the other hand, the criteria of the ICTR and of the SCSL mostly rest on whether national investigations or prosecutions are, or should be, the subject of an investigation by the Prosecutor rather than on any deficiency in the national proceedings. According to ICTR and SCSL Rule 9, when it appears that national proceedings should be investigated by the international Tribunal, the Prosecutor should consider the seriousness of the offences, the status of the accused at the time of the alleged offences and the general importance of the legal questions involved in the case. Nevertheless, since Rule 9 empowers the ICTY, the ICTR and the SCSL Prosecutors to request deferral of a case, if it involves legal questions which overlap with proceedings before the Tribunals, ultimately, the Courts can assert primacy in any situation not merely when problems are detected in national proceedings.²¹⁰ For example, in the *Tadić* jurisdictional decision, even though the Appeals Chamber defined the primacy of the Tribunal as a mechanism to counteract attempts by national courts to conduct sham trials and defeat the purpose of the creation of the ICTY, the request for deferral of the case from Germany was granted on the assertion of the Prosecutor that the proceedings involved factual and legal questions which had implications for other cases under investigation by his Office.²¹¹

When the Tribunals were created, there were no effective or impartial national courts to respond to the atrocities committed in the former Yugoslavia and Rwanda.²¹² It

²⁰⁸ William A. Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.384.

²⁰⁹ ICTY RPE, Rules 9 and 10; ICTR RPE, Rules 9 and 10.

²¹⁰ Bartram S. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, (1998) 23 *Yale Journal of International Law* 383, p.397.

²¹¹ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 58.

²¹² See: Fausto Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *Journal of International Criminal Justice* 655, p.658. Pocar highlights that the ICTY ‘was never intended to act indefinitely as a substitute for

was, in part, the absence of any such national institutions that made the case for international tribunals with primacy over the national courts in the territory of the former Yugoslavia and Rwanda so compelling.²¹³ Nevertheless the Council did not aim to stop the national courts in the former Yugoslavia from trying cases; in fact, the Security Council encouraged them to exercise their jurisdiction using national laws.²¹⁴ In May 1993, the Secretary-General stated that ‘it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to [serious violations of international humanitarian law]. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant laws and procedures.’²¹⁵ Whether they had the capacity or were willing to do so, however, was a different matter. The inability of the justice sector in Sierra Leone to combat impunity formed the basis of the request for the establishment of an international court. In his letter to the United Nations requesting the establishment of the Special Court, President Kabbah referred to the destruction of the legal and judicial infrastructure of Sierra Leone and the inadequacy of the national criminal law. Sierra Leonean law did not encompass all of the international crimes committed during the civil war. The President stated that without the creation of the Special Court it would not be possible to do justice for the citizens of Sierra Leone.²¹⁶ The Secretary-General also envisaged a relationship between the Special Court and the national courts in Sierra Leone. He advised the Security Council that, following the appointment of the Court’s Prosecutor, ‘arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded.’²¹⁷ Certainly, deferral authority was an important power when the *ad hoc* Tribunals commenced operations. In fact, the first defendants came

national courts, particularly those in the region, which have an essential role to play in ensuring that justice is served, reconciliation is promoted, and closure is brought to the families and victims of the war.’

²¹³ ‘Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’, UN Doc. S/1993/25704, para.65.

²¹⁴ *Ibid.*, para.64.

²¹⁵ *Ibid.* Also see: Neil J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, (1996) 59 *Law and Contemporary Problems* 127, p.129. Kritz points out that there are sound policy reasons for trials being undertaken by an international tribunal or by the national courts in the country concerned. In relation to the often shattered judicial system of a country emerging from genocide or war, an international tribunal will most likely have the required human and material resources.

²¹⁶ UN Doc. S/2000/786.

²¹⁷ ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.8.

before the courts as a result of deferral orders.²¹⁸ Yet, by 2000, the ICTY and the ICTR grappled with an ever increasing backlog of cases. Consequently, the judges turned their attention to the legal authority of the Tribunals to transfer cases to national courts rather than their authority to order the deferral of cases from those courts.

C. THE PRACTICE: ORIGINAL PROSECUTION STRATEGIES

(1) THE INITIAL PROSECUTION STRATEGY OF THE ICTY

The Statutes of the three Tribunals confer large discretionary powers on the Prosecutor in the choice of persons for investigation and trial. Article 16 (2) of the Statutes of the *ad hoc* tribunals provide that the Prosecutor ‘shall act independently as a separate organ [of the court and]...shall not seek or receive instructions from any Government or from any other source.’²¹⁹ Similarly, under Article 15 (1) of the SCSL Statute the Prosecutor shall act independently as a separate branch of the Court. The Statutes of the Yugoslavia and Rwanda Tribunals declare the Prosecutor ‘shall be appointed by the Security Council on nomination by the Secretary-General.’²²⁰ The SCSL Prosecutor is also appointed by the Secretary-General.²²¹ Entangled in the politics of peace in the Balkans, the ICTY Office of the Prosecutor got off to a very slow start. Following the formal establishment of the Yugoslavia Tribunal, in 1993, it was 14 months before the first prosecutor commenced work.²²² The Clinton Administration initially supported Luis Moreno-Ocampo, who a decade later was appointed as the first Prosecutor of the ICC, to become the ICTY Prosecutor. However, when the US

²¹⁸ See: *Tadić* (IT-94-1-D), Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Duško Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), 8 November 1994; ‘First Annual Report of the ICTR’, UN Docs. A/51/399 and S/1996/778, paras.33-34. In January 1996, the ICTR Prosecutor submitted the first formal request for the proceedings in Belgium Courts relating to Elie Ndayambaje, Joseph Kanyabashi and Alphonse Higaniro to be deferred to the competence of the Rwanda tribunal.

²¹⁹ ICTY Statute, Art. 16(2); ICTR Statute, Art. 16(2)

²²⁰ ICTY Statute, Art. 16(4); ICTR Statute, Art. 16(4).

²²¹ SCSL Statute, Art. 15(3).

²²² For information in relation to the various candidates nominated during the 14 month period and why certain member States of the Security Council opposed their appointment, see: Michael P. Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial Since Nuremberg*, Durham, NC: Carolina Academic Press, 1997, pp.75-77.

Government was informed that the Argentine Government opposed the nomination, it withdrew the proposal.²²³ The inability of the Security Council to agree on a candidate for the ICTY Prosecutor post, firstly, delayed the start of formal investigations by the Tribunal and, secondly, caused some speculation about the intention of certain member States regarding the prosecution of Serb senior leaders. In August 1993, the former chair of the Security Council Commission of Experts, M. Cherif Bassiouni, was proposed as the ICTY Prosecutor post by the US Government. In spite of his reputation as a leading scholar in the field of international criminal law, four permanent members of the Security Council – Britain, France, Russia and China – opposed his appointment. One commentator has noted that Britain viewed the candidate as a potential threat to the Balkan peace process.²²⁴ Diplomats were concerned that he would be quick to indict Serb leaders and thus weaken their ability to compel Slobodan Milošević, in particular, to sign a peace agreement.²²⁵ Bassiouni suspected the British might have wanted to subordinate prosecutions to secure peace.²²⁶ In the opinion of Lord David Owen, co-chairman of the Peace Conference on former Yugoslavia, the peace negotiations required ‘equal moral blameworthiness [...] to achieve a climate that would convince the Bosnians to accept whatever the Serbians dictated, and to avoid focusing on the prospect of the prosecution of Serbian leaders.’²²⁷ The former President of the ICTY has recollected the predicament the ICTY was faced with. Gabrielle Kirk McDonald has remarked that ‘[i]n these early years, the Tribunal was a victim of the tension between the perceived demands of peace and justice [...] Its mandate was to help restore international peace and security, but the logical implication of this - the indictment and trial of the most senior officials considered the primary perpetrators - also was considered an unacceptable risk to the peace process.’²²⁸ Several other candidates were proposed for the ICTY Prosecutor

²²³ David J. Scheffer, ‘Three Memories from the Year of Origin, 1993’, (2004) 2 *Journal of International Criminal Justice* 353, pp.359-360.

²²⁴ For details of the campaign against M. Cherif Bassiouni as the ICTY Prosecutor see: Michael P. Scharf, ‘*Balkan Justice: The Story behind the First International War Crimes Trial Since Nuremberg*’, Durham, NC: Carolina Academic Press, 1997, p.76.

²²⁵ *Ibid.*, detailing the campaign against M. Cherif Bassiouni as the ICTY Prosecutor.

²²⁶ *Ibid.*

²²⁷ M. Cherif Bassiouni, ‘Combating Impunity for International Crimes’, (2000) 71 *Colorado Law Review* 409, p.417.

²²⁸ Gabrielle Kirk McDonald, ‘Reflections on the Contributions of the International Criminal Tribunal for the former Yugoslavia’, (2001) 24 *Hastings International and Comparative Law Review* 155, p.161.

post, however, none of the individuals were successfully appointed. At the suggestion of the ICTY President, the Secretary-General nominated Richard Goldstone, a judge on the South African Constitutional Court.²²⁹ Finally, on 8 July 1994, the Security Council unanimously approved his appointment.

To understand the initial ICTY prosecution strategy and the early decisions made by Prosecutor Goldstone in relation to indictments, it is vital to appreciate the environment in which his Office operated when it commenced work. The judges of the Yugoslavia Tribunal, who had been elected shortly after the creation of the Court, became increasingly discouraged by the lack of formal investigations.²³⁰ As the first ICTY President, Judge Cassese, later remarked, he felt he was ‘at the helm of a ship that would probably never depart from the yard in which it was being built, piece by piece, day by day.’²³¹ Many non-judicial factors complicated the task entrusted to Goldstone and some of those factors also influenced his selection of the first cases. By the time he assumed his post as ICTY Prosecutor, the media were very sceptical about the chances of success for the Tribunal. Press reports pointed towards ‘a lack of resolve on the part of the international community and the United Nations with regard to the Tribunal being rendered effective.’²³² The ICTY was created in 1993 but almost 18 months later no indictments had been issued. Several issues contributed to this situation, some of them quite complex. Investigating the crimes and securing the evidence needed to support indictments was an arduous task. The conflict was ongoing in the former Yugoslavia, detailed negotiations were required to access intelligence information, and witnesses had to be identified, located and interviewed. Nevertheless, the inability of the Council to select a Prosecutor delayed the start of formal investigations and trials. It is hardly surprising that the media reports were profusely pessimistic about the ICTY’s chances of success. The scepticism of journalists was shared by the victims of the conflict who

²²⁹ David J. Scheffer, ‘Three Memories from the Year of Origin, 1993’, (2004) 2 *Journal of International Criminal Justice* 353, p.360.

²³⁰ See generally: Richard Goldstone, ‘A View from the Prosecution’, (2004) 2 *Journal of International Criminal Justice* 380.

²³¹ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585.

²³² Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’, (1996) 6 *Duke Journal of Comparative and International Law* 5, p.8.

desperately called for justice.²³³ Recognising that support of the media was critical to guarantee funding and political support for the ICTY, Prosecutor Goldstone devoted considerable energy to improving public relations. When he assumed his duties, he knew ‘it was essential to resuscitate positive media interest in the ICTY and to garner favourable publicity for the work, and, above all, for the prospects of the Tribunal.’²³⁴ With the limited resources available, Goldstone had to build an office with the capacity to investigate international crimes and litigate very complex cases. In 1994, he noted that his office needed twice the number of staff it had, including lawyers and investigators.²³⁵

The following year, rather than defining the prosecution strategy of the ICTY on the basis of the gravity of crimes committed or the leadership positions of persons in a political or military hierarchy, the Prosecutor referred to three general principles which would be applied by his office during the selection of cases.²³⁶ Firstly, decisions relating to indictments would be taken on a professional basis without regard to political considerations or consequences. This cannot be viewed as a strategic principle guiding the choice of persons to be indicted from among the thousands of suspects falling under the jurisdiction of the ICTY. Rather, it simply affirmed the statutory obligation of the Prosecutor under Article 16 (2) of the ICTY Statute to act independently and ‘not seek or receive instructions from any Governments or from any other source.’²³⁷ Secondly, the persons to be indicted would be selected from time to time on the basis of those who appeared to be most guilty on the evidence available to the Prosecutor.²³⁸ Finally, the Prosecutor stated that he considered the guiltiest offenders to be the persons who ordered the crimes but also indicated that all efforts would be taken by his office to ensure that the direct perpetrators who committed the crimes would be included in the indictments issued.²³⁹ The Office of the Prosecutor was under increasing pressure to issue its first indictments. In a public address, Goldstone referred to the conflict between ‘the urgency

²³³ Richard Goldstone, ‘A View from the Prosecution’, (2004) 2 *Journal of International Criminal Justice* 380.

²³⁴ *Ibid.*, p.381.

²³⁵ Marlise Simons, ‘Bosnian Rapes Go Untried by the UN’, New York Times, 7 December 1994, p.A12.

²³⁶ Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’, (1996) 6 *Duke Journal of Comparative and International Law* 5, p.7.

²³⁷ ICTY Statute, Art. 16(2).

²³⁸ Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’, (1996) 6 *Duke Journal of Comparative and International Law* 5, p.7.

²³⁹ *Ibid.*, p.8.

in putting out indictments and the necessity for ensuring that all indictments, and particularly the first indictments, are appropriate.²⁴⁰ He did not, however, explain what exactly constituted an ‘appropriate’ indictment. Presumably, it would reflect the broad principles outlined above. Applying those principles, arguably, indictments against the most senior leaders, who orchestrated the conflict in the former Yugoslavia, and the lower-rank commanders, who implemented their plans, were considered appropriate by the Prosecutor.

In 1995, the Chief of Investigations revealed that a ‘pyramidal prosecution strategy’ would be employed by the Office of the Prosecutor. Following this strategy, the prosecution would initially target lower-level suspects and then progressively move upwards to political and military leaders.²⁴¹ The ICTY judges did not agree, however, that targeting lower-level offenders first was the correct strategy to be adopted. The judges believed the role of the Tribunal was to immediately target the military and political leaders or high-ranking commanders, based on the notion of command responsibility as per Article 7(3) of the Statute.²⁴² Consequently, the judges decided to meddle in prosecutorial policy acting ‘as a collective body, and with a view to having a say in the future direction and the overall role of the tribunal.’²⁴³ They wanted to discount, as much as possible, minor perpetrators. In a letter to the Prosecutor, the ICTY President recalled the Nuremberg Charter’s explicit reference to the mandate of the International Military Tribunal to try ‘major’ war criminals. He argued that the premise of the ICTY Statute was the same – it insisted on the need to prosecute persons responsible for ‘serious’ violations. Quite rightly, the President noted that ‘an international court cannot go after all those who have committed atrocities.’²⁴⁴ Referring to the limited financial and human resources and the need to rely on state cooperation, the President opined that the ICTY must ‘concentrate on the leaders or at least on those who

²⁴⁰ *Ibid.*

²⁴¹ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585, p.586.

²⁴² ICTY Statute, Art. 7(3) states: ‘The fact that any of the acts...was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’

²⁴³ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585, p.586.

²⁴⁴ *Ibid.*, p.587.

planned and ordered atrocities, including the top brass of the states and other parties involved in the conflict'.²⁴⁵ Goldstone has acknowledged that his relationship with the judges, especially in the early days, was complicated. Maintaining that they were hugely frustrated by a lack of judicial work, he has remarked that there was a 'determined attempt by the judges to become involved in the work and policies of the Office of the Prosecutor'.²⁴⁶ Following the intervention of the judges in the prosecutorial policy, in February 1995, the Prosecutor undertook to 'issue appropriate indictments at the earliest possible time'.²⁴⁷ The indictments subsequently issued were against two of the most senior political and military Bosnian Serb leaders, Radovan Karadžić and Ratko Mladić.²⁴⁸

Despite the indictment of the two highest ranked Bosnian Serb leaders who orchestrated the war, a large number of relatively minor figures were also indicted by the Tribunal around that time. Duško Tadić, for example, was a low-rank figure from among the suspects that could have been prosecuted. His trial was, in fact, the first to commence before the ICTY. Tadić was charged with numerous counts of crimes against humanity and grave breaches of the Geneva Conventions, including the torture and murder of Muslim men and women in the Omarska concentration camp. He had been in custody in Germany since 1994, where proceedings had been initiated against him. However, pursuant to Rule 9 (iii) of the Rules of Procedure and Evidence, Prosecutor Goldstone called on the Tribunal to formally request Germany to defer the case to the ICTY. The Prosecutor asserted, *inter alia*, that the Tadić case had implications for his ongoing Omarska concentration camp investigation and that he intended to issue indictments against other suspects. Granting the application for the deferral of his case to the competence of the ICTY, the Trial Chamber stated:

This International Tribunal would not be acting in the proper interests of justice if some of these serious violations of international humanitarian law committed in the

²⁴⁵ *Ibid.*

²⁴⁶ Richard Goldstone, 'A View from the Prosecution', (2004) 2 *Journal of International Criminal Justice* 380, p.381.

²⁴⁷ ICTY Press Release (CC/PIO/003-E), 'The Judges of the Tribunal for the former Yugoslavia Express Their Concern Regarding their Programme of Judicial Work for 1995', 1 February 1995.

²⁴⁸ *Karadžić and Mladić* (IT-95-5-I), Indictment Bosnia and Herzegovina, 24 July 1995; *Karadžić and Mladić* (IT-95-18-I), Indictment Srebrenica, 14 November 1995.

same territory and during the same period of time by alleged co-offenders, who are party to the same criminal plan, were judged in national courts and others before this International Tribunal.²⁴⁹

Many years later, however, as a consequence of the completion strategy, some co-perpetrators were tried before the ICTY and others before the Bosnian War Crimes Chamber. Stemming from the ongoing concentration camp investigation, in February 1995, the Prosecutor indicted a number of suspects for crimes committed in Omarska. Several of those suspects, including the commander of the camp, Željko Mejakić, fell into the category of intermediary-rank offenders and were more senior than Tadić. However, in 2006, the Appeals Chamber ordered the referral of the *Mejakić et.al* case to Bosnia for trial.²⁵⁰ According to the Chamber, in light of the completion strategy, the gravity of the crimes charged and the level of responsibility of the accused did not demand trial by the ICTY. If Tadić had been arrested in Germany after the endorsement of the completion strategy, in July 2002, the Tribunal certainly would not have requested the deferral of his proceedings to its jurisdiction.²⁵¹ Instead, the Prosecutor would have requested the referral of his case to Germany in accordance with Rule 11bis.

Commenting on the Tadić trial, Carla Del Ponte has remarked that, to establish the credibility of the ICTY and show the world that it was able to try cases, Goldstone ‘had no choice but to initiate, as the very first ICTY case, the trial of Duško Tadić.’²⁵² Others have been more scathing; one academic has remarked, ‘[i]t was fitting that the tribunal’s first trial was a token gesture. After all, the establishment of the Hague tribunal was an act of tokenism by the world community, which was largely unwilling to intervene in ex-Yugoslavia but did not mind creating an institution that would give the

²⁴⁹ *Tadić* (IT-94-1-D), Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the matter of Duško Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), 8 November 1994, para. 18 (iv).

²⁵⁰ See: *Mejakić et al.* (IT-02-65-AR11bis), Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006.

²⁵¹ UN Doc. S/PRST/2002/21, Preamble: ‘The Council recognizes...that the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being most responsible for the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors.’

²⁵² Carla Del Ponte, ‘Prosecuting the Individuals Bearing the Highest Level of Responsibility’, (2004) 2 *Journal of International Criminal Justice* 516.

appearance of moral concern.²⁵³ The initial investigations resulted in the issuance of approximately seventy-five indictments, many of the cases involved intermediary-and lower-rank perpetrators.²⁵⁴

By early 1998, the newly appointed Prosecutor, Louise Arbour, began to rework the initial strategy.²⁵⁵ By this time, there were already a number of lower-level offenders to be tried by the ICTY. There was also a progressive increase in the number of accused who were arrested or had surrendered voluntarily to the jurisdiction of the tribunal.²⁵⁶ The suspects in ICTY custody who had been jointly indicted had now to be tried separately thus creating a much larger than anticipated number of trials. In the Office of the Prosecutor, the critical policy issue became the proper targeting of suspects. Consequently, the new Prosecutor re-evaluated all outstanding indictments *vis-à-vis* the overall investigative and prosecutorial polices of her office.²⁵⁷ The policy involved focusing investigations on persons ‘holding higher levels of responsibility’ or on a much broader target list of ‘those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences’.²⁵⁸ The Prosecutor withdrew a number of charges against lower-level suspects and redesigned the investigative strategy to focus on the ‘higher echelons of leadership.’²⁵⁹ This was done in an attempt to control the potential workload of the ICTY and to minimise the possibility of having too many

²⁵³ Comment of Gary Jonathan Bass. See: Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton: Princeton University Press, 2002, p.207.

²⁵⁴ For information on the cases, see generally: John H. Ralston and Sarah Finnin ‘Investigating International Crimes: A Review of International Law Enforcement Strategies Expediency v Effectiveness’, in Blumenthal and McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Leiden: Martinus Nijhoff Publishers, 2008, pp.54-55, and Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, Durham, NC: Carolina Academic Press, 1997.

²⁵⁵ Louise Arbour, ‘The Crucial Years’, (2004) 2 *Journal of International Criminal Justice* 396, p.398.

²⁵⁶ Gabrielle Kirk McDonald, ‘Reflections on the Contributions of the International Criminal Tribunal for the former Yugoslavia’, (2001) 24 *Hastings International and Comparative Law Review* 155, p.161.

²⁵⁷ ICTY Press Release (CC/PIU/314-E), ‘Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused’, 8 May 1998. To date, 20 ICTY indictments have been withdrawn: Mirko Babić, Nenad Banović, Zdravko Govedarica, Gruban, Marinko Katava, Dragan Kondić, Predag Kostić, Goran Lajić, Zoran Marinić, Agim Murtezi, Nedeljko Paspalj, Milan Pavlić, Milutin Popović, Draženko Predojević, Ivan Šantić, Dragomir Šaponja, Željko Savić, Pero Skopljak, Nedjeljko Timarac, Milan Zec.

²⁵⁸ *Ibid.*

²⁵⁹ Louise Arbour, ‘The Crucial Years’, (2004) 2 *Journal of International Criminal Justice* 396, p.398. For an examination of the withdrawal of indictments based on prosecutorial discretion, see: William A. Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.375-376.

additional trials resulting from the same indictment.²⁶⁰ The prosecution of the most senior political and paramilitary leaders responsible for the war in the former Yugoslavia shifted in a very positive direction after the outbreak of the war in Kosovo. The indictment of the notorious paramilitary leader, ‘Arkan’, was unsealed in an attempt to deter his associates from the commission of crimes in Kosovo.²⁶¹ In addition, Milošević and four other high-level leaders were also indicted for the crimes in Kosovo. The indictments against Arkan and Milošević contributed to the opinion of former Prosecutor Louise Arbour that ‘towards the end of 1999, the Tribunal was in the process of ‘realizing its full potential.’²⁶²

(2) THE INITIAL PROSECUTION STRATEGY OF THE ICTR

When the ICTR was established, the Statute provided for the Prosecutor of the ICTY to also act as Prosecutor of the Rwanda Tribunal.²⁶³ Tens of thousands of perpetrators participated in the Rwandan genocide. Similar to the Yugoslavia Tribunal, however, the ICTR Statute does not prescribe a jurisdictional limitation in terms of the seniority of the perpetrators for trial.²⁶⁴ Rather, the Statute offers some guidance in relation to the gravity of crimes to be prosecuted: Article 1 and Article 2 make explicit reference to the power of the Tribunal to prosecute serious violations of international humanitarian law and genocide respectively. It is well established in tribunal case law that the ICTR Prosecutor has broad discretionary power in the choice of the perpetrators for investigation. As the Appeals Chamber explained in *Akayesu*:

Investigation and prosecution of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor and [...] it is her responsibility to ‘assess the information received or obtained and decide whether there is sufficient basis to proceed.’ In many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its

²⁶⁰ ICTY Fifth Annual Report, UN Docs. A/53/219 and S/1998/737, para.90.

²⁶¹ Louise Arbour, ‘The Crucial Years’, (2004) 2 *Journal of International Criminal Justice* 396, p.398.

²⁶² *Ibid.*, p.396.

²⁶³ ICTR Statute, Art. 15(3), annexed to UN Doc. S/RES/955 (1994).

²⁶⁴ For a general discussion on the jurisdiction of the ICTR, see: Roy S. Lee, ‘The Rwanda Tribunal’, (1996) 9 *Leiden Journal of International Law* 37.

jurisdictions. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted.²⁶⁵

Instead the Tribunal's successive Prosecutors have concentrated indictments on the acts of genocide and other offences committed against Tutsi victims. In 1995, Prosecutor Goldstone defined the prosecution policy of the Rwanda Tribunal based on the level of responsibility of the accused. He stated that, due to the limited financial and human resources available to his office, there was 'no choice but to concentrate ... efforts on individuals who had been in positions of responsibility' for the mass killings that took place in Rwanda in 1994.²⁶⁶ The initial strategy was not underpinned exclusively by the position of accused in the Rwandan State, political or military hierarchy at the time of the genocide. Instead, by defining the strategy in terms of persons who had been in positions of responsibility, the Prosecutor had the scope to indict leading organisers and motivators of the genocide at the district and local level and key figures who were not part of the Rwandan political structure or military in 1994. The primary ICTR targets were the political, military and administrative leadership of Rwanda at both the national and district level. They were the individuals who planned and supervised the genocide.²⁶⁷ By 1996, the ICTR had indicted 21 accused. A number of those suspects were senior political and military figures at the time of the genocide. They included Théoneste Bagosora, who was effectively in control of the military and political affairs in Rwanda during the genocide; Andre Ntagerura, the Minister of Transport and Communications and Anatole Nsengiyumva, the Chief of Intelligence of the Rwandan Army.²⁶⁸ All the other accused were mid-level leaders, including Jean-Paul Akayesu, the bourgmestre of the Taba commune, and Ferdinand Nahimana, the director of the Radio Television Libre des Mille Collines.²⁶⁹ The selection of accused who exercised authority at both the State

²⁶⁵ *Akayesu* (ICTR-96-4-A), Judgment, 1 June 2001, paras.94-96.

²⁶⁶ UN Doc. S/1996/778, para.42.

²⁶⁷ Hassan B. Jallow, 'Prosecutorial Discretion and International Criminal Justice', (2005) 3 *Journal of International Criminal Justice* 145, p.151.

²⁶⁸ *Bagosora* (ICTR-96-7-1), Amended Indictment, 12 August 1999; *Nsengiyumva* (ICTR-96-12-1), Amended Indictment, 12 August 1999.

²⁶⁹ *Nahimana* (ICTR-96-11-I), Amended Indictment, 15 November 1999; *Akayesu* (ICTR-96-4-I), Indictment, 13 February 1996.

and district level was a solid strategy which reflected the true criminal enterprise responsible for the Rwandan genocide. According to Ralph Zacklin and Daphna Shraga:

In the Rwanda context, however, the over-all responsibility of the accused for the crimes committed cannot be determined solely on the basis of their prominence or rank in the political or military hierarchy. In a country where State sanctioned genocide was instigated and committed by and against the people, the most prominent on the list of wanted criminals were military officers, businessmen and company directors, mayors and heads of prefectures and other civil service functionaries who were not necessarily ranked in any given hierarchy.²⁷⁰

By 1999, it appears to an extent that the ICTR strategy also entailed the selection of cases based on the gravity of the crimes charged. From the *Ntuyahaga* proceedings, it would seem the Prosecutor did not intend to focus on indictments charging crimes against humanity or war crimes alone. In *Ntuyahaga*, the judge confirmed the charges of crimes against humanity against the accused but dismissed the charges of genocide.²⁷¹ Consequently, Prosecutor Arbour sought the withdrawal of the indictment. The Prosecutor explained that the strategy of her office was underpinned by ‘a global policy aimed at shedding light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated’.²⁷² She requested the withdrawal of the indictment as the objective of the ‘global policy’ would not be achieved by the prosecution of a single count indictment which solely related to the murders of the former Prime Minister and 10 Belgian soldiers. One scholar has noted that the Prosecutor sought withdrawal of the indictment ‘because the lesser offence did not justify an important investment of precious resources.’²⁷³ Similar to the Nuremberg and Tokyo joint trials, in a number of cases, the ICTR Prosecutor grouped suspects together, who allegedly participated in the same criminal transaction, such as the alleged crimes committed by senior military or government officials or offences related to a specific geographic region

²⁷⁰ Daphna Shraga and Ralph Zacklin, ‘The International Criminal Tribunal for Rwanda’, (1996) 7 *European Journal of International Law* 501, p.516.

²⁷¹ *Ntuyahaga* (ICTR-98-40-I), Decision on the Review of the Indictment, 29 September 1998.

²⁷² *Ntuyahaga* (ICTR-98-40-T), Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999, para. 1 (ii).

²⁷³ William A. Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.376.

in Rwanda. Thus, for example, in *Nyiramasuhuko et al.*, the so-called Butare case, the six persons jointly indicted included two former governors and two former mayors in Rwanda's Butare district together with the former Minister of Family and Women's Affairs.²⁷⁴ However, due to the extraordinary amount of time required to complete the joint trials and the resulting criticism of the ICTR, the Office of the Prosecutor changed its strategy to indict individuals separately, unless it found that witnesses and evidence were likely to be repeated.²⁷⁵

The ICTR has been overtly criticised for not indicting members of the victorious Rwandan Patriotic Front for the serious violations of international humanitarian law they allegedly committed in 1994.²⁷⁶ Overall, the literature available examining the ICTR prosecution strategy is scant. This may be explained by the fact that the Rwanda tribunal has, in practice, been successful in bringing to justice the perpetrators who held positions of leadership during the genocide. The majority of members of the Rwandan interim government during the 1994 genocide have been indicted by the ICTR. So far, convictions have been rendered against the former Prime Minister, Kambanda, four cabinet ministers, and many other senior local administrators and military officials who played a significant role in the genocide.²⁷⁷ As the former President of the ICTR has remarked, the tribunal 'blazed a trail in the prosecution of those bearing the greatest responsibility for the very worst crimes'.²⁷⁸ Thus, unlike the initial ICTY strategy which proved contentious, the ICTR prosecution policy was widely supported. Even so, by

²⁷⁴ *Nyiramasuhuko et al.* (ICTR-97-21-I), Indictment, 1 March 2001.

²⁷⁵ Hassan B. Jallow, 'Challenges of Investigating and Prosecuting International Crimes', in Decaux, Dieng and Sow (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Leiden: Martinus Nijhoff Publishers, 2007, p.442.

²⁷⁶ Luc Reydams, 'The ICTR Ten Years On – Back to the Nuremberg Paradigm?', (2005) 3 *Journal of International Criminal Justice* 977. Reydams argues that the conspicuous failure by the ICTR to prosecute crimes committed by the Rwandan Patriotic Front during 1994 constitutes a regrettable return to the Nuremberg paradigm of victor's justice. For an alternative opinion in relation to the non-indictment of members of the Rwandan Patriotic Front, see: William A. Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.147. Schabas argues that the ICTR was created to deal with the 'most significant act of genocide of the second half of the twentieth century' and, therefore, it is appropriate for the Prosecutor to orient indictments bearing that in mind.

²⁷⁷ For a list of completed cases, see generally: Timothy Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda', (2008) 14 *New England Journal of International and Comparative Law* 239, p.243 and Appendix A (chronology of the ICTR completed cases and sentences as of September 2008).

²⁷⁸ Dennis C. M. Byron, 'Looking at Legacy and Looking Back on the Legacy Symposium', (2008) 14 *New England Journal of International and Comparative Law* 319, p.319.

2003, in light of the completion strategy, there was concern in the Office of the Prosecutor that its caseload was too large to meet the timelines in the strategy. Consequently, the prosecution strategy to bring to justice those most responsible for the Rwandan genocide at national and local level had to be revisited and further refined.²⁷⁹ Prosecutor Hassan B. Jallow declared his intention to focus cases on ‘those persons bearing the highest responsibility for the crimes committed in Rwanda in 1994.’²⁸⁰ The criteria and considerations applied by the Office of the Prosecutor to select the targets after the completion strategy was adopted included the status of the offender in Rwanda; the extent to which the person had participated in the genocide; the need to geographically spread indictments in the choice of targets; the strength and cogency of the evidence; and the uniqueness of the possible legal issues in the case.²⁸¹

(3) THE INITIAL PROSECUTION STRATEGY OF THE SCSL

Having garnered experience from the *ad hoc* Tribunals, the Security Council was cognisant that, without defining the seniority of suspects to be prosecuted, the number of cases to be tried by an international tribunal would be voluminous and vast resources would be required for trials. Perhaps having learned this valuable lesson, a different approach was taken by the Council when it came to defining the personal jurisdiction of the Special Court for Sierra Leone.²⁸² Creating the institution in 2002, the members of the Council wanted to limit the focus of the Special Court to those who played a leadership role during the war.²⁸³ Although the term ‘persons who bear the greatest responsibility’ referenced in Article 1 of the Statute does not necessarily mean the most

²⁷⁹ Hassan B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, (2005) 3 *Journal of International Criminal Justice* 145, p.151.

²⁸⁰ ‘Completion Strategy of the International Criminal Tribunal for Rwanda’, UN Doc. S/2003/946, para.6.

²⁸¹ Guest Lecture Series of the ICC Office of the Prosecutor, Hassan B. Jallow, ‘The OTP-ICTR: Ongoing Challenges of Completion’, 1 November 2004, p.2.

²⁸² See: David M. Crane, ‘Terrorists, Warlords and Thugs’, (2005-2006) 21 *American University International Law Review* 505, p.508. Crane explains that, faced with the enormity of the Sierra Leonean tragedy, the United Nations was forced to act in spite of a great deal of reluctance. He notes that the political compromise for the SCSL was the limitation of its personal jurisdiction to those who bear the ‘greatest responsibility’.

²⁸³ SCSL Statute, Art. 1. For an examination of the jurisdictional limitation of accused based on seniority of accused, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.145-148.

senior leaders, in *Fofana*, the Trial Chamber interpreted the phrase in this context. Referring to the travaux préparatoires of the Special Court Statute, the Chamber stated:

In expressing its preference for “persons who bear the greatest responsibility” instead of “persons most responsible”, the Security Council directed that the fact that an individual held a leadership role should be the primary consideration; the severity of a crime or the massive scale of a particular crime should not be the primary consideration.²⁸⁴

Reporting on the creation of the Court, the Secretary-General noted that the introduction of the seniority standard for prosecution was ‘not as a test criterion or a distinct jurisdictional threshold, but as guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases’.²⁸⁵ Nevertheless, in the *Fofana* case, the Trial Chamber departed from the opinion of the Secretary-General when deciding that the term ‘those who bear the greatest responsibility’ is a jurisdictional requirement rather than just a guide to the Special Court Prosecutor.²⁸⁶

Thirteen persons who bear the greatest responsibility for the serious violations of international humanitarian law committed in Sierra Leone since 1996 were indicted by the Special Court. The leadership of the Armed Forces Revolutionary Council, the Civil Defence Forces, and the Revolutionary United Front were charged in three indictments. Two other indictments were issued against the former President of Liberia, Charles Taylor, and against the former leader of the Armed Forces Revolutionary Council, Johnny Paul Koroma. The Armed Forces Revolutionary Council trial has been completed. Alex Tamba Brima and Santigie Borbor Kanu were sentenced to 50 years of imprisonment while Brima Bazzy Kamara received 45 years. The SCSL has also concluded the Civil Defence Forces trial sentencing Moinina Fofana to 15 years and Allieu Kondewa to 20 years imprisonment. The Revolutionary United Front trial was completed and the accused were sentenced to terms of imprisonment ranging between 25

²⁸⁴ *Fofana* (SCSL 2004-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, para. 40.

²⁸⁵ ‘Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’, UN Doc. S/1993/25704, para.30.

²⁸⁶ *Fofana* (SCSL 2004-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, paras.27 and 39.

and 51 years. Trial Chamber II has found Charles Taylor guilty of aiding and abetting the commission of the crimes committed during the Sierra Leonean conflict.²⁸⁷ The Chamber also held Mr. Taylor criminally responsible for planning the atrocities committed by members of the Armed Forces Revolutionary Council and the Revolutionary United Front in various attacks including the invasion of Freetown.²⁸⁸ One accused, Johnny Paul Koroma, is still at large.

Commenting on the development of an international tribunal's prosecutorial strategy, the first SCSL Prosecutor, David Crane, has remarked that it is essential to develop a plan that takes account of the wariness of the international community for lengthy and expensive war crimes prosecutions. Crane believes that the standard for international prosecutions should be 'greatest responsibility' and that, by limiting the personal jurisdiction of the SCSL in terms of the seniority of the accused to be prosecuted, the Security Council created a workable mandate. The former SCSL Prosecutor has advised that:

A successful initial prosecutorial strategy, once...[the] tribunal establishment decision is made, stems from a mandate that can be accomplished within the political expectations of a reluctant international community. An overly broad mandate, with language that is subject to interpretation, can create a foundation for a tribunal that is built on sand. In my mind, the more vague the mandate, the more chance there is for frustration and even failure.²⁸⁹

CONCLUSION

Historically, the seniority of suspects has been a criterion considered by States when determining the appropriate jurisdiction for international trials. In the aftermath of the First World War, the Allied Powers took innovative steps, albeit with limited success, to prosecute the German Emperor and other senior political and military leaders responsible for the conflict. The Treaty of Versailles declared that a special tribunal

²⁸⁷ *Taylor* (SCSL 03-I-T), Summary Judgment, 26 April 2012, para.168.

²⁸⁸ *Ibid.*, para.177.

²⁸⁹ David M. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts', (2005-2006) 37 *Case Western Reserve Journal of International Law* 1, p.5.

would be created to try the former Head of State, whereas other leaders, notwithstanding any proceedings before national courts, would be tried before Allied Military Tribunals. In spite of the pioneering judicial framework contained in the Treaty and Germany's recognition of the primacy of the Military Tribunals to try suspects, the Allied Tribunals were never convened and the Emperor was not brought to trial. Instead only 12 low level suspects appeared before the national Supreme Court in the Leipzig trials. Efforts to bring war criminals to justice were considerably more successful after the Second World War. The Allied Powers policy towards the punishment of offenders that evolved during the conflict shows that there was a concentration on how multiple courts could try suspects depending on their seniority. Ultimately the strategy underpinning the creation of the Nuremberg and Tokyo tribunals was crafted by taking account of the seniority criterion and how leaders and their subordinates would be tried before international, national and military courts. Fifty-two "major war criminals" were tried before the Nuremberg and Tokyo International Military Tribunals. Other intermediary-level accused were brought to trial before various military commissions and national courts.

In spite of the Nuremberg and Tokyo precedent, the debates preceding the setting up of the ICTY and the ICTR did not focus on the appropriate forum for trials depending on the rank of suspects in political or military structures. When the Tribunals were established, the member States of the Security Council focused on how to resolve jurisdictional conflicts between the international and national level rather than defining how the different jurisdictions could complement each other in terms of investigations and trials. Therefore the Security Council agreed that although the ICTY and the ICTR shall have concurrent jurisdiction with national courts to prosecute crimes, the *ad hoc* Tribunals shall have primacy over national courts. Interestingly in the early years of their work the ICTY and the ICTR employed different prosecution strategies. The tribunals implemented the strategies without guidance from the Security Council in terms of the appropriate level of offender to be prosecuted at international level or perhaps more importantly the timeframe in which the Council expected the courts to complete their work. The ICTR concentrated its indictments on persons who held leadership positions while conversely the initial ICTY prosecution strategy concentrated on lower-level suspects with a view to progressively targeting political and military leaders. Regardless

of whether or not the Tribunals selected suspects based on seniority, when the discussions started on the completion of their mandates, both the ICTY and the ICTR were faced with the same problem in relation to their workload. At that time it became apparent that the *ad hoc* Tribunals had in fact indicted more people than could be brought to trial within a timeline that would be acceptable to the members of the Security Council. The political impetus to close the *ad hoc* tribunals and the need to formulate a completion strategy that would support this goal, forced the ICTY and the ICTR to revisit their prosecution strategies and their relationship with national courts, in particular the courts in the conflict-affected regions. The Completion Strategies that evolved resulted in significant changes in the policy, law and practice of the *ad hoc* Tribunals from the time they were created.

CHAPTER II – THE COMPLETION STRATEGIES OF THE TRIBUNALS

INTRODUCTION

Unlike the International Criminal Court, the *ad hoc* Tribunals and the Special Court for Sierra Leone were not intended to be permanent institutions; hence, these Courts must complete their missions at some point in the future.¹ As William A. Schabas has pointedly observed, '[i]t would seem that *ad hoc* tribunals are almost by definition confronted with the difficulty of knowing when to stop.'² As discussed in Chapter I, the ICTY has jurisdiction over crimes committed 'between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace' in the former Yugoslavia.³ The Rwanda Tribunal is competent to deal with offences committed between 1 January and 31 December 1994.⁴ When the SCSL was created its temporal jurisdiction was left open-ended. The Secretary-General advised that the lifespan of the Special Court would be determined by subsequent agreement of the parties 'upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources.'⁵ Defining the completion strategies and winding-down the judicial operations of the Tribunals is an arduous task. After all, as Judge David Hunt once remarked, the ICTY 'will not be judged by the number of convictions which it enters, or by the speed

¹ Parts of this chapter are reproduced in Fidelma Donlon, 'The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals', in Darcy and Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford: Oxford University Press, 2010, pp.353-381.

² William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.40.

³ UN Doc. S/RES/827 (1993), para.2.

⁴ UN Doc. S/RES/955 (1994), para.1 and ICTR Statute, Art. 1.

⁵ 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, para.28. In 2001, the Secretary-General remarked that the minimum time needed for the prosecution and trial of a very limited number of accused would be three years, see: 'Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2001/40, para.12.

with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.⁶

The completion strategies are best described as the detailed plans for closing down the ICTY, the ICTR and the SCSL within certain timelines, and by a variety of means.⁷ This chapter will analyse the genesis and evolution of the Tribunals' strategies. It will examine the distinct and dynamic part played by the Tribunals' judges, in particular the ICTY judges, in the development and implementation of the completion strategies. The Chapter will further explore the various measures taken by the Security Council to expedite the winding-down process of the *ad hoc* Tribunals' operations, in particular, the directives to concentrate prosecution and trials on the most senior leaders and to refer intermediary- and lower-rank accused to national courts for trial. The Security Council did not amend the Statutes of the Yugoslavia and Rwanda Tribunals to create a statutory limitation on the level of accused to be prosecuted or to legislate for the formal referral process. Thus, this Chapter will examine the idea that although the *political* driving force behind the completion strategies was and still remains the Security Council, the *policy* driving force and the key procedural legislator underpinning the strategies are the judges of the Tribunals. This notion will be considered via a detailed examination of the purpose and intent of the procedural law created by the judges to regulate the far-reaching referral process. In this respect, Rule 11bis of the rules of the ICTY, the ICTR, and the SCSL will be extensively examined. The discussion will also consider the steps taken by the ICTY

⁶ *Milošević* (IT-02-54-AR73.4), Dissenting Opinion of Judge David Hunt on Admissibility of Evidence-In-Chief in the form of Written Statements (Majority Decision given 30 September 2003), October 21 2003, paras. 20-22. In his dissent, Judge Hunt sternly criticized his fellow Appeals Chamber judges in relation to their interpretation of Rule 92bis. He stated that the Majority Appeals Chamber Decision drove a 'horse and cart' through the previous interpretation of Rule 92bis, regulating the admission of written statements in lieu of oral testimony, which resulted in a violation of the rights of the accused. Judge Hunt opined that the only reasonable explanation for this appeared to be a desire to assist the prosecution in bringing the completion strategy to a rapid conclusion. However, in his Separate Opinion, Judge Shahabuddeen noted that it was not surprising that the completion strategy had not been mentioned in the Majority Decision. He noted that it had not been referred to in the Decision as it had nothing to do with the matter. Judge Shahabuddeen remarked that the reasoning set out in the Majority Decision left no room for a judicial finding that the completion strategy had been taken into account. See: *Milošević* (IT-02-54-AR73.4), Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision dated 30 September 2003 on Admissibility of Evidence-In-Chief in the form of Written Statements, October 31 2003, para.21.

⁷ Larry Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', (2005) 99 *American Journal of International Law* 158, p.159. Johnson described the ICTY completion strategy as a strategy for closing down the Tribunal by a given date and by various means.

judges to define the Tribunal's prosecutorial policy at two key moments in the history of the institution. The disparity of opinion between the judges of the Yugoslavia and Rwanda Tribunals in relation to the extent to which they were prepared to amend the Rules of Procedure and Evidence to ensure the application of the seniority criterion by the Prosecutor will also be addressed. The amendment of the ICTY's Rule 28(A) will be discussed in this regard.

A. THE ORIGINS AND EVOLUTION OF THE COMPLETION STRATEGIES

(1) *THE COMPLETION STRATEGIES OF THE ICTY AND THE ICTR*

As early as 1998, officials and member States of the Security Council voiced their unease regarding the slowness of the ICTY and the ICTR proceedings; the associated length of detention of accused; the rising budgets of the Tribunals and the time that would be required to finally complete their mandates.⁸ The former Deputy to the United Nations Under-Secretary-General for Legal Affairs, Ralph Zacklin, later remarked, '[t]he ad hoc Tribunals have been too costly, too inefficient and too ineffective. As mechanisms for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable.'⁹ However the most contentious question was why, after almost seven years of operations and expenditures totalling \$400 million, only 15 trials had been completed by the *ad hoc* Tribunals?¹⁰ Thus, in 1998, the General Assembly, following the advice of the Fifth Committee responsible for the financing of the Tribunals, requested the Secretary-General to carry out a review of their functioning and operations.¹¹ In 2000, the Expert Group appointed by the Secretary-General to evaluate the effective work of the institutions noted in their final report that, although

⁸ See generally: Dominic Raab, 'Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals', (2005) 3 *Journal of International Criminal Justice* 82, pp.82-102. See also: Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues', (2008) 14 *New England Journal of International and Comparative Law* 169, at pp.170-171.

⁹ See: Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals', (2004) 2 *Journal of International Criminal Justice* 541, p.545.

¹⁰ See: 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda', UN Doc. S/2000/597, para.35.

¹¹ UN Doc. A/RES/53/212 (1999), para.5.

trials could be made more efficient, until the ‘winding-down process’ started, the financial resources required to fund the Tribunals could not be reduced.¹²

The judges of the Yugoslavia Tribunal were also tackling the question of winding-down judicial operations at that time. Shortly after he was elected President of the ICTY, one of the most influential figures involved in the evolution of the completion strategy, Judge Claude Jorda, observed that the ICTY was ‘at a turning point in its history’.¹³ Noting the very high costs associated with international justice and the Tribunal’s obligation to the international community, Judge Jorda identified the setting of a time-frame for the completion of the ICTY’s mission as one of his primary objectives. The President also indicated that, to expedite proceedings and improve pre-trial case management in the future, ‘maximum use needs to be made of [the] Rules of Procedure and Evidence’.¹⁴ Subsequently, the judges undertook an analysis of all possible measures available to the Tribunal to enable it to efficiently manage its overburdened workload. The efforts of the ICTY judges culminated in the presentation of a report by President Jorda to the Security Council in 2000 which indicated that the Tribunal would not be able to complete judicial activities before 2016, unless certain measures were approved by the Council.¹⁵ Three measures were proposed by the judges to accelerate the completion of trials. The first measure involved conferring on senior legal officers the authority to take certain decisions regarding the conduct of pre-trial proceedings (setting deadlines, hearing witnesses by deposition, etc.).¹⁶ Secondly, the creation of a pool of *ad litem* judges to increase trial capacity was suggested.¹⁷ Finally, it was proposed that the Appeals Chamber would be enlarged.

The most far-reaching component of the ICTY completion strategy – the transfer of cases to the Balkan States as a means to reduce the Tribunal’s caseload – was

¹² See: ‘Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, UN Doc. S/2000/597 , para.262.

¹³ ICTY Press Release (CC/P.I.S/466-E), ‘Statement by Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia’, 27 January 2000.

¹⁴ *Ibid.*

¹⁵ See ‘Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991’, UN Doc. S/2000/865, para.35.

¹⁶ *Ibid.*, para.97.

¹⁷ *Ibid.*, paras.106-127.

suggested to the Security Council for the first time in the report. Drawing on what they referred to as the Nuremberg model, the judges discussed the possibility of the ICTY concentrating ‘on a restricted number of high-ranking leaders’ and transferring ‘lower ranking criminals’ to the Balkan States.¹⁸ This measure was no doubt rooted in the growing consensus among the judges of the *ad hoc* Tribunals that, in spite of the importance of creating an international jurisprudence, and of victims seeing the trial of perpetrators, ‘the major objectives of the Security Council are in large part not fulfilled if only low-level figures rather than the civilian, military and paramilitary leaders who were allegedly responsible for the atrocities are brought before the Tribunals for trial.’¹⁹ Although the transfer of cases from the ICTY to national authorities would have undoubtedly reduced the Tribunal’s caseload and, thus, the time needed to complete its mission, due to the volatile political climate in the Balkans and security concerns for witnesses, victims and accused, the ICTY judges did not support this measure in 2000.²⁰

Nevertheless, the Security Council responded positively to the other measures suggested by the judges by adopting Resolution 1329. To enable the Tribunals to expedite the conclusion of their work at the earliest time, the Council amended the ICTY Statute to establish a pool of *ad litem* judges.²¹ In addition, the Statutes of the ICTY and the ICTR were amended to enlarge the Appeals Chambers.²² Interestingly, in Resolution 1329, although the Council took note of the Tribunals’ position that senior leaders should be tried before them rather than minor actors, it did not go so far as to direct the *ad hoc* Tribunals to concentrate indictments on this category of offender and transfer other cases to national courts.²³ Instead, the Council recalled the concurrent jurisdiction exercised by the Tribunals with national courts and noted ICTY Rule 11bis which at that time

¹⁸ *Ibid.*, paras.56-57.

¹⁹ See ‘Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, UN Doc. S/2000/597, para.96.

²⁰ See ‘Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991’, UN Doc. S/2000/865, paras.53-54.

²¹ UN Doc. S/RES/1329 (2000), paras.1 and 4.

²² *Ibid.*, paras. 1-3. Initially, the ICTY and the ICTR had two distinct Appeals Chambers, but with the same judges serving in both. With the adoption of Resolution 1329, two additional judges were provided for the ICTR Appeals Chamber.

²³ UN Doc. S/RES/1329 (2000), Preamble.

authorised a Trial Chamber to suspend an indictment to allow a national court to process a case.²⁴

The concept of completing the work of the *ad hoc* Tribunals appears to have gained some traction with the ICTR judges in 2001. The former President of the Rwanda Tribunal, Judge Erik Møse, has reported that when the judges of the two Tribunals met in Dublin during that year, there appeared to be broad consensus that it was time to contemplate the life span of the two institutions possibly by ‘reviewing the prosecutorial policy or setting a target date for the filing of the last indictment.’²⁵ In a subsequent address to the Security Council, President Jorda reiterated the judges’ view that the ICTY should focus more on cases involving high-ranking military and political officials.²⁶ Under certain conditions, cases involving lower-level perpetrators could be transferred to the Balkan States. An indication of the willingness of the ICTY judges to use their authority as the Tribunal’s procedural lawmakers to create a legal mechanism for the transfer of cases can be deduced from the remarks made to the Council. At that time, Judge Jorda stated the judges would consider what amendments to the Rules would be required to redefine the relationship between the ICTY and national courts.²⁷ Yet, Prosecutor Del Ponte appeared less adamant that the seniority criterion should be applied to the selection of suspects for investigation and trial. She warned the Council to avoid ‘the trap of separating the accused into big fish and small fish.’²⁸ Quite rightly, the Prosecutor explained that many accused played a role somewhere in between these two extremes – as key organisers and motivators at the district or local level. For example, although ICTR investigations concentrated on senior officials in the command structures of the Government, military, media, clergy, and the business world, the Prosecutor argued that lower level perpetrators also justified her attention.²⁹ From the perspective of victims, she opined it was the direct perpetrators who brought their world to an end rather than the remote figures who planned the genocide.³⁰ Linking prosecutions with efforts to

²⁴ *Ibid.*

²⁵ See: Eric Møse, ‘The ICTR’S Completion Strategy – Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667, p.667.

²⁶ UN Doc. S/PV.4429 (2001), p. 5.

²⁷ *Ibid.*

²⁸ *Ibid.*, p.9.

²⁹ *Ibid.*, p.10.

³⁰ *Ibid.*, p.10.

maintain peace, she noted, ‘[u]nless these local leaders are brought to justice...the ordinary population will not come to terms with the past, and the process of reconciliation and building a stable peace will suffer accordingly.’³¹

Despite the concerns expressed by the Prosecutor, less than a year later and for the first time, the three organs of the ICTY jointly agreed to the application of the seniority criterion in the selection and trial of cases.³² Paradoxically, as the ICTY reached its highest point of judicial activity, pressure from the Security Council to set an end date for operations was most acutely felt by the Tribunal.³³ Responding to the Council’s demands, in June 2002, President Jorda presented a report to the Security Council, jointly prepared by the President, the Prosecutor and the Registrar. In essence, this report is the comprehensive ICTY completion strategy. Broadly, it outlines structural and operational reforms to expedite proceedings. More critically, it proposes the referral of certain cases to national courts to enable the Tribunal to direct activities ‘in a manner more in line with the spirit of the mission it received from the Security Council...to give priority to the prosecution of the most serious crimes which directly threaten international peace and security.’³⁴ Thus, in the completion strategy, the ICTY advocated that the correct approach to be taken by the Tribunal was to prosecute the ‘main political and military figures’ leaving the trial of their subordinates to the national courts.³⁵ The three organs of the ICTY jointly presented a two-pronged process of “concentration” and “referral” as the mechanism for the ICTY to complete investigations around 2004 and first instance trials around 2008. The concentration-prong involved the Tribunal focusing on the prosecution and trial of the highest-ranking political and military leaders. The referral-prong involved the transfer of intermediary- and lower-level accused to national courts which could process cases effectively by adhering to the internationally recognised standards of human rights and due process. The strategy also hinted at the level of responsibility of the accused to be transferred. It suggested that perpetrators, who held a

³¹ *Ibid.*, p.9.

³² As a follow up to the presentation of the reform programme in 2001 by President Jorda, in January 2002, the President, the Prosecutor and the Registrar set up a working group to consider the problems involved in setting up a case referral process. See: UN Doc. S/2002/985, para.19.

³³ ‘Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts’, UN Doc. S/2002/678, para.1.

³⁴ *Ibid.*, para. 2.

³⁵ *Ibid.*, para. 36.

position of command at an intermediary-level between the major leaders indicted and tried by the ICTY and the low-ranking subordinates indicted and tried by the national courts pursuant to the Rome Agreement of 18 February 1996, should be transferred.³⁶

As previously noted, the completion strategy also demonstrates the readiness of the ICTY judges to act as legislator regarding the procedures required to implement the referral process. The Tribunal sought the endorsement of the Security Council to transfer mid-level accused to the War Crimes Chamber in the Court of Bosnia and Herzegovina for trial and declared that, if the Security Council endorsed the plan, the judges would proceed to adopt the necessary amendments to the Rules of Procedure and Evidence.³⁷ On 23 July 2002, the ICTY completion strategy and the broad timelines for conclusion of its activities were endorsed by Presidential Statement.³⁸ The Security Council followed up with Resolution 1503 which describes a completion plan composed of ‘three interlocking components’.³⁹ The first component, the completion timelines, directs the Tribunals to complete investigations by the end of 2004, all first instance trial activities by the end of 2008, and all work in 2010.⁴⁰ The second component, the application of the seniority criterion by the Tribunals, directs the courts to concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for the crimes within their jurisdiction. The third component, the referral of cases to national courts,

³⁶ *Ibid.* See also: Rome Agreement, signed by Presidents Izetbegovic, Tudjman and Milošević, 18 February 1996, available at http://www.ohr.int/ohr-dept/hr-rol/thedepth/war-crime-tr/default.asp?content_id=6093.

³⁷ In December 2004, the laws required to create the Chamber were adopted by the Bosnian parliament. The laws created: ‘Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina’; the ‘Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina; and the international Registry for Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina. The ‘War Crimes Chamber’ is hereinafter the term used to describe the hybrid components of the various Bosnian institutions.

³⁸ UN Doc. S/PRST/2002/21.

³⁹ The term ‘three interlocking components’ is used by Larry Johnson to describe the strategy as formulated by the Council in UN Doc. S/RES/1503 (2003), Preamble. See: Larry Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 2005 158, p.159.

⁴⁰ For a proposed lesson to be extracted from the framework of the completion strategy, see: David Tolbert, ‘The Ends of International Justice: Closing International Tribunals’, (2007) 2 *International Justice Tribune Series – 2007 Year of Assessment* 11, p.14. Tolbert argues that while there is value in setting target dates, as they help concentrate minds, it is critical that they are recognised as target dates and not deadlines for completion. He remarks that predicting future trial schedules is much more of an art than a science. For tribunals which have completions strategies, in the future it should be borne in mind that the strategies should not create arguments for the opponents of international justice as has been inadvertently done by the *ad hoc* completion strategies.

authorises the ICTY and the ICTR to refer cases of those who do not bear the same level of responsibility as senior leaders to competent national jurisdictions. Although the ICTY judges played an instrumental role in the evolution of the strategy, at least one judge highlighted that the strategy should not impact the conduct of proceedings. In *Nyiramasuhuko*, Judge Hunt cautioned that the endorsement by the Security Council ‘in the strongest terms’ of the completion strategy in Resolution 1503 should not be interpreted as an encouragement by the Council to the ICTY or the ICTR to ‘conduct its trials so that they would be other than fair trials.’⁴¹

The ICTR did not present a comprehensive completion strategy until 2003.⁴² Arguably, the Rwanda Tribunal was slower to accept the strategy underpinned by the concentration of trials on the most senior leaders. In part, this may be because the ICTR felt its work already concentrated on trying many of the senior figures who orchestrated the genocide.⁴³ This was a valid argument since, by 2000, the detainees in the custody of the ICTR included one former Prime Minister, 10 former Cabinet Ministers, six other senior political appointees, four senior military officers, three former provincial governors and five mayors of provincial capitals.⁴⁴ However, the reticence of the ICTR to present a comprehensive plan did not go unnoticed by the Council. Rather than wait for the ICTR to present a report, in Resolution 1503 the Security Council urged the ICTR ‘to formalize a detailed strategy, modelled on the ICTY Completion Strategy to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions [...] including Rwanda’ to facilitate the completion of its work in 2010.⁴⁵ In effect, this was a direction from the Council to the ICTR to apply the seniority criterion and meet the

⁴¹ *Nyiramasuhuko* (ICTR-97-21-T), Decision in the Matter of Proceedings Under Rule 15bis(D), Dissenting Opinion of Judge David Hunt, 24 September 2003, para.17. See also: *Milošević* (IT-02-54-AR73.4), Dissenting Opinion of Judge David Hunt on Admissibility of Evidence-In-Chief in the form of Written Statements (Majority Decision given 30 September 2003), October 21 2003, paras. 20-22.

⁴² ‘Completion Strategy of the International Criminal Tribunal for Rwanda’, UN Doc. S/2003/946.

⁴³ See: the comment of ICTR in relation to the recommendation of the experts that leaders should be tried rather than minor perpetrators, in the ‘Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, UN Doc. S/2000/597, p.140. As a comment on the recommendation, the ICTR noted, ‘[t]his re-statement of the obvious objective of the Security Council is of relevance to the proceedings before the ICTY and not ICTR, as the detainees in Arusha are alleged to be civilian and military leaders.’

⁴⁴ See: Eric Møse, ‘The ICTR’S Completion Strategy-Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667, p.668.

⁴⁵ UN Doc. S/RES/1503 (2003), Preamble.

completion timelines by referring cases to national courts. In 2003, the first comprehensive ICTR completion strategy was forthcoming under the leadership of President Erik Møse.⁴⁶

The evolution of the completion strategies illustrates that, unlike the Tribunal for the former Yugoslavia, the ICTR was more reactive than proactive in relation to defining and presenting a comprehensive plan to the Security Council.⁴⁷ From 2000, the ICTY judges were instrumental in shaping the policy and legal framework required to put into practice a strategy underpinned by the referral of intermediary- and lower-level perpetrators to national courts. At that time, the ICTY judges first discussed the advantages and disadvantages of transferring cases to the Balkan States but stopped short of recommending this procedure to the Council as a way to reduce the Tribunal's workload. Yet, due to positive political developments in the Balkans and increased cooperation between the ICTY and the Office of the High Representative to Bosnia and Herzegovina, the judges revisited the policy of case referral. Ultimately, the completion strategy as described in Resolution 1503 originated at the ICTY and was largely conceived by the Tribunal's judges. As pointed out above, it appears that the ICTR completion strategy was forthcoming due to the pressure exerted by the Security Council, in particular, the direction given in Resolution 1503. The Council urged the ICTR to formulate a plan, modelled on the ICTY completion strategy in order to complete all first instance trials by the end of 2008, and all of its work in 2010.

(2) THE COMPLETION STRATEGY OF THE SCSL

The adoption of the Special Court for Sierra Leone's completion strategy was instigated by the United Nations General Assembly. In 2004, during the second year of the SCSL's operations, the Court faced a funding crisis: the voluntary contributions of the various Governments backing the Special Court were insufficient to meet its budget

⁴⁶ 'Completion Strategy of the International Criminal Tribunal for Rwanda', UN Doc. S/2003/946.

⁴⁷ See: comments of Jean Pélé Fomete, 'Countdown to 2010: A Critical Overview of the Completion Strategy of the International Criminal Tribunal for Rwanda (ICTR)', in Decaux, Dieng and Sow (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Leiden: Martinus Nijhoff Publishers, 2007, p.361.

requirements.⁴⁸ To resolve the crisis, a one-off subvention grant in the amount of \$16.7 million was issued by the United Nations to allow the Court to finance its third year of operations.⁴⁹ The General Assembly's resolution authorising the exceptional grant noted that the SCSL was expected to complete its work by 31 December 2005. The Assembly requested the Secretary-General to invite the Special Court to adopt a completion strategy.⁵⁰ In May 2005, the Special Court's completion strategy approved by the SCSL's Management Committee was submitted to the United Nations.⁵¹

In contrast to the ICTY's completion plan, which was driven by the Tribunal's judges, the SCSL strategy was developed by the Court's Registrar in co-operation with senior staff. There is a primary policy difference between the SCSL's completion strategy and the strategies of the *ad hoc* Tribunals. The Special Court's plan assumes that all persons indicted by the SCSL will be tried before the Court. Thus, the strategy focuses on the completion of all of the SCSL's trials in an expeditious manner. The completion strategies of the ICTY and the ICTR assume that intermediary- and lower-level accused would not be tried by the Tribunals after the endorsement of the strategies. Thus, in addition to the expeditious completion of trials, the *ad hoc* Tribunals' completion strategies concentrate on the referral of cases to national courts for trial. The policy difference between the SCSL and the Yugoslavia and Rwanda tribunals can be explained by the fact that, from its inception, the Special Court concentrated its indictments on persons bearing the greatest responsibility for serious violations of international humanitarian law committed in Sierra Leone. In fact, only 13 persons have been indicted by the Special Court.⁵² By the time the SCSL's completion strategy was adopted, proceedings had commenced against nine of the accused and all efforts were ongoing to have Charles Taylor and Johnny Paul Koroma transferred to the Special Court. Unlike the *ad hoc* Tribunals, the SCSL was not tackling a serious case backlog. Instead the priority of the Court was to wind-down its core judicial activities by issuing final judgments

⁴⁸ International Centre for Transitional Justice 'The Special Court for Sierra Leone under Scrutiny', March 2006, p.32.

⁴⁹ UN Doc. A/Res/58/284 (2004). See also the SCSL Second Annual Report (2004 – 2005), p. 28.

⁵⁰ *Ibid.*, paras.2 and 6.

⁵¹ 'Special Court for Sierra Leone Completion Strategy', 18 May 2005, UN Doc. S/2005/350. Completion Strategy Updates were submitted to the Management Committee on 12 October 2005, 19 July 2006, 14 December 2006, July 2007, January 2008, July 2008 and June 2009.

⁵² Note: Two indictments were withdrawn as a result of the death of Foday Sankoh and Sam Bockarie.

against all accused in custody and to ensure the transfer of convicted persons to appropriate prisons outside Sierra Leone.⁵³ The SCSL Completion Strategy sets out the main milestones for each of the trials and appeals before the Court.⁵⁴ Approximately every six months the strategy is updated. Although the original Completion Strategy anticipated the completion of trials by mid-2007, the transfer of the former President of Liberia, Charles Taylor, to the custody of the SCSL, in 2006, extended the lifespan of the Court. Consequently, the timeline in the SCSL revised Completion Strategy for the end of all SCSL trials and appeals is 2012.⁵⁵

B. RULE 11BIS: THE FAR-REACHING CASE REFERRAL MECHANISM CREATED BY THE JUDGES

(1) THE PURPOSE AND INTENT OF THE RULE 11BIS REFERRAL MECHANISM

An integral component of the *ad hoc* Tribunals' completion strategies is the referral of intermediary- and lower-level accused to national courts for trial. In 2000, the Expert Group evaluating the effective functioning of the Tribunals identified the ICTY's Rule 11bis as the possible procedural mechanism to manage 'second-tier perpetrators' as the Prosecutor focused on 'leadership cases'.⁵⁶ Entitled 'Suspension of Indictment in case of Proceedings before National Courts', the original rule authorised a Trial Chamber to suspend an indictment against an accused in anticipation of proceedings before the national court of a State in which the accused was arrested, if that State was prepared to prosecute the case.⁵⁷

There was, however, no parallel provision in the ICTR Rules. The experts recommended that the Rwanda Tribunal include in its Rules of Procedure a provision

⁵³ 'Special Court for Sierra Leone Completion Strategy', 18 May 2005, UN Doc. S/2005/350, para.3.

⁵⁴ SCSL Fifth Annual Report, p.37.

⁵⁵ SCSL Completion Strategy, Update May 2011.

⁵⁶ 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda', UN Doc. S/2000/597, para.101.

⁵⁷ See: ICTY RPE, IT.32. Rev.12 (1997), Rules 11bis(A) and (B).

similar to the ICTY Rule 11bis.⁵⁸ Interestingly, in 2000, the ICTR remarked that the need for such a rule had not been demonstrated to the Tribunal.⁵⁹ In fact, the amendment was proposed at the sixth plenary but was not adopted by the judges. Perhaps the need for a regulation similar to the ICTY Rule 11bis in the ICTR Rules had, in fact, been demonstrated two years earlier in the *Ntuyahaga* case. In 1998, the ICTR charged Bernard Ntuyahaga with a single count of crimes against humanity for the murder of the former Prime Minister of Rwanda and 10 Belgian peacekeepers. The other three counts in the indictment charged the accused with genocide and violations of common Article 3 to the Geneva Conventions and Additional Protocol II. They were not confirmed by the reviewing judge. Consequently, pursuant to Rule 51, the Prosecutor sought to withdraw the indictment declaring that a single count relating to murder would not serve her objective of ‘exposing the totality of crimes committed in Rwanda in 1994.’⁶⁰ The Prosecutor argued that the withdrawal of the indictment would promote the exercise of concurrent jurisdiction by facilitating the prosecution of the accused by national courts.⁶¹ With this in mind, she requested the transfer of Ntuyahaga to the Government of the United Republic of Tanzania. In addition, the Belgium Government requested the ICTR to hand over the accused for trial before their courts. The Belgium Government went so far as to submit that the ICTR’s Rules of Procedure should be modified to include a provision similar to the ICTY Rule 11bis.⁶²

However, the judges noted that the ICTY Rule 11bis was limited to the State in which the accused was arrested and was not applicable in the *Ntuyahaga* case since it was not clear whether the arresting State, Tanzania, was prepared to try the accused. Granting the Prosecutor leave to withdraw the indictment, the Chamber declared that neither the

⁵⁸ See: ‘Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, UN Doc. S/2000/597, para.16.

⁵⁹ *Ibid.*, Annex 1 – ‘Comments of the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, observations of the Prosecutor and comments of the Secretary-General, where relevant’, para.74.

⁶⁰ UN Doc. S/1999/943, para.35.

⁶¹ *Ntuyahaga*, (ICTR-98-40-T), Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999, para.1(i).

⁶² The Trial Chamber noted that, even if the ICTR Rules contained a provision similar to the ICTY Rule 11bis, the provision would not be applicable in the *Ntuyahaga* case since the ICTR was not aware whether the arresting State, the United Republic of Tanzania, would be willing to continue the proceedings in their courts. ICTY Rule 11bis was limited to cooperation with the State in which the accused was arrested.

ICTR Statute nor the Rules of Procedure and Evidence empowered the Tribunal to refer proceedings to any national jurisdiction.⁶³ Thus, the ICTR did not have the jurisdiction to order the release of Ntuyahaga into the custody of a given State.⁶⁴ Considering Belgium was willing and adequately prepared to take the case but the ICTR did not have the required procedural mechanism to transfer the accused to that State, it seems surprising that the Tribunal remarked in 2000 that the need for a regulation similar to the ICTY Rule 11bis had not been demonstrated. Surely the need for a referral procedure had already been evidenced by the *Ntuyahaga* case. If anything the case showed the need for a wider procedural regime which would have facilitated the referral of accused to jurisdictions other than arresting States.

Nonetheless, in 2002, the ICTR Rules of Procedure and Evidence were amended to include a more comprehensive Rule 11bis regulating the suspension of an indictment which was inspired by the principle of universal jurisdiction.⁶⁵ Although pursuant to the ICTY rule the Yugoslavia Tribunal was empowered to transfer a case to the arresting State, for the first time the new ICTR rule authorised the court to transfer accused to a jurisdiction other than the State in which the accused was arrested – to the authorities of the ‘receiving State’.⁶⁶ The ICTR judges adopted the new Rule 11bis to enable the ICTR to focus on a limited number of important cases to push forward with its completion strategy and finish first instance trials by 2008.⁶⁷

However, with the formal implementation of referring cases involving intermediary-and lower-level accused to national courts forthcoming, the ICTY judges debated the Tribunal’s power to do so. They were concerned that the Statute contained some ambiguities in this respect. In fact, at the extraordinary plenary session of 23 April 2002, the judges suggested that the Security Council amend the Statute to empower the

⁶³ *Ntuyahaga* (ICTR-98-40-T), Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999, para.1.

⁶⁴ *Ibid.*, para.3.

⁶⁵ For information in relation to the ICTR 12th Plenary Session, 5-6 July 2002, at which the judges adopted the ICTR Rules of Procedure and Evidence, Rule 11bis, see: ICTR Press Briefing (ICTR/INFO-9-13-22.EN), 8 July 2002. For a discussion in relation to the ICTR applicable law prior to the adoption of the ICTR RPE, Rule 11bis, see: *Ntuyahaga* (ICTR-98-40-T), Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999. The ICTR RPE, Rule11bis entitled ‘Referral of the Indictment to another Court’ was introduced less than two years later at the 14th Plenary Session, 23-24 April 2004.

⁶⁶ ICTR RPE (2002), Rule 11bis A(ii).

⁶⁷ See: ICTR Press Briefing (ICTR/INFO-9-13-22.EN), 8 July 2002.

ICTY to refer cases.⁶⁸ Although Article 29 of the Statute imposed on all United Nations member States a general obligation to cooperate with the ICTY, it was not without question whether this provision could be interpreted as permitting the Tribunal to compel national courts to try referred persons for all charges in the indictments issued by the Prosecutor. Nor were the judges convinced that the principle of concurrent jurisdiction and the primacy of the ICTY could be interpreted as sanctioning the far-reaching referral process required to facilitate the completion strategy and the winding-down of the ICTY mission by 2010.⁶⁹

To implement the completion strategy referral process, the ICTY advocated that the scope of application of the existing Rule 11bis governing the suspension of an indictment needed to be expanded.⁷⁰ The original ICTY rule provided that an indictment could be suspended only if the State in which the accused was arrested had jurisdiction. The ICTY contemplated broadening the jurisdictions to which it could refer a case to beyond just the arresting State. The Tribunal maintained that it should be authorised to refer cases to States where the crimes were perpetrated.⁷¹ The inclusion of States with territorial jurisdiction over the crimes was a strategic move by the ICTY for a number of reasons. Firstly, as noted in 2001 by President Jorda, the judicial systems of the States of the former Yugoslavia would have to be ‘reconstructed on democratic foundations’ before any cases could be transferred.⁷² Considering the urgent need to refer cases to meet the completion timelines, there was not sufficient time to wait for the reform of those judicial sectors. Instead, the tribunal supported the creation of the hybrid War Crimes Chamber in the Court of Bosnia and Herzegovina. The ICTY intended to refer most of its cases involving intermediary-level accused to the Bosnian Court. Yet, a number of the accused which the Tribunal wanted to transfer were Serbs with both Bosnian and Serbian citizenship. Before their transfer to the ICTY, rather than surrendering to the Bosnian authorities, some of the accused had surrendered to the authorities of Serbia and Montenegro. Without amending Rule 11bis to include States

⁶⁸ See: ‘Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts’, UN Doc. S/2002/678, para.37.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 35.

⁷¹ *Ibid.*, para.38.

⁷² UN Doc. S/PV.4429 (2001), p.5.

with territorial jurisdiction there was, thus, a possibility that those accused would have to be transferred back to Serbia and Montenegro rather than to the War Crimes Chamber in the Court of Bosnia and Herzegovina. Secondly, getting witnesses to testify in trials, be they in Bosnia and Herzegovina or in Serbia and Montenegro, was a thorny issue. Many witnesses believed that Serbia was a safe refuge for Bosnian war criminals. Ultimately, the chances of convincing Bosnian prosecution witnesses to travel to Belgrade to testify in trials were slim. It was widely considered that witnesses would be more willing to testify in a Bosnian court if appropriate support and security services were provided to them. The War Crimes Chamber planned to provide the services. Therefore, to ensure the possible referral of cases to the Bosnian War Crimes Chamber, Rule 11bis had to be amended to include States of territorial jurisdiction.

Moreover, the referral of the indictment's supporting material to national courts gave rise to concerns. It was likely that some of the victims' and witnesses' statements in the files were covered by protective measures. To ensure the continued security of victims and witnesses, the ICTY advised amendment of Rule 11bis to empower the Tribunal to order national courts to uphold its protective measures.⁷³

Rule 11bis governing the suspension of an indictment did not specify the appropriate level of responsibility for an accused to be tried in a national court. In its completion strategy report, the ICTY noted that, since the war in the former Yugoslavia involved States, autonomous entities and paramilitary groups carrying out widespread offences, it was difficult to precisely pinpoint which accused should be referred.⁷⁴ Nevertheless, the Tribunal maintained that for reasons of transparency *vis-à-vis* the international community and the States of the former Yugoslavia, Rule 11bis should be amended to incorporate two criteria to be assessed when deciding on a referral. The position of the accused and the gravity of the crimes charged were the suggested criteria. The judges noted that it would be for the competent Trial Chamber 'to access and set out *in concreto* the main points of those criteria', at a later stage.⁷⁵

⁷³ 'Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts', UN Doc. S/2002/678, para.41.

⁷⁴ *Ibid.*, para.42.

⁷⁵ *Ibid.*

Another major concern, regarding the referral of cases to national courts, related to the characterisation and confirmation of the charges contained in the international indictment. Although the ICTY was prepared to refer cases to States in the former Yugoslavia, some trepidation remained regarding the ability of national courts to ensure the accused would be tried for all of the crimes in the Tribunals' indictments. This concern was bolstered by the text of the original Rule 11*bis* governing the suspension of an indictment. It prescribed that, if a case was transferred to a national court, the indictment issued by the Tribunal would be suspended pending the start of proceedings.⁷⁶ This, in the opinion of the ICTY, gave too much latitude to national courts to drop or change the charges against an accused. Focused on creating a robust referral mechanism, the ICTY intended to guarantee that an accused, referred to a national jurisdiction pursuant to Rule 11*bis*, would answer for all the crimes as characterised and confirmed in the Tribunal's indictment.⁷⁷ The position taken by the Tribunal regarding the characterisation and confirmation of charges in their indictments is hardly surprising. To reduce its caseload and meet the 2010 completion timeline, the ICTY planned to refer a number of cases to national courts. Naturally, the Tribunal wanted to alleviate any risk of the international crimes in its indictments being characterised as ordinary crimes in a national indictment. Such a situation would result in the ICTY invoking its primacy and requesting the deferral of the case back to its jurisdiction. This would defeat the purpose of case referral resulting once again in an increase in the Tribunals' caseload.

Finally, it was suggested in the report that the competent Trial Chamber should be authorised to decide *ex officio* to refer a case after giving the Prosecutor and, if applicable, the accused the opportunity to be heard.⁷⁸ Interestingly, not unlike the objections raised by the Prosecutor in 2004 about the amendment of Rule 28(A), the Prosecutor did not agree to a Trial Chamber being authorised to act *ex officio*. She maintained that this would infringe on her statutory powers. The ICTY indicated that if the Security Council approved the proposals, whether the Statute was amended or not, Rule 11*bis* would be amended by the judges to reflect their suggestions. Subsequently,

⁷⁶ For the original text of Rule 11*bis*, see: ICTY RPE, IT.32. Rev.12 (1997), Rule 11*bis*.

⁷⁷ 'Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts', UN Doc. S/2002/678, para.40.

⁷⁸ *Ibid.*, para.43.

the Security Council Presidential Statement endorsed the intention of the ICTY to amend its Rules of Procedure and Evidence to facilitate the referral of cases to national jurisdictions.⁷⁹

(2) RULE 11BIS PROCEDURE: THE REFERRAL OF INDICTMENTS TO NATIONAL COURTS

The general principle of the *ad hoc* Tribunals' primacy over national courts is declared in the ICTY and the ICTR Statutes.⁸⁰ The Special Court's Statute refers to the primacy of the SCSL over the national courts of Sierra Leone.⁸¹ As the Security Council intended when it adopted the Statutes, the details of how the ICTY and the ICTR assert their primacy are defined by the judges and set out in the Rules of Procedure and Evidence.⁸² Part II of the Rules entitled 'Primacy of the Tribunal' sets out the circumstances under which the *ad hoc* tribunals may assert their primacy.⁸³ Likewise, Part II of the SCSL's Rules of Procedure and Evidence, entitled 'Cooperation with States and Judicial Assistance', prescribes the conditions when the Special Court may exercise its primacy over Sierra Leonean courts. In the event of corresponding or competing prosecutions in national courts, the mechanism for the deferral of cases to the Tribunals' jurisdiction is also expounded in the Rules. As Jann Kleffner has remarked, prior to the adoption of the Tribunals' completion strategies, the Rules of Procedure and Evidence displayed a preoccupation with deciding how the ICTY and the ICTR could assume jurisdiction over cases.⁸⁴ Following the endorsement of the completion strategies, the Tribunals' judges transformed the Rules by incorporating the mechanism and procedures needed to refer cases to domestic courts for trial. At an extraordinary plenary, held in September 2002, the ICTY judges revised Rule 11bis entitling it, 'Referral of the Indictment to Another Court'.⁸⁵ In 2004, the ICTR judges revised the rule governing suspension of an indictment to adopt the corresponding Rule 11bis regulating the referral

⁷⁹ UN Doc. S/PRST/2002/21.

⁸⁰ ICTY Statute, Art. 9; ICTR Statute, Art. 8.

⁸¹ SCSL Statute, Art. 8(2).

⁸² See 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808', UN Doc. S/25705 (1993), para.65.

⁸³ ICTY RPE, Rules 7bis-13; ICTR RPE, Rules 8-13.

⁸⁴ Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford: Oxford University Press, 2008, p.68.

⁸⁵ ICTY Ninth Annual Report, UN Doc. S/2002/985, para.42.

of an indictment to national courts.⁸⁶ In 2008, at the 11th plenary meeting of the Special Court, the judges adopted a new Rule 11bis to provide a mechanism for the Court to refer the indictment against Johnny Paul Koroma to a willing and adequately prepared State for trial.⁸⁷

The power of the ICTY to refer its cases to national jurisdictions has been challenged on the grounds that Rule 11bis lacks a legal basis in the Statute and in any implied or inherent powers that the Tribunal may have.⁸⁸ In *Stanković*, the Appeals Chamber rejected that argument for two main reasons. Firstly, the judges explained that, even though there is no explicit Statutory provision regulating the referral of cases to national jurisdictions, in accordance with the Tribunal's concurrent relationship with national courts as foreseen under Article 9 of the Statute, the transfer of accused to domestic jurisdictions could be contemplated.⁸⁹ Secondly, the Appeals Chamber highlighted that in various resolutions the Security Council had confirmed the legal authority of the ICTY to refer cases and implicitly recognized the authority of the ICTY judges to amend the Rules of Procedure and Evidence to do so.⁹⁰ There was, however, a procedural gap in the applicable law of the Tribunals: the Rules of Procedure and Evidence did not specify how and according to what criteria the Tribunals could refer cases, in which indictments had been confirmed, to national courts for trial. Pursuant to the Statutes of the *ad hoc* Tribunals, the judges are empowered to adopt rules of procedure 'for the conduct of the pre-trial phase of proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.'⁹¹ In Resolutions 1503 and 1534, the Security Council recognised the Tribunals' implicit statutory authority to refer cases to national courts and directed the ICTY and the ICTR to refer intermediate- and lower-rank accused to domestic jurisdictions. In *Trbić*, the Referral Bench interpreted the purpose and intent of the rule. The judges stated:

⁸⁶ ICTR Press Briefing (ICTR/INFO-9-13-22.EN), 8 July 2002. In July 2002, the ICTR judges introduced Rule 11bis, governing suspension of indictments and authorising a Trial Chamber to transfer a case to a competent national jurisdiction. According to the ICTR, the purpose of the new rule was to enable the Rwanda Tribunal to concentrate on a limited number of cases to meet the timelines in the completion strategy.

⁸⁷ SCSL Fifth Annual Report, p.25.

⁸⁸ *Stanković* (IT-96-23/2-AR11bis.1), Appellant's Brief, 1 July 2005, para.5,

⁸⁹ *Stanković* (IT-96-23/2-AR11bis.1), Decision on Rule 11bis Referral, 1 September 2005, para.14.

⁹⁰ *Ibid.*, paras.15-17. See also: UN Doc. S/RES/1503 (2003); UN Doc S/RES/1534 (2004).

⁹¹ ICTY Statute, Art. 15, ICTR Statute, Art. 14.

The major purpose of the rule is to enable the Referral Bench, where it is in the interests of justice to do so, to give effect to the policy of the Security Council, as reflected in Resolution 1534, that the efforts of the Tribunal should be concentrated on trying the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction.⁹²

Thus, it was entirely appropriate for the Tribunals' judges to amend Rule 11bis to define the procedural law required to support the referral process implied under Article 9 of the Statutes.

The situation is not so clear cut when one considers the judges' adoption of the SCSL's Rule 11bis. The authority of the Special Court to refer the case of the outstanding fugitive, Johnny Paul Koroma, to a national court for trial has not yet been challenged before the Court. However, taking the reasoning of the Appeals Chamber in *Stanković* into consideration, there is an interesting legal argument to be made that the SCSL does not in fact have the power, under Rule 11bis of its Rules of Procedure and Evidence, to refer its cases to national courts outside Sierra Leone. Article 8(1) of the SCSL Statute refers to the Court's concurrent relationship with the national courts of Sierra Leone rather than the national courts of all States.⁹³ There is no explicit reference in the SCSL Statute empowering the Special Court to refer its cases to national jurisdictions. Moreover, the Security Council has never recognised, in any of its resolutions, the authority of the Special Court to refer its cases to national courts. Thus, the question is whether, in accordance with the SCSL's concurrent relationship with the national courts of Sierra Leone as foreseen under Article 8(1) of the Statute, the Special Court only has implicit authority to refer the Johnny Paul Koroma case under Rule 11bis to Sierra Leone?

The current text of Rule 11bis is not identical in the Rules of Procedure and Evidence of the ICTY, the ICTR and the SCSL. Nevertheless, the case referral mechanism created by the rules is practically the same. Rule 11bis(A) provides that after an indictment has been confirmed and before the start of trial, whether or not the accused

⁹² *Trbić* (IT-05-88/1PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para. 18.

⁹³ SCSL Statute, Art. 8 (1).

is in the custody of the Tribunal, a request for referral can be heard.⁹⁴ The ICTY's and the SCSL's Rule 11bis(A) authorises the President to appoint three permanent Judges to the Referral Bench, which will determine whether to refer a case or not.⁹⁵ The situation is slightly different in the ICTR, as the President designates cases to different Trial Chambers.⁹⁶ The creation of the permanent ICTY Referral Bench was a very positive development. As the referral hearings increased, the three permanent judges became increasingly familiar with the national courts and laws of the referral States. The judges could effectively analyse objections raised by both the Prosecution and Defence in this respect as many of the objections raised in the various cases were the same. Overall, the ICTY Rule 11bis jurisprudence is comprehensive and consistent. The same situation does not necessarily prevail in the ICTR. Rather than creating a permanent Referral Bench, the President designates referral cases to various Trial Chambers. In a number of ICTR cases rejecting referral motions, the grounds for refusal varied between the Chambers.⁹⁷ As a general comment and from the perspective of building a national judicial system sufficiently robust to meet the standards required by the *ad hoc* Tribunals to refer a case, the lack of clarity from the ICTR, when stipulating the problems preventing the referral of cases, does not help a State like Rwanda, which is willing to accept cases, to remedy those problems. Thus far, there have been no Rule 11bis proceedings before the Special Court.

When examining Rule 11bis, a broader issue to be explored is whether the management of the Tribunals' referral process is in fact an appropriate judicial function. The decision to refer accused to national courts for trial is a judicial one in cases where indictments exist whereas the decision to refer other non-indicted cases to national authorities rests exclusively with the Prosecutor. It is therefore interesting to consider whether the Tribunals could have created an alternative transfer regime for indicted cases without involving the judges in the procedure? For example, could the referral of indicted

⁹⁴ ICTY RPE, Rule 11bis(A); SCSL RPE, Rule 11bis(A). ICTR RPE, Rule 11bis(A) states that after an indictment has been confirmed a request for referral can be heard, however, unlike the ICTY and the SCSL rules it does not explicitly state that the application must be heard before the start of a trial.

⁹⁵ *Ibid.*

⁹⁶ ICTR RPE, Rule 11bis(A).

⁹⁷ See: William A. Schabas, 'Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda', (2009) 13 *Max Planck Yearbook of United Nations Law* 29, pp.38- 55.

cases to national jurisdictions be managed in the same way as the transfer of the so-called ‘Category 2 cases’, which are handed over by the ICTY and the ICTR Office of the Prosecutor to national authorities without any judicial supervision at all?⁹⁸ The Rule 11bis procedures are applicable to cases in which indictments have been confirmed.⁹⁹ Therefore, the Tribunals were satisfied that sufficient evidence existed to provide reasonable grounds for believing that the persons charged in the indictments had committed crimes within their jurisdiction.¹⁰⁰ On the other hand, the Category 2 cases do not involve indicted persons. The ICTY Category 2 files are best described as collections of materials from the Prosecutor’s investigations which never actually reached the indictment phase.¹⁰¹ The ICTR files are composed of some investigations which are ready for trial and some dossiers requiring further investigation by domestic authorities.¹⁰² There is a critical distinction between the two types of cases. The Rule 11bis cases have reached the pre-trial stage of proceedings before the Tribunals and involve persons who have been publicly indicted.¹⁰³ On the contrary, the Category B cases are at various stages of investigation and the Prosecutor has not issued indictments.¹⁰⁴ This distinction justifies the application of different case referral regimes and necessitates the transfer of indicted persons to domestic authorities by judicial decision.

It is paramount that the rights of persons indicted by the Tribunals be respected in the course of referral proceedings and also by national courts after a transfer has been ordered. In this regard the Tribunals’ judges play a critical role; they are required to

⁹⁸ UN Doc. S/2005/782, para. 40. The ICTR Prosecutor indicated that, according to the 2004 Completion Strategy, he intended to transfer files involving thirty-two individuals to national jurisdictions for trial.

⁹⁹ See: ICTY RPE, Rule 11bis(A); ICTR RPE, Rule 11bis(A).

¹⁰⁰ See: ICTY RPE, Rule 47(B); ICTR RPE, Rule 47(B). The Rule provides that if the Prosecutor is satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime, an indictment shall be prepared and submitted for confirmation to a Judge.

¹⁰¹ UN Doc. S/2007/663, para.15. See also: David Tolbert and Aleksander Kontic, ‘The ICTY: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.157.

¹⁰² UN Doc. S/2005/782, para. 40.

¹⁰³ The submission and confirmation of indictments is governed by ICTY RPE, Rule 47 and ICTR RPE, Rule 47, under Part Five of the Rules of Procedure and Evidence entitled ‘Pre-Trial Proceedings’.

¹⁰⁴ For a discussion on the transfer of non-indicted ICTR cases, see: Alhagi Marong, Chernor Jalloh and David Kinnecome, ‘Concurrent Jurisdiction at the ICTR: Should the Tribunal Refer Cases to Rwanda?’, in Decaux, Dieng and Sow (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Leiden: Martinus Nijhoff Publishers, 2007, pp.170-173.

adjudicate questions relating to the fairness of the transfer and/or issues that might prejudice the rights of the accused.¹⁰⁵ ICTY and ICTR Rule 11bis permits the referral of cases to the State in whose territory the crime was committed; the State in which the accused was arrested; or any State having jurisdiction and willing and adequately prepared to accept such a case.¹⁰⁶ SCSL Rule 11bis permits the referral of an accused to the authorities of any willing and adequately prepared State with jurisdiction over the case.¹⁰⁷ Thus, for example, in situations where there are concurrent jurisdictions among states based on the territoriality and nationality principles, the Tribunals' judges are required to resolve conflicts of competing claims for jurisdiction. Moreover, to safeguard the rights of the accused, many of whom have spent years in the Tribunals' custody awaiting trial, it is correct that the accused are given the opportunity to raise objections before the judges regarding their referral to a national court for trial. For example, in *Mejakić et al.*, the accused submitted that based upon their citizenship the appropriate state for the case to be referred to was Serbia and Montenegro.¹⁰⁸ Due to the territoriality principle, the Prosecutor and Bosnia and Herzegovina argued that the state of referral should be Bosnia.¹⁰⁹ Serbia and Montenegro submitted that it was willing and adequately prepared to accept the case.¹¹⁰ The ICTY Appeals Chamber explained:

[W]here there are concurrent jurisdictions under Rule 11bis (A)(i)-(iii) of the Rules, discretion is vested in the Referral Bench to choose without establishing among these three options and without requiring the Referral Bench to be bound by any party's submission that one of the alternative jurisdictions is allegedly the most appropriate.

¹⁰⁵ The judges' role is not vital in the transfer of Category 2 cases. No individuals are indicted and awaiting trial before the Tribunals in these cases, therefore, there are no accused to contest the fairness of the case transfer. In addition, after the Category 2 file is transferred to the national authorities, there is no guarantee that indictments will be issued or who they may be issued against.

¹⁰⁶ ICTY RPE, Rule 11bis(A)(i), (ii), (iii); ICTR RPE, Rule 11bis(A)(i), (ii), (iii). The inclusion of the third category of State, a country with jurisdiction and the capacity to try the accused, was considered necessary due to the inability of some courts in the territorial states to guarantee the protection of internationally recognized fair trial rights. See comments of S. Williams, 'The Completion Strategy of the ICTY and the ICTR in International Criminal Justice: A Critical Analysis of Institutions and Procedure', in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, London: Cameron May, 2007, p.153.

¹⁰⁷ SCSL RPE, Rule 11bis(A).

¹⁰⁸ *Mejakić et al.* (IT-02-65-PT), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para. 34.

¹⁰⁹ *Ibid.*, para.33.

¹¹⁰ *Ibid.*, para.36.

A decision of the Referral Bench on the question as to which State a case should be referred (vertical level, i.e. between the International Tribunal and individual States) must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11bis(A) of the Rule.¹¹¹

In *Mejakić et al.*, the Referral Bench transferred the case to the Bosnian authorities; the judges determined that Bosnia and Herzegovina had ‘a significantly greater nexus’ with the accused and the offences they had allegedly committed than Serbia and Montenegro.¹¹²

Judge Mohamed Shahabuddeen has observed that it would be inappropriate for judges to prioritise the completion strategy above the rights of the accused in proceedings before the Appeals Chambers.¹¹³ It would be equally wrong for the Tribunals to prioritise the referral of cases to national courts without first exploring whether referral States can guarantee the protection of internationally recognised human rights standards. In this regard, the Tribunals’ judges play an essential role in the referral process. In accordance with Rule 11bis, before ordering the referral of a case, the judges must be satisfied that the accused will receive a fair trial in the national court and that the death penalty will not be imposed or carried out.¹¹⁴ This provision contains the explicit condition that the ICTY, the ICTR and the SCSL may only refer accused persons to national courts that will ensure the application of international fair trial standards. Thus, it is not only the fairness of the referral process that the Tribunals’ judges safeguard; they also play a critical role in protecting the rights of witnesses and accused before and after a case is transferred to a domestic jurisdiction. For example, as suggested by the ICTY in the completion strategy report, Rule 11bis(D)(ii) provides that the Referral Bench may order that protective measures for certain witnesses or victims remain in force after a referral.¹¹⁵ Moreover, to

¹¹¹ *Mejakić et al.* (IT-02-65-AR11bis.1), Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, 7 April 2006, para. 46. See also: *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.33.

¹¹² *Mejakić et al.* (IT-02-65-PT), Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, paras. 41-42.

¹¹³ See: *Milošević* (IT-02-54-AR73.4), Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber’s Decision Dated 30 September 2003 on Admissibility of Evidence-In-Chief in the form of Written Statements, October 31 2003, para.21.

¹¹⁴ ICTY RPE, Rule 11bis(B); ICTR RPE, Rule 11bis(C); SCSL RPE, Rule 11bis(B).

¹¹⁵ ICTY RPE, Rule 11bis(D)(ii); ICTR RPE, Rule 11bis (D)(ii); SCSL RPE, Rule 11bis (D)(ii).

determine the capability of a state to hold fair trials, it is established in Rule 11bis case law that the judges must consider whether the principles enshrined in the Statutes will be protected by the national court.¹¹⁶ The Statutes prescribe basic fair trial principles which reflect the standards enshrined in the International Covenant on Civil and Political Rights.¹¹⁷ In Rule 11bis proceedings, therefore, the judges of the Yugoslavia and Rwanda Tribunals have considered the capacity of national courts to ensure that the accused will have a fair and public hearing; will be presumed innocent until proven guilty; will be informed promptly and in detail of the charges in a language understood by the accused; will be tried without undue delay; will have legal assistance; and will be entitled to cross-examine witnesses and to communicate with counsel of his or her own choosing.¹¹⁸

Interestingly, in this respect, during Rule 11bis hearings, the judges of the *ad hoc* Tribunals act more like members of an international human rights body than an international criminal court as they are required to consider and assess the capacity of States to adhere to human rights norms. This is an entirely appropriate judicial function; it would be outrageous if the Tribunals transferred indicted persons to jurisdictions that did not respect the international standards which the accused would be afforded if their trials proceeded before the ICTY or the ICTR.

Unlike the transfer of cases from the Yugoslavia Tribunal to Bosnia and Herzegovina, there has been considerable opposition to the Rule 11bis referral of cases from the ICTR to Rwanda by the international human rights community and some non-governmental organisations, in particular Human Rights Watch and the International Criminal Defence Attorneys' Association. In June 2007, the ICTR Prosecutor submitted his first application for the referral of a case to Rwanda.¹¹⁹ Subsequently, several other applications were filed by the Prosecutor for the transfer of accused persons to Rwanda for trial.¹²⁰ In the various cases, both Human Rights Watch and the International Criminal

¹¹⁶ *Hagekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 4 December 2008, para.4.

¹¹⁷ ICTY Statute, Art. 21; ICTR Statute, Art. 21. See also: International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 14.

¹¹⁸ *Ibid.*

¹¹⁹ *Kayishema* (ICTR-2001-67-I), Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

¹²⁰ *Hagekimana* (ICTR-00-55B-R11bis), Prosecutor's Request for the Referral of the Case of Ildephonse Hagekimana to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Kanyarukiga* (ICTR-2002-78-R11bis), Prosecutor's Request for the Referral of the Case

Defence Attorneys' Association were granted leave by the ICTR to make submissions as *amicus curiae*.¹²¹ In *Kayishema*, Human Rights Watch argued in its *amicus* brief that the accused should not be transferred to Rwanda as a referral would result in a violation of his rights as enumerated in Article 20 of the ICTR Statute.¹²² Specifically, Human Rights Watch asserted that the Rwandan Courts 'remain subject to political influence; services intended to protect witnesses and provide counsel to the indigent suffer from significant fiscal constraints; and the power of the police and security forces is insufficiently regulated.'¹²³ Moreover, Human Rights Watch argued that the ability of Rwandan Courts to sentence certain persons to life imprisonment in solitary confinement could expose the accused to a violation of his or her rights under Article 7 of the International Covenant on Civil and Political Rights since this penalty 'may amount to torture or cruel, inhuman, and degrading treatment or punishment'.¹²⁴ Although the various ICTR Trial Chambers dismissed the referral applications in 2008 on a number of different grounds, including on some of the points raised by Human Rights Watch, the Appeals Chamber agreed to uphold their Decisions on only two grounds.¹²⁵ Firstly, there was a risk that an accused transferred from the ICTR to Rwanda for trial may face life imprisonment in isolation without appropriate safeguards to protect his right not to be subjected to cruel, inhuman

of Gaspard Kanyarukiga to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Munyakazi* (ICTR-97-36-R11bis), Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Gatete* (ICTR-2000-61-R11bis), Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 28 November 2007.

¹²¹ For example, see: *Munyakazi* (ICTR-1997-36-I), Decision on the Request of Human Rights Watch for Leave to Appear as *Amicus Curiae*, Rules 11bis and 74 of the Rules of Procedure and Evidence, 10 March 2008; *Hagegekimana* (ICTR-00-55B-I), Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDA, and ADAD for Leave to Appear and make Submissions as *Amici Curiae*, 4 December 2007.

¹²² *Kayishema* (ICTR-2001-67-I), Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11bis Transfer, 3 January 2008, para.15.

¹²³ *Ibid.*, para.14.

¹²⁴ *Ibid.*, para.15(c).

¹²⁵ *Hagegekimana* (ICTR-00-55B-R11bis), Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hagegekimana to Rwanda, 19 June 2008; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008; *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecutor's Request for the Referral of the Case to the Republic of Rwanda, 28 May 2008. For a critique of the ICTR referral decisions, see also: William A. Schabas, 'Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda', (2009) 13 *Max Planck Yearbook of United Nations Law*, pp.38-55.

or degrading punishment.¹²⁶ Secondly, the accused right to obtain and examine Defence witnesses in the same circumstances as Prosecution witnesses could not be guaranteed by Rwanda at that time.¹²⁷

Under Rule 11bis(C), an ICTR Trial Chamber is allowed to transfer a case to a competent State after the Judges are satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. Until 2007, the death penalty remained the major impediment to the ability of the Tribunal to transfer any case under Rule 11bis to Rwanda.¹²⁸ However, in 2007, Rwanda showed how willing it was to accept referral cases by taking a major legislative step designed to facilitate the transfer of accused under Rule 11bis. In March 2007, the Organic Law concerning the Transfer of Cases to the Republic of Rwanda from the ICTR and other States was enacted to regulate issues regarding the referral of accused for trial. According to Article 21 of the Transfer Law, the heaviest penalty to be imposed on a convicted person in a case transferred to Rwanda from the ICTR is life imprisonment.¹²⁹ In fact, later that year, the Organic Law relating to the Abolition of the Death Penalty, which replaced the death penalty with life imprisonment or life imprisonment with special provisions, was adopted by the Parliament.¹³⁰ Under Article 4 of the Abolition of the Death Penalty Law, if a person is sentenced to life with special provisions that person may be kept in isolation.

Thus, consistent with the explicit test set down in ICTR Rule 11bis(C), the death penalty would not be imposed or carried out if an accused would be convicted in a case referred to Rwanda for trial. However, even though it is not overtly stated in Rule 11bis,

¹²⁶ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para.20; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.16; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral, 4 December 2008, para.38.

¹²⁷ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para.50; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.35; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.40.

¹²⁸ See: remarks made by the ICTR Prosecutor to the UN Security Council, UN Doc. S/PV.5594 (2002), p.14.

¹²⁹ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007.

¹³⁰ Organic Law No.31/2007 relating to the Abolition of the Death Penalty, Official Gazette of Republic of Rwanda, 25 July 2007.

pursuant to the jurisprudence of the ICTY and the ICTR another test has been introduced by the Judges. In determining whether a State is adequately prepared to accept a case, the Judges must be satisfied that the penalty structure will provide an appropriate punishment for the crimes the accused is charged with.¹³¹ Moreover, the conditions of detention must be in compliance with internationally recognised standards.¹³² In 2008, the penalty structure in Rwanda proved to be one of the most contentious issues in the initial referral cases before the ICTR. The pivotal question was which punishment would apply to an accused referred from the Rwandan Tribunal and this in turn brought into question the relationship between the Transfer law and the Abolition of the Death Penalty Law.¹³³ In terms of the applicable punishment, the Prosecution and the Government of Rwanda argued that the Transfer Law, as *lex specialis*, would be the only law applicable to a case referred by the ICTR and, thus, the heaviest penalty for an accused if convicted would be life imprisonment.¹³⁴ Both the Defence and Human Rights Watch argued that the Abolition of the Death Penalty law could apply and, therefore, a person referred for trial by the ICTR could be convicted to life imprisonment in isolation.¹³⁵ The Appeals Chamber ruled that the penalty structure in Rwanda was not adequate for a case referral

¹³¹ *Mejakić et al.* (ICTY-IT-02-65-AR11bis.1), Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006, para.48; *Stanković* (ICTY-IT-96-23/2-PT), Decision on Referral of Case under Rule 11bis, 17 May 2005, para.32; *Ljubičić* (ICTY-IT-00-41-AR11bis.1), Decision on Appeal against Decision on Referral under Rule 11bis, 4 July 2006, para. 48; *Bagaragaza* (ICTR-05-86-AR11bis), Decision on Appeal, 30 August 2006, para.9.

¹³² *Stanković* (ICTY-IT-96-23/2-AR11bis.1), Decision on Rule11bis Referral, 1 September 2005, para.37; *Todović and Rašević* (ICTY-IT-97-25/1-AR11bis.2), Decision on Appeals against Decision on Referral under Rule 11bis, 4 September 2006, para.99.

¹³³ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007; Organic Law No.31/2007 relating to the Abolition of the Death Penalty, Official Gazette of Republic of Rwanda, 25 July 2007.

¹³⁴ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, (ICTR-97-36-R11bis), 8 October 2008, para.12; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.8; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.31. See also: Article 25 Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, which states '[i]n the event of any inconsistency between this Organic Law and any other Law, the provisions of this Organic Law shall prevail.'

¹³⁵ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, (ICTR-97-36-R11bis), 8 October 2008, para.15; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.9; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.32.

under Rule 11bis.¹³⁶ The Judges concluded that, since there was no authoritative interpretation of the two laws in question, a ‘genuine ambiguity’ existed about whether a person convicted in a transferred case would be sentenced, in accordance with the Transfer Law, to a maximum penalty of life imprisonment or, in accordance with the Abolition of the Death Penalty Law, to life imprisonment with special provisions.¹³⁷ Therefore, the penalty structure in Rwanda precluded the referral of cases in accordance with Rule 11bis.

The second ground on which the Appeals Chamber agreed to uphold the refusal to order the referral of cases to Rwanda related to the willingness of Defence witnesses to testify in trials in Rwanda. Before referring a case to a competent State under Rule 11bis, the Judges must assess whether the accused would receive a fair trial by determining if the person would be afforded the rights enshrined in Article 20 of the ICTR Statute. One of the key fair trial issues scrutinised in the various ICTR cases was the ability of the accused to ensure the attendance and examination of defence witnesses under the same conditions as prosecution witnesses.¹³⁸ Article 14 of the 2007 Transfer Law empowers the Prosecutor General and the High Court to provide security for witnesses appearing in the trial of cases referred from the ICTR.¹³⁹ For example, in accordance with Article 14, the High Court has the authority to order protective measures akin to those set out in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence. In addition, concerning witnesses who would travel to Rwanda from abroad, the Law also provides that they would be granted safe passage, namely the witnesses shall have ‘immunity from search, seizure, arrest or detention’ when giving testimony or travelling to and from trials.¹⁴⁰ However, regardless of the aforementioned legislative safeguards, in 2008 the ICTR Appeals Chamber upheld the Decisions of the various Trial Chambers not to

¹³⁶ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11bis, 8 October 2008, para.20; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.16; *Hagekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.38.

¹³⁷ *Ibid.*

¹³⁸ ICTR Statute, Art. 20(3)(e).

¹³⁹ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, Art. 14.

¹⁴⁰ *Ibid.*

transfer cases to Rwanda stating that the right of the accused to a fair trial would be jeopardised since Rwanda could not at that time guarantee the accused the right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as Prosecution witnesses.¹⁴¹ In *Hagegekimana*, the Appeals Chamber concurred with the Decision of the Trial Chamber that witnesses in Rwanda may not testify for the defence in cases referred from the ICTR due to the fear that ‘they may face serious consequence, including prosecution, threats, harassment, torture, arrest, or even murder.’¹⁴² The Judges of the Appeals Chamber also accepted that some defence witnesses may be unwilling to testify for fear that they would be accused of adhering to ‘genocidal ideology’.¹⁴³

Despite the refusal of the ICTR to agree to the referral of any case to Rwanda in 2008, there was subsequent progress made. In June 2011, Trial Chamber II ordered the referral of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11bis. In December 2011 the Appeals Chamber upheld the decision of Trial Chamber II to refer the case.¹⁴⁴ Regarding the previously contentious matter of the penalty structure that would be applicable to persons transferred from the ICTR, in 2008, the Rwandan Parliament adopted a law modifying the Abolition of the Death Penalty Law which clarified that life imprisonment in solitary confinement shall not be pronounced in cases transferred to Rwanda from the ICTR or other States.¹⁴⁵ Consequently, in *Uwinkindi*, the Chamber was satisfied that the ambiguities that existed in previous Rule 11bis applications had been

¹⁴¹ *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para.50; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.35; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.40.

¹⁴² *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para.22; *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para.37; *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.26.

¹⁴³ *Kanyarukiga* (ICTR-2002-78-R11bis), Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para.26.

¹⁴⁴ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

¹⁴⁵ Organic Law No.66 modifying and complementing Organic Law No.31/2007 relating to the abolition of the death penalty, Official Gazette of the Republic of Rwanda, 21 November 2008.

resolved by Rwanda and, thus, the penalty structure is adequate as required by the jurisprudence of the ICTR.¹⁴⁶

In relation to the fair trial concerns regarding the willingness of witnesses to testify that were identified by the Trial and Appeals Chamber in the previous Rule 11bis applications, in *Uwinkindi*, the Prosecution argued that they were no longer an obstacle to the referral of cases to Rwanda. The fact that Rwanda had amended the Transfer Law in 2009 to provide under Article 13 that ‘[w]ithout prejudice to the relevant laws on contempt of court and perjury, no persons shall be criminally liable for anything said or done in the course of a trial’ was highlighted.¹⁴⁷ In addition, Article 14 of the Transfer Law was amended to allow witnesses living abroad to testify by video-link or to have their testimony taken by deposition in Rwanda or another country.¹⁴⁸ Moreover, since 2008, Rwanda has established a new Witness Protection Unit within the Supreme and High Court. In spite of the various amendments to the Transfer Law and other reforms in Rwanda, the Defence and Human Rights Watch asserted that from interviews they had conducted with witnesses their unwillingness to testify had not changed since 2008.¹⁴⁹ Although the Trial Chamber noted that Defence witnesses may have concerns in relation to their decision to testify, the Judges pointed out that their mandate is to decide if the accused will be able to secure the appearance of witnesses rather than to examine whether the fears of potential witnesses are legitimate or not.¹⁵⁰ With this in mind, the Trial Chamber decided that the provisions of Rwandan law are ‘adequate to ensure a fair trial of the Accused before the High Court of Rwanda.’¹⁵¹ The Judges also highlighted their expectation that ‘if in the course of the trial in Rwanda the Accused, his counsel or any witnesses on his behalf makes a statement amounting to a denial of the genocide, he or

¹⁴⁶ *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011, para.51.

¹⁴⁷ Organic Law No. 3/2009 modifying and complementing the Organic Law No.11/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 26 May 2009, Art. 2.

¹⁴⁸ *Ibid.*, Art. 3.

¹⁴⁹ *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011, paras. 70-77.

¹⁵⁰ *Ibid.*, para.90.

¹⁵¹ *Ibid.*

she shall not be prosecuted for contempt or perjury.¹⁵² Although *Uwinkindi* submitted that the Referral Chamber incorrectly determined the ability of witnesses, both inside and outside of Rwanda, to attend a trial, the Appeals Chamber decided that the Chamber had ‘acted within its discretion in finding that the recent amendments to relevant laws and enhancements to witness protection services constitute sufficient assurances to address the defence witnesses concerns and to help secure their appearance.¹⁵³

In some regards, the Judges’ determination of a State’s capacity to deliver fair trials resulting from Rule 11bis referral proceedings is not unlike the Judges’ assessment of the ability of a State to diligently prosecute a case during deferral proceedings. In fact, after a case is referred to a national court for trial, Rule 11bis of the *ad hoc* Tribunals’ Rules of Procedure and Evidence creates a system to ensure that the case is diligently prosecuted and the accused receives a fair trial in the concerned State. According to this system the judges ensure that the trial of referred cases proceeds before national courts in a way that is acceptable to the Tribunals.¹⁵⁴ Pursuant to Rule 11bis(D)(iv), the Prosecutor is authorised to send observers to monitor the proceedings in the national courts.¹⁵⁵ In April 2011, the ICTR judges added a new element to the monitoring regime by amending Rule 11bis(D)(iv) to enable the Chamber to direct the Registrar to send observers to monitor proceedings. In *Uwinkindi*, the Referral Chamber took note of the new power of the judges to request monitoring of referred cases and expressed the opinion that it would be ‘in the interests of justice to ensure that there is an adequate system of monitoring in place’ if the case is to be referred to Rwanda for trial.¹⁵⁶ The Appeals Chamber found no error in the Referral Chamber ‘relying to a considerable degree on the monitoring mechanism it had fashioned in ensuring that Mr. Uwinkindi’s trial will be fair and, if not,

¹⁵² *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011, para.96.

¹⁵³ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para.62.

¹⁵⁴ See: comments of Sarah Williams, ‘The Completion Strategy of the ICTY and the ICTR in International Criminal Justice: A Critical Analysis of Institutions and Procedure’, in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, London: Cameron May, 2007, p.202.

¹⁵⁵ ICTY RPE, Rule 11bis (D)(iv); ICTR RPE, Rule 11bis (D)(iv).

¹⁵⁶ *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011, paras.208 -209.

that the proceedings would be revoked.¹⁵⁷ At any time before the accused is found guilty or acquitted by a national court, the judges may revoke the referral order, invoke primacy and request the deferral of the case within the terms of Rule 10. The ICTR judges have expressed caution, however, about the revocation mechanism, noting that although it constitutes ‘a safeguard, it is not a panacea.’¹⁵⁸ Interestingly, this safeguard is not incorporated in SCSL Rule 11bis. One explanation for the omission may be the fact that the SCSL’s primacy is limited to the courts of Sierra Leone. Therefore, the Special Court cannot formally exercise primacy over the national courts of other States by requesting the deferral of proceedings to its jurisdiction. The omission may also signal the intent of the SCSL not to refer the Johnny Paul Koroma case to Sierra Leone. If a referral to the national courts of Sierra Leone was anticipated, it is most likely that the deferral safeguard would have been included in SCSL Rule 11bis. Although ICTY and ICTR Rule 11bis does spell out the criteria that judges must be satisfied exist in a State before they can refer a case, no criteria are specified in the Rule for revocation of an order. Instead, Rule 11bis(F) prescribes that deferral of a case will be requested within the terms of Rule 10.¹⁵⁹ Rule 10 stipulates that a Trial Chamber may issue a formal request for deferral on any of the grounds specified in Rule 9.

Three broad grounds for deferral of a case to the competence of the Tribunals are listed in Rule 9.¹⁶⁰ Firstly, the Prosecutor may request deferral if the crimes being charged under national law are characterised as ordinary crimes. Secondly, a case may be deferred if the proceedings lack impartiality or independence, or are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted. The third ground for deferral is if the case involves significant factual or legal questions which may have implications for prosecutions before the Tribunal. To a large

¹⁵⁷ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para.83.

¹⁵⁸ *Uwinkindi* (ICTR-2001-75-R11bis), Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011, para.217.

¹⁵⁹ ICTY RPE, Rule 11bis(F); ICTR RPE, Rule 11bis (F).

¹⁶⁰ ICTY RPE, Rule 9. The grounds listed for a request for a deferral in the ICTR RPE, Rule 9 differ. The ICTR rule stipulates that a deferral request may be made by the Prosecutor if the proceedings in any State are the subject of an investigation by the Prosecutor; or should be the subject of an investigation by the Prosecutor due to the seriousness of the offences, the status of the accused or the general importance of the legal questions involved in the case. For a decision on deferral under ICTR Rule 11bis(F), see: *Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor’s Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11bis(F) & (G), 17 August 2007.

extent, the first ground for deferral - the characterisation of international crimes as ordinary crimes - is not particularly relevant in cases transferred under Rule 11bis. This is due to the fact that the Tribunals made it clear to potential referral States that their courts would have to respect the charges contained in the international indictment before any case would be referred. Consequently, the Bosnian law regulating the transfer of cases from the ICTY provides that if the tribunal transfers a case with a confirmed indictment to Bosnia, the national prosecutor shall initiate criminal prosecution according to the facts and charges in the ICTY indictment.¹⁶¹ The prosecutor may add charges to the indictment but may not drop charges from the ICTY indictment.¹⁶² The Tribunal's indictment is adapted to make it compliant with national laws and will only be accepted if the War Crimes Chamber is satisfied that the ICTY indictment has been adequately adapted.¹⁶³ Likewise, the Rwandan Organic Law on the transfer of cases from the ICTR also states that the ICTR indictment shall be adapted to ensure compliance with national law and shall be subsequently accepted by the High Court.¹⁶⁴ The third ground for deferral under Rule 9 does not assume much relevance in referral cases either. Most probably, if a case involved significant factual or legal questions which have implications for other prosecutions before the *ad hoc* Tribunals, the Prosecutor would not request the referral of that case in the first place.

After an order is issued under Rule 11bis, the accused, if in custody, shall be handed over to the authorities of the Referral State.¹⁶⁵ If the accused is not in custody, the Tribunals may issue an arrest warrant declaring the State to which the accused is to be transferred for trial.¹⁶⁶ The Prosecutor shall provide all information relating to the case, in particular, the material supporting the indictment, to the national prosecution

¹⁶¹ See: Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 2(1).

¹⁶² *Ibid.*, Art. 2(2).

¹⁶³ *Ibid.*, Art. 2(1).

¹⁶⁴ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, Art. 3 - Art. 4. In April 2009, Rwanda adopted amendments to the Organic Law. The Organic law as amended provides that the President of the High Court may now appoint a bench of three judges for trial. Additionally, if a witness cannot appear for the defence, the law provides that the witness may testify abroad before a judge or a foreign judge.

¹⁶⁵ ICTY RPE, Rule 11bis(D)(i); ICTR RPE, Rule 11bis(D)(i); SCSL RPE, Rule 11bis(D)(i).

¹⁶⁶ ICTY RPE, Rule 11bis(E); ICTR RPE, Rule 11bis(E); SCSL RPE, Rule 11bis(E).

authorities.¹⁶⁷ The key concern for the Tribunals after a case has been referred under Rule 11bis is that the accused will receive a fair trial and the case will be diligently prosecuted by the national authorities. Thus, the second ground for deferral under Rule 9 relating to proceedings lacking impartiality is significant. This opinion is supported by the decision of the Appeals Chamber in the *Janković* case. According to the Chamber, ‘Rules 11bis(D)(iv) and 11bis(F) serve as precautions against a failure to diligently prosecute a referred case or conduct a fair trial’.¹⁶⁸ Interestingly, the first Rule 11bis order to be revoked, resulting in the deferral of the case back to the ICTR, was not the result of an unfair trial or suspicious prosecution. Rather, in *Bagaragaza*, the decision to refer the case to the Kingdom of the Netherlands was predicated on the Trial Chamber’s belief that the Dutch courts were competent to prosecute the accused. It later transpired, however, that the Dutch authorities did not have jurisdiction to prosecute the case.¹⁶⁹ The referral order was, thus, revoked, and the authorities in the Netherlands were requested to defer to the competence of the ICTR, in accordance with Article 28 of the Statute and Rule 10 of the Rules of Procedure and Evidence.

As a result of the completion strategies, the Security Council has prescribed general prosecutorial guidelines for the ICTY and the ICTR. The Council has not become involved in the specific details of individual cases. Rather, it has urged the Tribunals in reviewing indictments to ensure that they concentrate on the most senior leaders. The implications of referring indicted persons from the Tribunals back to national courts for trial are serious. To a large extent, the criteria applied by the Prosecutors to select the suspects who fall into the category of most senior leader are vague.¹⁷⁰ From the perspective of national trials, however, it is essential that victims and witnesses, who will be required to testify in those trials, understand why persons who were originally indicted by the ICTY and the ICTR will not be tried at the international level. Furthermore, to protect both the credibility of the Tribunals and the referral process, it is even more

¹⁶⁷ ICTY RPE, Rule 11bis(D)(iii); ICTR RPE, Rule 11bis(D)(iii); SCSL RPE, Rule 11bis(D)(iii).

¹⁶⁸ *Ademi & Norac* (IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para.57.

¹⁶⁹ *Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor’s Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11bis(F) & (G), 17 August 2007.

¹⁷⁰ Geert-Jan Alexander Knoops, ‘Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective’, (2004) 15 *Criminal Law Forum* 365, pp.370-390.

important that the decisions related to the selection of the indicted persons to be transferred to domestic jurisdictions are transparent. As a consequence of the judges' involvement in Rule 11bis proceedings, the legitimacy of the case referral process has been strengthened. For example, unlike the ICTR rule, ICTY Rule 11bis(C) stipulates additional criteria for the Referral Bench to contemplate before deciding to refer a case.¹⁷¹ As suggested by the ICTY in the 2002 completion strategy report, the judges must consider the gravity of the crimes charged and the level of responsibility of the accused when deciding to refer a case or not. This gives effect to the policy of the Security Council as directed in Resolution 1534 that the efforts of the Tribunal should focus on the trial of the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction. The ICTY rule has also opened the door for the judges to determine the suitability of the accused selected by the Prosecutor for referral to domestic jurisdictions. In the course of the Rule 11bis proceedings, the judges of the Yugoslavia Tribunal have developed transparent principles for the assessment of the gravity of crimes charged and the level of responsibility of the accused. The principles were applied by the judges to each indicted person on a case by case basis with the result that the referral judgments clearly explain why certain accused were selected for trial by national courts and why others were appropriate for trial at the international level. The judges have, consequently, made a significant contribution to the understanding of how persons indicted by the ICTY were selected for transfer to national courts for trial. This challenges the perception that the referral process is simply a means to dispose of all cases backlogged in the Tribunals to other courts. Instead the judges' application of clear selection principles based on the gravity of crimes and the level of responsibility of the accused supports the notion that, to facilitate the completion strategies, the Tribunals

¹⁷¹ Although the ICTR judges are not directed under Rule 11bis to assess the level of responsibility of the accused and the gravity of crimes charged when deciding to refer an accused, the criteria have already been applied by the ICTR Prosecutor to assist him with the selection of accused suitable for transfer. Moreover, the decision of an ICTR Trial Chamber to refer a case to the authorities of a State is discretionary. In this respect see: *Munyakazi* (ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008 , para.5; *Hagegekimana* (ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 4 December 2008, para.5. Thus, although, under ICTR Rule 11bis, the judges are not specifically directed to consider gravity and the level of responsibility of an accused, the judges will consider the purpose and intent of the rule when deciding referral motions. If, therefore, the Prosecutor filed a request to refer the case of a most senior leader most responsible for the Rwandan genocide to a national court, it is most likely the judges would exercise their discretion and reject the request.

have implemented a legitimate prosecution strategy, underpinned by a division of labour based on the seniority of accused, between international and national courts. In this respect, the contribution of the Tribunals' judges to the legacy of the ICTY and the ICTR is vital.

By ordering the referral of a case under Rule 11bis, the *ad hoc* Tribunals do not relinquish their primacy over national courts. The concurrent jurisdictional relationship, between the international tribunals and national courts, enshrined in the Statutes of the Tribunals is not changed by Rule 11bis. What has changed, however, is the policy of the Security Council and the Tribunals for the former Yugoslavia and Rwanda towards invoking their primacy. The revision of Rule 11bis by the judges of the *ad hoc* Tribunals, to create a more far-reaching mechanism for the transfer of cases than was previously possible under the rule governing the suspension of an indictment, signalled a new era in the history of the courts. As Schabas has expressed, '[w]ithin less than a decade, the emphasis was upon sending cases back to national courts, not withdrawing them in favour of the international tribunals.'¹⁷² During the opening era of the ICTY and the ICTR, the Tribunals used their deferral power to transfer cases from national courts to their jurisdiction to enable them to commence operations. In the closing epoch, due to the active role played by the judges as both policy- and law-makers, the Tribunals are empowered to refer cases to national courts enabling them to end their judicial operations. In conclusion, the judges' revision of Rule 11bis has created a new complementary relationship between international and national jurisdictions underpinned by the distribution of cases and information.¹⁷³ This represents a significant stage in the evolution of the ICTY and the ICTR - a phase marked by a legitimate concurrent approach to the prosecution of perpetrators by both the international Tribunals and national courts.

¹⁷² William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.383.

¹⁷³ For an analysis of the new relationship, see Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the *ad hoc* Tribunals', (2008) 57 *International and Comparative Law Quarterly* 403. El Zeidy posits that the amendment of Rule 11bis reflects a new angle in the understanding of primacy and complementarity; the rule creates a system of complementarity but does not rule out the Tribunal's primacy.

C. ICTY RULE 28(A): A NEW OVERSIGHT ROLE FOR THE JUDGES OF THE YUGOSLAVIA TRIBUNAL

Prior to the implementation of the completion strategies, the *ad hoc* Tribunals could try all serious violations of international humanitarian law, regardless of the level of responsibility of the suspects, be they a head of State or an opportunistic thug. Obviously, this meant the scope of perpetrators to indict was vast. Hence, the ICTY and the ICTR Prosecutors were by necessity required to develop strategies to target perpetrators and crimes in a manner which allows them to manage the resources available to them in a way that would best serve the Tribunals' mandates.¹⁷⁴ In spite of the well-recognised discretionary power of the ICTY Prosecutor, at two critical moments in the history of the institution, the ICTY judges have played a definitive role in defining the prosecution parameters. This point is illustrated by the actions of the judges during the creation phase of the ICTY, following the announcement of the 'pyramidal prosecution strategy'.¹⁷⁵ It is further demonstrated by the amendment of Rule 28(A) by the ICTY judges as a response to the Security Council's adoption of Resolution 1534 during the completion phase of the Tribunal.

In 2004, as part of the completion strategy, the ICTY judges used their authority as the Tribunal's procedural lawmakers to ensure the Prosecutor would adhere to the seniority guidelines given by the Security Council. In fact, by amending Rule 28(A), the judges introduced for the first time into the ICTY procedural regime some judicial oversight regarding the level of responsibility of the suspects to be indicted. As a means to push forward the completion strategies and reduce case backlogs, the goal of the judges of the *ad hoc* Tribunals and the Security Council was to narrow the personal jurisdiction of the Tribunals to the highest-ranking offenders. The Council, however, did not amend the Statutes to achieve this goal. Rather, with the adoption of various resolutions, the Council provided new guidelines to the Tribunals to apply the seniority criterion. Resolution 1503 called on the ICTY and the ICTR to complete all work in 2010 by focusing trials on the 'most senior leaders suspected of being most responsible' for the

¹⁷⁴ See generally: John H. Ralston and Sarah Finnin, 'Investigating International Crimes: A Review of International Law Enforcement Strategies Expediency v Effectiveness', in Blumenthal and McCormack, (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Leiden: Martinus Nijhoff Publishers, 2008, p.49.

¹⁷⁵ See Chapter 3, footnote 191 and accompanying text.

crimes within the jurisdiction of the Tribunals. Pursuant to Article 18 (4) of the ICTY Statute, if the Prosecutor determines that a *prima facie* case exists, an indictment shall be prepared and submitted to a judge for confirmation. Commenting on the authority of a judge to dismiss an indictment, Judge Patricia Wald stated in her partial dissenting opinion in *Jelisić*:

The trial Judges are not given any power to reject the indictment because they do not think it is a wise use of the Tribunal's resources or for any other reason other than the lack of a *prima facie* case. Nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring the case.¹⁷⁶

Thus, in 2003, it was the Prosecutor's prerogative to select the persons to be indicted and the judges had no authority to determine whether the subjects of any new indictments satisfied the seniority standard set by the Security Council in Resolution 1503. As the former ICTY President, Judge Theodor Meron, noted, the application of the seniority criterion spelled out in Resolution 1503 in the indictment process was a 'matter clearly between the Council and the Prosecutor'.¹⁷⁷ If sufficient evidence was presented to make a *prima facie* case, then the indictment had to be confirmed by a judge regardless of the seniority of the accused.¹⁷⁸

Yet, despite the directions given by the Council, it appears that at least one organ of the *ad hoc* Tribunals was initially slow to push forward with implementation of the completion timelines. In January 2004, the UN Internal Oversight Office presented its review of the work of the ICTY and the ICTR Office of the Prosecutor. The report concluded that 'overall, there was insufficient information to confirm the Tribunals'

¹⁷⁶ *Jelisić* (IT-95-10-A), Judgment, Partial Dissenting Opinion of Judge Wald, 5 July 2001, para.4. See also: ICTY Statute, Art. 19(1) entitled Review of the Indictment, which provides: 'The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.'

¹⁷⁷ UN Doc. S/PV.4838 (2003), p.6.

¹⁷⁸ See: ICTY Statute, Art. 19(1), which states that: '[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.' The original Rule 28(A) provided that, on receipt of an indictment for review from the Prosecutor; the Registrar shall consult with the President who shall designate one of the permanent Trial Chamber Judges for the review.

contention...that the Office of the Prosecutor investigation and prosecution mandates would be completed by 2004 and 2008 respectively.¹⁷⁹ The Oversight Office put forward detailed recommendations to ensure future transparency in presenting information on the Completion Strategy to the Security Council and to ensure progress towards ending the activities of the Tribunals.¹⁸⁰ Further concerns were generated in 2003 by the ICTY President's reports that the Prosecutor intended to submit 14 additional indictments for confirmation. This would cause a two year slippage in the completion timelines previously adopted.¹⁸¹ Determined to push the Tribunals to stick to the completion timelines set out in Resolution 1503, the Council responded to reports of tardiness by adopting Resolution 1534 which contained two further key directives to the *ad hoc* Tribunals. Firstly, the Prosecutors were called on to review their case loads to determine which cases should be transferred to competent national jurisdictions.¹⁸² Secondly, to ensure application of the seniority criterion, the Council called on each Tribunal 'in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes' within the Tribunals' jurisdiction.¹⁸³ Under ICTY Rule 47, indictments are reviewed by a judge who shall examine each of the counts charged and determine whether a case exists against the suspect. By calling on the ICTY and the ICTR to ensure that the criterion would be applied during the 'review' and 'confirmation' stage of the indictment process, the Council must have envisaged some form of future judicial supervision of new indictments to ensure that only the most senior leaders proceeded to trial.¹⁸⁴ The Security Council further called on each Tribunal to take all possible measures to complete investigations by the end of 2004 and all work in 2010 and urged the institutions 'to plan and act accordingly'.¹⁸⁵

¹⁷⁹ 'Report of the Office of Internal Oversight Services on the Review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and for the former Yugoslavia', UN Doc. A/58/677 (2004), para.3.

¹⁸⁰ *Ibid.*, para.39.

¹⁸¹ UN Doc. S/PV.4838 (2003), p.6.

¹⁸² UN Doc. S/RES/1534 (2004), para.4.

¹⁸³ *Ibid.*, para.5.

¹⁸⁴ Dominic Raab, 'Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals', (2005) 3 *Journal of International Criminal Justice* 82, p.87.

¹⁸⁵ UN Doc. S/RES/1534 (2004), para.3.

Less than two weeks later, the ICTY judges transformed the situation pertaining to the involvement of judges in the indictment process. In a response to the call of the Security Council in Resolution 1534 to ensure that new indictments meet the seniority threshold, the ICTY judges amended Rule 28(A) at an Extraordinary Plenary held on 6 April 2004.¹⁸⁶ The amended rule empowers the judges through the Bureau¹⁸⁷ to decide ‘whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.’¹⁸⁸ By adopting this amendment, the judges have created a new procedure which subjects the discretion of the ICTY Prosecutor to judicial supervision. If the Bureau is satisfied that the suspect meets the seniority standard, the indictment shall be submitted to a reviewing judge. However, if the judges’ Bureau decides that the standard is not satisfied, the indictment shall be returned to the Prosecutor. Therefore, in accordance with the procedure defined in Rule 28(A), the judges’ Bureau ultimately decides whether a person indicted by the Prosecutor is one of the most senior leaders responsible for the crimes committed in the former Yugoslavia and, thus, whether the indictment will be submitted for confirmation.

Regarding the amendment of Rule 28(A), many commentators agree that there is nothing inherently wrong with the notion of judges participating in decisions related to who should be prosecuted, as is the procedure in many civil law jurisdictions and the International Criminal Court.¹⁸⁹ But there are divergent views in relation to whether or not the independence of the ICTY Prosecutor was encroached upon by the adoption of the new procedure. Arguing that the scope of the amended rule may be *ultra vires*, Daryl Mundis has stated that deciding who to prosecute, by Statute, is a duty arguably placed exclusively within the authority of the Prosecutor.¹⁹⁰ On the other hand Larry Johnson opined that Rule 28(A) does not violate the Statute; in his opinion, it is ‘part and parcel of

¹⁸⁶ ICTY Press Release (JL/P.I.S/837e), ‘Judges Amend Rule 28 at Extraordinary Plenary’, 8 April 2004.

¹⁸⁷ ICTY RPE, Rule 23(A) states that the Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

¹⁸⁸ *Ibid.*

¹⁸⁹ Pursuant to inquisitorial procedures, typically, instructing magistrates prepare cases by collecting evidence of both guilt and innocence. In common law jurisdictions, the authorities responsible for prosecution generally prepare cases. For the admissibility of cases before the ICC, see: Rome Statute, Art. 17.

¹⁹⁰ Daryl A. Mundis, ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’, (2005) 99 *American Journal of International Law* 142, p.148.

the completion strategy and a response to the invitation issued by the Security Council in Resolution 1534.¹⁹¹ He argues that, just as a reviewing judge, pursuant to Article 19 of the Statute, examines an indictment to decide if a *prima facie* case has been established by the Prosecutor, pursuant to Rule 28(A), the Bureau reviews the indictment to decide if, *prima facie*, it meets the seniority threshold set down by the Security Council.¹⁹² The critical point is that in both instances the Prosecutor has earlier assessed a given case and independently decided to indict a suspect.

As specified in the Secretary-General's report on the establishment of the ICTY and pursuant to Article 16(2) of the ICTY Statute, the independent Prosecutor is responsible for the conduct of all investigations and prosecutions and 'shall not seek or receive instructions from any Government or from any other source.'¹⁹³ As noted by Johnson, despite the amendment of Rule 28(A), the judges do not intervene in the Prosecutor's decision-making process in relation to which suspects to indict. The Prosecutor acts independently without receiving instructions from any source. Thus, in this regard, Rule 28(A) as amended does not limit the discretionary power of the ICTY Prosecutor to open investigations and/or indict suspects. One observer has remarked that '[s]etting the parameters of prosecutorial policy, as opposed to implementing it, is a legislative function.'¹⁹⁴ Since 2000, the Security Council has given guidelines in relation to the appropriate ICTY prosecutorial policy to be applied during the winding-down process and the judges have amended the Rules of Procedure and Evidence accordingly. With Rule 28(A), however, the judges have created a procedure to safeguard the most senior leader prosecution policy – it is effectively an indictment filter mechanism to ensure the seniority standard is satisfied in the indictments submitted by the Prosecutor.¹⁹⁵ Arguably, this procedure is a check on the ICTY Prosecutor's discretion as it is the judges' Bureau that ultimately decides if a suspect falls within the parameters of

¹⁹¹ Larry Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', (2005) 99 *American Journal of International Law* 158, pp.165-166.

¹⁹² *Ibid.*, p.166.

¹⁹³ See: 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808', UN Doc. S/1993/25705, paras.85-89.

¹⁹⁴ Dominic Raab, 'Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals', (2005) 3 *Journal of International Criminal Justice* 82, p.99.

¹⁹⁵ Larry Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', (2005) 99 *American Journal of International Law* 158, p.168.

the senior leader policy. Finally, the disparity of opinion between the judges of the *ad hoc* Tribunals in relation to the possible amendment of ICTR Rule 28(A) is evidenced by the position taken by the ICTR judges. Reportedly, the judges of the Rwanda Tribunal did not amend the rule as they maintained that judicial scrutiny of the application of the seniority criterion in the indictment process violated the Statute by limiting the independence of the Prosecutor.¹⁹⁶ In her report to the Security Council in 2004, Prosecutor Del Ponte objected to the action taken by the ICTY judges. She stated her opinion that the Rule 28(A) amendment ‘was contrary to the Statute and unnecessary in light of the independence given to [the Prosecutor] under the Statute’.¹⁹⁷ However, the members of the Council took no action in relation to the concerns raised by the Prosecutor.¹⁹⁸ It appears that the ICTY Prosecutor has adhered to the seniority criterion and, since the adoption of Resolution 1534, has not indicted any intermediary- or lower-level accused.

CONCLUSION

By ordering the referral of a case under Rule 11bis, the *ad hoc* Tribunals do not relinquish their primacy over national courts. The concurrent jurisdictional relationship between the international tribunals and national courts, enshrined in the Statutes of the Tribunals is not changed by Rule 11bis. What has changed, however, is the policy of the Security Council and the Tribunals for the former Yugoslavia and Rwanda towards invoking their primacy. The revision of Rule 11bis by the Judges of the *ad hoc* tribunals, to create a more far-reaching mechanism for the transfer of cases than was previously possible under the rule governing the suspension of an indictment, signalled a new era in the history of the courts. As one principal commentator has put it, ‘[w]ithin less than a decade, the emphasis was upon sending cases back to national courts, not withdrawing

¹⁹⁶ Daryl A. Mundis, ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’, (2005) 99 *American Journal of International Law* 142, p.148.

¹⁹⁷ ‘Enclosure II – Assessment of Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534’, UN Doc. S/2004/420, para.41. See also: ICTY Weekly Press Briefing, 28 April 2004.

¹⁹⁸ See: Larry Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 158, p.166.

them in favour of the international tribunals.¹⁹⁹ During the opening era of the ICTY and the ICTR, the Tribunals used their deferral power to transfer cases from national courts to their jurisdiction, to enable them to commence operations. Now in the closing epoch, due to the active role played by the Judges as both policy- and law-makers, the Tribunals are empowered to refer cases to national courts, to enable them to end their judicial operations.

The Judges' revision of Rule 11bis has created a new complementary relationship between international and national jurisdictions underpinned by the distribution of cases and information.²⁰⁰ For the first time since the creation of the *ad hoc* Tribunals a clear set of principles to determine whether an accused should be tried at international or national level have emerged in the Rule 11bis jurisprudence. This represents a significant stage in the evolution of the ICTY and the ICTR, a phase marked by a legitimate concurrent approach to the prosecution of perpetrators by both the international tribunals and national courts.

¹⁹⁹ William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.383.

²⁰⁰ For an analysis of the new relationship, see: Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the *ad hoc* Tribunals', (2008) 57 *International and Comparative Law Quarterly* 403.

CHAPTER III – RULE 11BIS CASE REFERRALS: GUIDING PRINCIPLES OF SELECTION FOR INTERNATIONAL PROSECUTIONS

INTRODUCTION

In his seminal book on the Nuremberg trials, Telford Taylor, who was a member of the American prosecution team, detailed that, during the defendant selection process, he circulated a memorandum to the team suggesting some criteria to be applied when determining who to indict. That memo was largely ignored.¹ Thus, unsurprisingly, Taylor, who later was Chief Counsel in the series of 12 trials known as the ‘Subsequent Nuremberg Proceedings’ before the United States military tribunals, harshly criticised the choice of defendants noting: ‘All in all, the task of selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on.’² From the inception of the ICTR and the SCSL, the prosecution policy was geared towards senior leaders of the Rwandan genocide and the civil war in Sierra Leone. Many years after its creation, by arrest or voluntarily, the higher-rank accused arrived at the Yugoslavia Tribunal. Following the Security Council’s endorsement of the Completion Strategy and the adoption of Resolutions 1503 and 1534, however, the *ad hoc* Tribunals were directed to concentrate on individuals who were in positions of leadership and those who bear the greatest responsibility for the crimes within their jurisdiction. Yet, despite the application of the seniority criterion by the Courts, neither the Statutes nor the Rules of Procedure and Evidence of the three tribunals set out clear guiding principles to be taken into account by the Prosecutors when selecting individuals to indict.

Under ICTY Rule 11bis(C), the Referral Bench shall, in accordance with Security Council Resolution 1534, consider the gravity of the crimes charged and the level of responsibility of the accused in determining whether to refer a case to a national court for

¹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, p.90.

² *Ibid.*

trial. Although pursuant to ICTR Rule 11bis, the judges of the Rwanda Tribunal are not directed to assess the level of responsibility of the accused and the gravity of crimes charged when deciding to refer an accused, the criteria have already been applied by the Prosecutor to assist him with the selection of accused suitable for transfer. In response to Resolution 1534, the ICTR Prosecutor reviewed his prosecution policy and decided the criteria to be utilised to select the indicted persons who should be tried before the ICTR.³ The criteria included the alleged status and the extent of participation of the accused during the genocide; the alleged connection the accused may have had with other cases; the desire to cover all the administrative divisions in Rwanda where the crimes were committed; and the availability of evidence and investigative material for transmission to a State for national prosecution.⁴

Even if, as a matter of policy, international prosecutions are limited to civilian, military and paramilitary leaders who bear the greatest responsibility for the crimes committed in a conflict, transparent principles to guide Prosecutors in their determination of the accused to be selected for indictment are still needed. Therefore, this Chapter offers an analysis of the ICTY Rule 11bis jurisprudence. It shall identify and examine the principles applied by the judges in determining the gravity of crimes and the level of responsibility of accused. The Rule 11bis gravity principles will be discussed in the context of the principles applied in sentencing judgments. The Chapter will explore which crimes are grave enough to warrant trial by the ICTY. The various interpretations of what the phrase “most senior leader” means will be considered to clarify the position of the ICTY in this regard. The different strategies used by Defence counsel to define accused as most senior leaders will be presented. In so doing, the doctrines of Joint Criminal Enterprise and Command Responsibility are examined from a new dimension. Finally, the impact of the jurisprudence from the ICC will be explored and the emergence of the most senior prosecution norm at international level canvassed.

³ Hassan B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, (2005) 3 *Journal of International Criminal Justice* 145, pp.151- 153.

⁴ UN Doc. S/2006/358, para.14.

A. ASSESSMENT OF THE CHARGES

After confirmation of an indictment, the *ad hoc* Tribunals may order the referral of an accused *proprio motu* or at the request of the Prosecutor.⁵ Any decision under Rule 11bis(A) is discretionary once the judges can refer the case to a competent State, and once they are satisfied the accused will receive a fair trial and the death penalty will not be imposed.⁶ The authority of the judges to order referral *proprio motu* was considered in *Todović*. Although this power is contemplated in the Rules of Procedure and Evidence, the Referral Bench decided that it may not be judicious to use it in certain cases. Noting the particular insight of the Prosecutor into many factors relevant to the complex question as to whether a case could be appropriately tried by a State in the former Yugoslavia, the judges accepted that the Office of the Prosecutor has a special role in the referral process due to information it may possess that other parties may not have access to.⁷ Although the Referral Bench can act *proprio motu*, in this case, the judges decided that ‘it would be unjustified and unwise’ to act on their own initiative.⁸

The ICTY Statute and Rules of Procedure and Evidence say nothing regarding the weight to be given by the Referral bench to a) the gravity of the crimes charged and b) the level of responsibility of the accused in determining an application under Rule 11bis. The pivotal question is whether it is a totality of these criteria that is the deciding factor, or can a single criterion be determinative? Opinions varied among the parties to the 11bis proceedings in relation to this matter. In the first referral proceedings, the Government of Bosnia and Herzegovina, as the State receiving the *Stanković* case, posited that it would probably never be appropriate for the ICTY to refer, to national courts, cases against the highest-level political or military figures, whatever the charges, while cases against regular soldiers would probably be appropriate to refer even if such figures were charged

⁵ ICTY RPE, Rule 11bis(B); ICTR RPE, Rule 11bis(B) and (C).

⁶ *Rašević & Todović* (IT-97-25/1-AR11bis.1), Decision on Rule 11bis Referral, 23 February 2006, para. 8. In this ruling, the Appeals Chamber confirmed that, if a referral decision is appealed, the issue is whether the Referral Bench ‘has correctly exercised its discretion in reaching that decision.’ The appellant must show that the Referral Bench ‘misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Referral Bench must have failed to exercise its discretion properly.’

⁷ *Mrkšić et al.* (IT-95-13/1-PT), Decision on Prosecutor’s Motion to Withdraw Motion and Request for Referral of Indictment Under Rule 11bis, 30 June 2005, Part III – Discussion.

⁸ *Ibid.*

with the gravest of crimes.⁹ For perpetrators falling between the categories, such as, for example, an army colonel, the Government suggested that the gravity of the offence might be the determinative factor.¹⁰ In a separate case involving atrocities committed in Srebrenica, the Prosecutor submitted that the level of responsibility should be the determinative factor as the Security Council never intended the Tribunal to try the hundreds of lower-level perpetrators involved in the commission of such mass crimes.¹¹

The Referral Bench concluded:

Rule 11bis(C) is intended to ensure that, in deciding whether to exercise its discretion in favour of or against referring a case – a decision which necessarily is reached having regard to all the relevant circumstances of the case – the Referral Bench takes into account, *inter alia*, the gravity of the crimes charged and the level of responsibility of the accused. These two considerations are not exclusive of other relevant circumstances, and neither is necessarily determinative. Either, or both in combination, may, in a particular case, persuade the Referral Bench, where it is in the interests of justice to do so, to give effect to the policy of the Security Council, as reflected in Resolution 1534, that the efforts of the Tribunal should be concentrated on trying the most senior leaders suspected of being most responsible for the crimes within the Tribunal’s jurisdiction.¹²

Interestingly, in the *Fofana* case, the Special Court for Sierra Leone Trial Chamber took a different approach to determining seniority. It did not assess both the position of the accused in a given hierarchy and the gravity of the offences charged, which are the criteria used by the ICTY. Instead, referring to the travaux préparatoires of the Special Court Statute, the judges accepted the views of the Security Council that the leadership role, rather than the severity of the crime or its massive scale, should be the primary consideration.¹³

Having established the principle that both the seniority of the accused and the gravity of the crimes charged should be considered by the Referral Bench in referral

⁹ *Stanković* (IT-96-23/2-PT), Government of Bosnia and Herzegovina Response to the Questions of the Specially Appointed Chamber of the ICTY, annexed to the Letter from the Minister of Justice of Bosnia and Herzegovina to the ICTY Office of the Registrar, 22 February 2005, p.1.

¹⁰ *Ibid.*

¹¹ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case under Rule 11bis, 27 April 2007, para.14.

¹² *Ibid.*, para.18.

¹³ *Ibid.*, para 40.

proceedings, the question is whether the judges are obliged to consider the criteria in conjunction with other cases? This issue, in particular, has given rise to some of the most tenuous arguments put forward by the ICTY Prosecutor in the course of the Rule 11bis proceedings. For example, in *Mejakić et al.* and *Milošević*, the Prosecutor submitted that it was appropriate to examine the gravity of crimes charged and the level of responsibility of the respective accused in the context of previous and future prosecutions before the ICTY. In and of itself, this is not a preposterous proposition. However, the Prosecutor went further to propose that the cases should be considered in the ‘context of the overall discharge of the Tribunal’s mandate’, arguing that the contribution of a given case to the historical record of the conflict in the former Yugoslavia is minimised in importance if other trials involving similar charges at the same location have been completed before the court.¹⁴ The Prosecution stated that, if those trials had not occurred and without the ‘egregious events’ previously being heard, the ICTY could not say that it had properly fulfilled its mandate.¹⁵

It is difficult to accept the Prosecutor’s position that cases should be referred if there has been similar trials involving similar charges before the Tribunal. Rule 11bis(C) establishes the gravity of the crimes charged and the level of responsibility of the accused as the criteria to be assessed by the Referral Bench. The Security Council resolutions on the matter of referral clearly refer to the application of the seniority criterion by the ICTY as a means to complete its work in 2010. There is nothing in the Rules of Procedure and Evidence or in the resolutions which infers that an accused, who allegedly committed similar crimes in the same geographical area as another perpetrator who has been already been tried, should be referred to national courts. The argument advanced for referral in the *Mejakić et al.* and *Milošević* cases was feeble. Those cases involved different perpetrators holding different levels of responsibility, charged with crimes committed at different times than the accused in previous trials. The Referral Bench did not accept the submission that all the crimes charged in the referral cases had been sufficiently tried before the Tribunal. Correctly, the bench noted that Rule 11bis does not require the judges to decide if alleged criminal conduct has been ‘sufficiently tried’ or is well

¹⁴ *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.11.

¹⁵ *Mejakić et al.* (IT-02-65-PT), Prosecution’s Further Submissions Pursuant to Chamber’s Order of 9 February 2005, 21 February 2005, para.12.

documented by the Tribunal.¹⁶ There is nothing in the Rules which obliges the judges to consider the gravity of the offences and the level of responsibility of the accused in conjunction with other cases before making a referral decision.¹⁷ Nor are there any provisions preventing the judges from doing so. The Appeals Chamber stated: ‘Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it.’¹⁸

Although Rule 11bis does direct the judges to consider the severity of the ‘crimes charged’, neither the Statute nor the Rules of Procedure and Evidence stipulate the principles to be applied by the judges when appraising the charges. According to the Appeals Chamber, the assessment of the gravity of the crimes and the level of responsibility of the accused in referral proceedings should be made solely on the basis of the factual allegations contained in the indictment – they being the essential case raised by the Prosecution for trial. Thus, during referral proceedings, the judges consider the charges in the operative indictment, although those charges remain to be proven at trial. No evidence is introduced or witnesses called by the parties to substantiate the charges, rather the judges use the allegations in the indictment as a point of reference for assessing the gravity of the offences and the seniority of the accused. This principle has proven contentious and has been challenged by a number of accused. They argued that ‘neither the pronouncements of the Security Council, nor the Tribunal’s Rules of Procedure, anywhere declare that the operative indictment is the sole source of the facts’ to be used for determining gravity and level of responsibility.¹⁹ In an attempt to avoid referral to the Bosnian War Crimes Chamber, Milan Lukić went so far as to argue for the introduction of extrinsic evidence. The accused wanted the statements made by the Prosecutor that his ‘paramilitary unit was one of the most feared and notorious during the conflict’ and that he personally was ‘considered to be perhaps the person who killed more people with his own hands than any other during the course of the Bosnian conflict’, admitted.²⁰ The

¹⁶ Milošević (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.20.

¹⁷ Janković (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.26.

¹⁸ *Ibid.*

¹⁹ Lukić and Lukić (IT-98-32/1-AR11bis.1), Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007, para.14.

²⁰ *Ibid.*

argument for the admission of extrinsic evidence in referral proceedings did not gain traction with the Appeals Chamber. Referencing the text of Rule 11bis and concrete policy reasons, the judges stated that if they were to ‘look beyond the four corners of an indictment’, they would find themselves ‘in the untenable position of making speculation upon speculation with regard to whether there are other possible charges that could be brought against the accused...and how these possible charges might relate to the issues of gravity and level of responsibility.’²¹ Citing *Janković*, the judges endorsed the approach taken by the Referral Bench which explicitly rejected consideration of allegations not contained in the operative indictment.²² The principle is firmly established in Rule 11bis jurisprudence that the assessment of the gravity of crimes charged and the level of responsibility of an accused is correctly determined by the Referral Bench ‘solely in light of the allegations in the operative indictment.’²³

It is not only the issue of whether extrinsic evidence should be considered during referral proceedings that has proven controversial. Also, a number of accused challenged the Referral Bench’s use of indictments, confirmed after the Prosecutor’s motion for referral was accepted. The argument was based on the fact that the second indictment differed from the indictment in force at the time of the original request. The accused have challenged this approach alleging that it allows the Prosecutor to manipulate the referral process by amending indictments to constrict the geographic and temporal scope of the offences and, thus, minimise the gravity of their alleged crimes and make their cases more appropriate for referral.²⁴ In *Lukić and Lukić*, the Appellant submitted that the second indictment had been amended and ‘tailored...to make the alleged criminal conduct seem less serious and thus more appropriate for referral.’²⁵ Theoretically, a zealous prosecutor might employ this strategy to increase the chances of securing a referral, but in practice this does not happen. In these proceedings, no credible evidence of manipulation was introduced, thus, the Appeals Chamber took it for granted that the Prosecutor ‘would not seek to influence the proceedings in such a way that by [changing]

²¹ *Ibid.*, para. 17.

²² *Ibid.*; *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule11bis Referral,15 November 2005, para. 21.

²³ *Lukić and Lukić* (IT-98-32/1-AR11bis.1), Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007, para.17.

²⁴ *Lukić and Lukić* (IT-98-32/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 5 April 2007, para.10.

²⁵ *Ibid.*, para.23.

the charges alleged, this Tribunal would have decided the referral request differently.²⁶ Amusingly, in this case, the second amended indictment provided more information about the Appellant's leadership role in the White Eagles paramilitaries, information which totally undermined his claim that the amended indictment sought to minimise his level of responsibility to facilitate the transfer of his case.²⁷ The principle has been set down by the Appeals Chamber that the factual allegations contained in the most recently confirmed version of an indictment should be relied on by the Referral Bench even if this indictment differs from the version applicable at the appointment of the bench.²⁸

The temporal scope of the crimes charged in the indictment is also relevant in determining the gravity of the offences. In *Janković*, the accused committed 'by any measure, particularly serious offences against the most vulnerable of persons in any conflict, namely, women and girls.'²⁹ The indictment covered the period from April 1992 until February 1993; however, the specific charges against the accused occurred over a three month period between July and October 1992.³⁰ When assessing the gravity of the crimes charged, the Referral Bench considered the alleged acts of torture and rape, involving sixteen females during the three month period, instead of the broader range of crimes involving thousands of unlawfully confined Muslims referred to in the indictment. Anxious to be tried by the ICTY, *Janković* argued that the gravity of crimes charged should have been assessed using the enlarged temporal scope of the offences. This would have enhanced the gravity of his alleged crimes. However, the Appeals Chamber did not accept the argument. According to the judges, the Referral Bench did not err in limiting its assessment to the time period during which the crimes allegedly occurred. Therefore, in assessing the crimes charged, considerations should be limited to the actual period of

²⁶ *Janković* (IT-96-23/3-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.25.

²⁷ See: *Lukić and Lukić* (IT-98-32/1-PT), Second Amended Indictment, 27 February/April 2006, para.31. The White Eagles were a group of Bosnian Serb paramilitaries in Višegrad, south-eastern Bosnia and Herzegovina, which worked with local police and military units in terrorizing the Muslim population during the 1992-1995 Bosnian war.

²⁸ *Rašević and Todović* (IT-97-25/1-AR11bis.1), Decision on Rule 11bis Referral, 23 February 2006, paras.18-19.

²⁹ The Referral Bench considered the nature of the crimes to be particularly serious citing a case involving accused who committed similar offences in the same region, see: *Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001, para.858.

³⁰ See: *Janković , Zelenović and Stanković* (IT-96-23/2-I 20), Amended Indictment, 20 April 2001.

time during which the crimes as charged were committed, even if the period of time covered in the indictment is longer.³¹

B. ASSESSMENT OF THE LEVEL OF RESPONSIBILITY

Former ICTY Prosecutor, Del Ponte, was wary of strictly categorising accused as high- or low-level position holders in a given hierarchy as a means to limit prosecution targets. In 2001, she cautioned the Security Council that scores of perpetrators ‘played a very nasty role...as key organizers and motivators at the district and local level.’³² The Prosecutor argued that such ‘willing perpetrators’ justified her attention since they enthusiastically put the criminal enterprises of the senior leaders into action in the former Yugoslavia and Rwanda.³³ Despite her pronouncements, the Completion Strategy timelines, calling for the end of all investigations by 2004, first instance trials by 2008 and all work in 2010, were considered more important. To meet the timelines, the Tribunals were directed to concentrate on the most senior leaders suspected of being most responsible for the crimes within their jurisdiction.³⁴

While the instruction to focus on the most senior leaders may initially be considered quite straightforward to put into practice, upon reflection, this is not the case. For example, in a given civilian, military or paramilitary hierarchical structure, people with a high-rank are assumed to be senior leaders due to their command position in that structure. The selection of the ‘supreme commanders’ like Radovan Karadžić or Jean Kambanda is, thus, straightforward as it directly correlates to their top tier positions in a government structure.³⁵ However, the concept of senior leader does not exclude *de facto* leadership exercised by people of a lesser, or no formal, rank or position in a hierarchy.³⁶ This point is validated by many Tribunal cases involving intermediate-and lower-level accused who, in fact, assumed the role of senior leader in the planning and commission of

³¹ *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.21.

³² UN Doc. S/PV.4429 (2001), p.9.

³³ *Ibid.*, p.10.

³⁴ UN Doc. S/RES/1503 (2003), Preamble.

³⁵ For reference to the concept of ‘supreme leader’, see: *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.12.

³⁶ For a discussion in relation to this point, see: Larry Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 158.

war crimes and crimes against humanity at regional level. ICTY Rule 11bis(C) contemplates the examination of the level of responsibility of an accused as a criterion to be used by the judges in determining whether to refer a case. But what does the phrase “level of responsibility of the accused” actually refer to? Does the phrase refer to the role of the accused in the commission of the alleged offences? Or does the phrase refer to the position of the accused in a structural sense, specifically, the position or rank of the person in a given hierarchy? If the phrase does refer to the level of responsibility of an accused in a hierarchy, is it a military hierarchy or broader in terms of a government or political hierarchy? Alternatively, does the phrase in fact refer to both the level of responsibility of an offender in both the commission of the alleged crimes and a hierarchical structure?³⁷

In *Stanković*, the first ICTY referral case, the Prosecutor submitted that the level of responsibility of an offender in Rule 11bis(C) refers to and requires an examination of two associated factors. Firstly, the structural level or place of the accused in a government, military or political hierarchy and, secondly, the role of the accused *vis-à-vis* the crimes charged in the indictment. The Appeals Chamber has found that ‘[n]othing in the wording of Rule 11bis(C)...indicates that the “level of responsibility” is restricted to military responsibility to the exclusion of political responsibility.’³⁸ This position is supported by the text of Resolution 1534 which directs the Tribunals to concentrate ‘on the most senior leaders suspected of being most responsible for the crimes committed’.³⁹ The resolution does not point towards a specific hierarchy to focus upon. The Referral Bench has stated, in view of the history and purpose of Rule 11bis, that judges should interpret the level of responsibility ‘so as to include both the *military rank* of the accused and their *actual role* in the commission of the crimes.’⁴⁰

The question then follows, how do judges deduce the level of responsibility of the accused in a given hierarchy and for the crimes committed? How does the Referral Bench decide if an accused can be categorised as a most senior leader? The first ICTY

³⁷ *Mejakić* (IT-02-65-PT), Decision for Further Information in the Context of the Prosecutor’s Request under Rule 11bis, 9 February 2005, para.1.

³⁸ *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.19.

³⁹ UN Doc. S/RES/1534 (2004), para.5.

⁴⁰ *Ademi and Norac* (IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para.29.

referral proceedings shed very little light on what the phrase “most senior leader” actually means. From the indictment, it appeared that the accused enslaved nine non-Serb women over a three month period of time and raped two of them. In assessing his level of responsibility, the Referral Bench held that the accused ‘did not have rank of military significance, and it is not suggested that he had any political role. He was not in any relevant sense a “leader”.’⁴¹ This demonstrates the judge’s perception that a most senior leader will most probably have held a significant military rank or played a leading political role in the conflict. As an infantry soldier, *Stanković* rested within the terms of an intermediate or lower-level accused and was referred to the Bosnian War Crimes Chamber for trial.

Is it, then, only the perpetrators who held the highest policy-making military or political role in the conflict that can be considered the most senior leaders? In the case of *Dragomir Milošević*, the Referral Bench was presented with an accused at the other end of the authority scale to *Stanković* who was an infantry soldier.⁴² The accused was only subordinate to Ratko Mladić and Radovan Karadžić, previously referred to by the judges as the ‘supreme military and civilian leaders’ of the war in the former Yugoslavia.⁴³ For fifteen months, General Dragomir Milošević was the commander of 18,000 soldiers besieging Sarajevo. During this campaign of shelling and sniping, thousands of civilians were killed or wounded.⁴⁴ Considering the guidance from *Stanković*, to assess the ‘rank of military significance’, it would appear that as General of the army of the Republika Srpska, only subordinate to the ‘supreme leaders’, Milošević was an obvious perpetrator for prosecution by the ICTY. Surprisingly, the Prosecutor did not think so. She argued that the role of a soldier, even at the commander level was to execute the siege. In her opinion, the case was suitable for transfer because the accused was ‘not the architect of the overall policy underpinning the alleged crimes and driving their commission.’⁴⁵ The Prosecutor seems to have adopted a limited interpretation of the phrase “most senior leader”, only considering the architects and driving force behind the Sarajevo siege as falling into the category. Examining this proposition, the judges stated:

⁴¹ *Stanković* (IT-96-23-2-PT), Decision on Referral of Case under Rule 11bis, 17 May 2005, para.19.

⁴² *Milošević* (IT-98-29/1-PT), Amended Indictment, 18 December 2006.

⁴³ *Stanković* (IT-96-23-2-PT), Decision on Referral of Case under Rule 11bis, 17 May 2005, para.21.

⁴⁴ *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.10.

⁴⁵ *Ibid.*, paras.12 and 22.

The Referral Bench does not consider, however, that the phrase “most senior leaders” used by the Security Council is restricted to individuals who are “architects” of an “overall policy” which forms the basis of alleged crimes. Were it true that only cases against military commanders, who were at the highest policy-making levels of an army – in the case of the VRS the Republika Srpska highest political and supreme military levels – could not be referred under Rule 11 *bis*, this would diminish the true level of responsibility of many commanders in the field and those at staff level. This does not appear to be required by the resolutions of the Security Council nor is it their apparent effect. The Referral Bench therefore considers that individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”.⁴⁶

The broad interpretation of the phrase “most senior leader” by the Referral Bench expands the number of perpetrators that may fall into the category. Thus, when evaluating the position and function of the accused, the judges took into account that: (a) Milošević was the permanent commander of the Sarajevo-Romanija Corps for fifteen months; (b) the highest military command was only one rank above him, and (c) he negotiated, signed and implemented anti-sniping and local cease-fire agreements and controlled access of the United Nations Protection Force to territory around Sarajevo.⁴⁷ Within the overall chain of actors, General Milošević fell into the category of most senior leader; his case was, therefore, required to be tried at the ICTY.

The principle developed by the Referral Bench in the *Milošević* case, that the phrase “most senior leader” does not only apply to the leaders at the highest policy-making levels, was reviewed by the Appeals Chamber in the case of *Lukić and Lukić*.⁴⁸ Referring to a statement made by the President of the Security Council directing the

⁴⁶ *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005, para.22.

⁴⁷ *Ibid.*, para.23.

⁴⁸ *Lukić and Lukić* (IT-98-32/1-AR11*bis*.1), Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007, para.18.

ICTY to ‘concentrate its work on the prosecution and trial of the civilian, military, and paramilitary leaders’, the Appellant argued that the statement implied that all paramilitary leaders should be retained by the ICTY for trial.⁴⁹ The Appeals Chamber did not agree with this interpretation. According to the judges, the Presidential statement did not preclude the referral of paramilitary leaders as a matter of law nor did it bar the referral of ‘*all* cases involving civilian, military and paramilitary leaders’.⁵⁰ Similar to the decision in *Dragomir Milošević*, the Chamber agreed that the most senior leaders may come from positions of military, paramilitary or civilian leadership.⁵¹

Milan Lukić was the leader of the notorious “White Eagles”, a local Bosnian Serb paramilitary group which exacted a reign of terror over the Višegrad Muslim population during the 1992-1995 conflict. The Referral Bench tested his level of responsibility by assessing ‘the role of the accused in the commission of the alleged offences and...the position and rank of the accused in the civil, political, or military hierarchy’.⁵² The judges stated that if a person ‘exercised such a significant degree of authority’ in the hierarchy or in the commission of the crimes to be categorised as a most senior leader, their case would not be compatible with referral.⁵³ Despite commanding a paramilitary group and brutally killing approximately 150 people, the Referral Bench felt that Lukić could not ‘sensibly be characterised as one of the ‘most senior leaders’, as envisioned by the Security Council in Resolution 1534.⁵⁴ The Appeals Chamber overturned this decision finding merit in the Appellant’s contention that the Referral Bench had erred in its factual assessment of whether he was a most senior leader.⁵⁵ According to the Appeals Chamber, the Referral Bench incorrectly presumed that a local paramilitary leader can never constitute a most senior leader. The judges had placed too much emphasis on the limited geographic area of the crimes and had not given sufficient weight to the alleged participation of Lukić in the commission of the crimes.⁵⁶ In fact, the accused had

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para.20.

⁵¹ *Ibid.*

⁵² *Ibid.*, para.28.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, para.30.

⁵⁵ *Lukić and Lukić* (IT-98-32/1-AR11bis.1), Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007, para.21.

⁵⁶ *Ibid.*, para.22.

orchestrated ‘one of the most notorious campaigns of ethnic cleansing in the conflict.’⁵⁷ The Appeals Chamber believed the Security Council Presidential statement to have inferred that at least some paramilitary leaders should be tried by the ICTY. Paramilitary leaders were predominantly operative at local level during the war. According to the Chamber, the intent of the Council to have at least some of the most significant paramilitary leaders prosecuted by the ICTY might be thwarted if undue attention was placed on the local nature of their crimes. Consequently, the judges ruled that ‘[t]here is no nexus between, on the one hand, leadership responsibility for the most serious crimes and, on the other hand, a broad geographic area.’⁵⁸ The decision of the Appeals Chamber is compelling. Lukić was involved in two horrendous incidents in which Bosnian Muslim men, women, and children were barricaded into houses. The buildings at Pionirska Street and Bikavac were then set on fire. More than 150 people died. In view of the infamous role played by the paramilitary organisations during the Bosnian war, the judges’ order that the case was too significant to be appropriate for referral, should be applauded.⁵⁹ With the exception of Željko Raznjatović (also known as Arkan), Sredoje Lukić was the most significant paramilitary leader to be indicted by the ICTY. Subsequently, Lukić was sentenced by the ICTY to life imprisonment for his crimes. Regarding the two fires, in its Judgment the Trial Chamber observed:

At the close of the 20th century, a century marked by war and bloodshed on a colossal scale, these horrific acts remain imprinted on the memory for the viciousness of the incendiary attack, for the obvious premeditation and calculation that defined it, for the sheer callousness, monstrosity and brutality of herding, trapping and locking victims in the two houses, thereby rendering them helpless in the ensuing inferno and for the degree of pain and suffering inflicted on the victims as they were burnt alive.⁶⁰

The principle that there is no link between, on the one hand, leadership responsibility and, on the other hand, a broad geographic area does not mean that all local paramilitary leaders will be considered senior enough for trial by the ICTY. This

⁵⁷ *Lukić and Lukić* (IT-98-32/1-PT), Second Amended Indictment, paras. 1, 14 and 27.

⁵⁸ *Lukić and Lukić* (IT-98-32/1-AR11bis.1), Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007, para.22.

⁵⁹ *Ibid.*, para.25.

⁶⁰ *Lukić and Lukić* (IT-98-32/T), Judgment, 20 July 2009, para.740.

principle was expanded upon in the *Janković* case. Like Milan Lukić, the accused, was commander of a local paramilitary group and he also was sub-commander of the local military police. The Referral Bench ruled that the rank of the accused was ‘not a sufficient basis to characterise him as a “leader” for the purpose of Rule 11bis.’⁶¹ On Appeal, Janković focused on his position of command over both paramilitaries and police at local level. The Appellant argued that exercise of his authority over others in a limited geographic area did not mean he could not be characterised as a leader.⁶² Referring to the *Milošević* case, the Appeals Chamber indicated that perpetrators should not be referred, ‘who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”’.⁶³ This was the principle to be applied when evaluating the level of responsibility of accused.⁶⁴ Although, like Lukić, the accused was a paramilitary leader at local level, since the case involved far fewer victims and less varied incidents than the charges against Lukić, the Appeals Chamber ruled that the case was compatible with referral.

The form of participation of a person in the commission of alleged offences is a critical element to be assessed when determining the level of responsibility of that individual. Article 7(1) of the Statute provides that ‘[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible for the crime.’⁶⁵ Even if an intermediary-rank accused is charged with direct perpetration under Article 7(1), this greater degree of participation in the crime is not necessarily a bar to referral of the accused.⁶⁶

In the *Tadić* judgment, the Appeals Chamber interpreted Article 7(1) very broadly by ruling that an individual, who, in carrying out a common criminal purpose, contributes

⁶¹ *Janković* (IT-96-23/2-PT), Decision on Referral of Case Under Rule 11bis, 22 July 2005, para.19.

⁶² *Janković* (IT-96-23-/2-AR 11 bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.13.

⁶³ *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.22.

⁶⁴ *Janković* (IT-96-23-/2-AR 11 bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.22; *Rašević and Todović* (IT-97-25/1-AR11bis.1 and IT-97-25/1-AR11bis.2), Decision on Savo Todović’s Appeals Against Decisions on Referral Under Rule 11bis, 4 September 2006, para.20.

⁶⁵ ICTY Statute, Art. 7(1).

⁶⁶ *Ljubičić* (IT-00-41-PT), Prosecutor’s Further Submissions Pursuant to the Referral Bench’s Decision of 5 September 2005, 14 September 2005, para.9.

to the commission of crimes by a group of persons, may be held criminally liable for those crimes, subject to certain conditions.⁶⁷ If the conditions are satisfied, each member of the enterprise is responsible for the acts of the others in it. This marked the emergence of the joint criminal enterprise doctrine as a mode of liability. As Schabas has noted, joint criminal enterprise gives the Prosecutor ‘a powerful tool to address crimes committed by groups and organisations, where proof of the individual *mens rea* of specific acts is not always easy to establish.’⁶⁸ In many Tribunal cases, joint criminal enterprise has been used to argue the responsibility of leaders for a variety of offences committed by persons with whom they had no concrete agreement to commit the crimes. An exemplary case involves the former President and member of the presidency of the Republika Srpska, Momčilo Krajišnik. Together with Radovan Karadžić and General Mladić, he managed the Republika Srpska and participated in a joint criminal enterprise in which non-Serb populations in 37 municipalities were persecuted through crimes including murder, deportation and extermination.⁶⁹ The crimes committed by Bosnian-Serb forces during the conflict resulted in thousands of murders and over one hundred thousand deportations and unlawful transfers. Krajišnik, as a most senior political leader, was physically and causally removed from the actual offences.⁷⁰ Yet, the Trial Chamber agreed that he had ‘played a vital role in implementing the objective to permanently remove Muslims and Croats from parts of Bosnia and Herzegovina. His positions gave him [...] the authority to enable local authorities, military, police, and paramilitary groups to implement the objective...’ of the joint criminal enterprise.⁷¹ An example of a lower level offender carrying out the objective of the enterprise is recorded in the case of Miroslav Kvočka. As a duty officer in the Omarska concentration camp, he was found guilty of the crimes committed as part of the ‘hellish orgy of persecution’ which took place there.⁷² The judgment in his case concluded that the ‘joint criminal enterprise pervading the camp was

⁶⁷ *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para.190.

⁶⁸ William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.309.

⁶⁹ *Krajišnik* (IT-00-39-T), Judgment, 27 September 2006, para.1085.

⁷⁰ For comments in relation to the position of the accused, see: Alexander Zahar and Goran Sluiter, *International Criminal Law*, Oxford: Oxford University Press, 2008, p.255.

⁷¹ *Krajišnik* (IT-00-39-T), Judgment, 27 September 2006, para.1158.

⁷² ICTY Press Release (CC/P.I.S/631-e), ‘Judgment in the Case of the Prosecutor against Miroslav Kvočka et al.’, 2 November 2001.

the intent to persecute and subjugate non-Serb detainees [...] through crimes such as murder, torture, and rape'.⁷³ Although the judges agreed that, as a police officer, the accused could not be charged with participating in, producing or even planning the camp, the Trial Chamber rejected the argument that Kvočka was not aware of his participation in the camp component of a widespread system of persecution in the municipality.⁷⁴

Although the duty officers in the camp were tried by the ICTY, as a consequence of the completion strategy, the commander of Omarska was transferred to a national court for trial. The joint criminal enterprise pervading the concentration camp was, however, once again scrutinised in the *Mejakić et al.* Rule 11bis proceedings. In fact, the referral proceedings add a new dimension to the study of the joint criminal enterprise doctrine. Rather than being a powerful prosecution tool in Rule 11bis proceedings, the doctrine has been seized by Defence Counsel as a means to enhance the level of responsibility of the accused and, thus, prevent their referral to national courts.

In *Mejakić et al.*, the accused were indicted for crimes committed in the Omarska and Keraterm detention camps. The Defence submitted that the offences related to events which were part of a widespread joint criminal enterprise. They asserted that the indictment sought to find the accused responsible 'for actions and crimes allegedly committed by others, including persons [...] already tried by the ICTY, and those who have cases pending, as well as those leadership individuals who are still at large'.⁷⁵ The Defence contested the transfer by arguing that the accused participated in the joint criminal enterprise at the leadership level. Involvement at that rank meant the accused could be considered senior leaders and, as such, had to be tried by the ICTY. Considering the Defence argument, the Referral Bench recognised that the indictment pleaded that the camps were set up by the Prijedor Crisis Staff 'to carry out part of the overall objective of the joint criminal enterprise of the Bosnian Serb leadership [...].'⁷⁶ However, the indictment also specifically pleaded that 'the participation of the accused in the joint

⁷³ *Kvočka et al.* (IT-98-30/1), Judgment, 2 November 2001, para.320.

⁷⁴ *Ibid.*, paras. 322-328.

⁷⁵ *Mejakić et al.* (IT-02-65-PT), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para.22.

⁷⁶ *Mejakić et al.* (IT-02-65), Consolidated Indictment (Omarska and Keraterm Camps), 5 July 2002, para.19.

criminal enterprise was limited to their activities within the two camps.⁷⁷ The major joint criminal enterprise involving the highest Serb political leadership was referred to in the indictment but the judges accepted that it was not the Prosecutor's case that the accused 'were participants at that level in what may be described as the "big picture".'⁷⁸ They participated, instead, in the joint criminal enterprise by carrying out acts at two camps as a means to implement only part of the objectives of the enterprise. The Referral Bench refused to accept that the level of responsibility of the accused should have been assessed by reference to the responsibility of the political leadership. Nor should the seriousness of the crimes against the accused be assessed by virtue of the gravity of the whole of the joint criminal enterprise.⁷⁹ The principle set down in the *Mejakić et al.* case is that the level of responsibility of the accused is 'to be evaluated by reference to their particular positions and functions, not by reference to the responsibility of the political leadership.'⁸⁰

The attempt by the Defence to rely on the 'mistaken and exaggerated statement of the joint criminal enterprise' was not successful.⁸¹ Neither was the argument that, even though the crimes alleged directly against the accused were not of the highest gravity, their connection to other crimes through the device of the joint criminal enterprise warranted careful treatment, that could only be adjudicated by the same tribunal that was considering other aspects of the enterprise.⁸² The doctrine of joint criminal enterprise, much loved by the Prosecutor, is, therefore, still attention-grabbing in the closing years of the ICTY. It is intriguing that the doctrine, once feared to become an umbrella to 'just convict everyone', would ever be adopted by Defence counsel.⁸³ As a means to convince judges that their clients are among the most senior leaders that must be tried by the ICTY, this has, however, happened in Rule 11bis proceedings.

⁷⁷ *Ibid.*

⁷⁸ *Mejakić* (IT-02-65-PT 20), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para.23.

⁷⁹ *Ibid.*, para.24

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, para.25.

⁸² *Ibid.*, para.18.

⁸³ Mohamed Elewa Badar, "'Just Convict Everyone!' Joint Perpetration: From *Tadić* to *Stakić* and Back Again', (2006) 6 *International Criminal Law Review* 293.

Another mode of criminal liability - command responsibility - is set out in Article 7(3) of the ICTY Statute. The fact that a crime was ‘committed by a subordinate does not relieve his or her superior of criminal responsibility if they knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’⁸⁴ Similar to the joint criminal enterprise doctrine, this mode of liability has proven controversial. Schabas has stated that, if the Tribunals devoted less time to command responsibility, ‘they might already have fulfilled their mandates and completed their work.’⁸⁵ Ironically, in an attempt to expedite the completion of its work by transferring cases to national courts, the ICTY has once again had to spend time assessing the responsibility of commanders. Rather than emphasising the command responsibility of the accused, in Rule 11bis hearings, the Prosecutor has a tendency to down-play this form of liability. Similar to the doctrine of joint criminal enterprise, it has, however, been invoked by Defence counsel in cases involving accused who did not want to be transferred to the Bosnian War Crimes Chamber. The strategy of the Defence was to establish that the accused exercised such a significant degree of authority to warrant categorisation as a most senior leader. As directed by the Security Council, only intermediary-and lower-rank accused should be transferred. If the tactic worked, the accused would remain in the custody of the ICTY.

It is established in Tribunal case law that a person ‘who has authority over a large group of people has the ability to inflict more damage by means of this group than he or she would be able to inflict alone.’⁸⁶ A position of command authority will distinguish an accused from lower level perpetrators who did not exercise any authority over others. Yet, for the purposes of Rule 11bis proceedings, even though an accused may have held a position of command authority over a large number of alleged perpetrators, this does not automatically mean that the person falls into the category of ‘military, civilian or paramilitary leaders’ who bear the most responsibility for the crimes committed in the former Yugoslavia. Take, for example, the case of Pasko Ljubičić, the highest ranking

⁸⁴ ICTY Statute, Art. 7(3); ICTR Statute, Art. 7(3).

⁸⁵ William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, p.324.

⁸⁶ *Tadić* (IT-94-1-A), Judgment in Sentencing Appeals, 26 January 2000, paras.55-56; *Krajišnik* (IT-00-39-T), Judgment, 27 September 2006, para.1156.

HVO Military Police officer in the central Bosnian region during the war. Charges in his indictment related to a series of attacks on Bosnian Muslim towns resulting in the death of more than 100 civilians, the detention and cruel treatment of many more and the forcible transfer of the population from the region. Ljubičić allegedly personally participated in the planning and execution of the attacks and, as a superior, was charged with responsibility for the acts of his subordinates. The Prosecutor, however, successfully argued that his case was compatible with referral as he was not among the most senior military leaders in the central Bosnian region. In fact, since the accused was implementing decisions and carrying out orders issued by his superior commanders, the Prosecutor argued that he fell into the category of intermediate offenders suitable for trial at national level. Attributing very little weight to the Article 7(3) charge, the Referral Bench, whilst acknowledging that the accused was a military commander in a position of authority, decided that ‘in the context of other cases being tried before this Tribunal, it is not apparent that he was one of the most senior leaders [...]’ as contemplated by Security Council Resolution 1534.⁸⁷ In *Janković*, the Defence placed particular emphasis on the superior responsibility of the accused under Article 7(3) to support their argument that as a commander, he exercised such a degree of authority that it was appropriate to characterise him as a leader. Unconvinced by the submission, the Referral Bench concluded that commanding other alleged perpetrators at local level was not sufficient reason to classify an accused as a leader.⁸⁸ Upholding this decision, the Appeals Chamber has set the principle that it is correct to give little weight to an Article 7(3) charge when deciding whether to refer a case to national authorities or not.⁸⁹ The principle was further expanded in the *Trbić* case. The judges decided:

The Bench must not look merely at the Article 7(1) and 7(3) forms of responsibility charged in the indictment to determine an accused’s level of responsibility, but must instead examine the accused’s actual role and degree of participation in each crime. This assessment is no different where the indictment charges the accused with participating in a JCE, as in the present case. Also of relevance is the accused’s *de*

⁸⁷ *Ljubičić* (IT-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis , 12 April 2006, para.19.

⁸⁸ *Janković* (IT-96-23/2-PT), Decision on Referral of Case Under Rule 11bis, 22 July 2005, para.19.

⁸⁹ *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.20.

jure or *de facto* rank or position in the political or military hierarchy, and especially whether he orchestrated the actions of others, and thereby inflicted more damage than he could have otherwise.⁹⁰

The crimes charged in *Trbić* were the most serious the Referral Bench had to examine in the context of Rule 11bis referral proceedings. The accused participated in the Srebrenica massacre where over 7,000 military-aged Bosnian Muslim men and boys were rounded up, detained and then summarily executed. Arguing for referral, the Prosecutor highlighted that there were hundreds of perpetrators involved in the Srebrenica massacre ‘either as physical perpetrators or as persons directing or providing assistance to perpetrators.’⁹¹ In spite of the egregious nature of the crimes, and referring to the concurrent jurisdiction of the Tribunal with national courts, the judges noted that it was not the intention of the Security Council that all such perpetrators be tried by the ICTY. In this particular case, the judges gave emphasis to the alleged role of the accused in Srebrenica as well as his degree of authority over other perpetrators rather than the gravity of the crimes committed. The Referral Bench accepted the principles set down in earlier cases as a means to evaluate the level of responsibility of the accused. They looked beyond the Article 7(1) and 7(3) forms of responsibility charged in the indictment to determine the level of responsibility.⁹² The actual role and degree of participation of the accused in each crime should be assessed, and this is unchanged if the accused is charged with participation in a joint criminal enterprise.⁹³ The *de jure* or *de facto* rank or position of the accused in the political or military hierarchy should be considered with particular focus upon whether the person organised the actions of others, thus, causing more injury than he could have otherwise.⁹⁴ An examination of the role and degree of authority of Trbić evidenced that his *de facto* level of responsibility was less than his captain rank would imply. The Prosecutor argued that, ‘despite his role in organizing and

⁹⁰ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.20.

⁹¹ *Ibid.*, para.22.

⁹² *Ibid.*, para.20.

⁹³ *Ibid.*; *Lukić and Lukić* (IT-98-32/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 5 April 2007, para.28; *Ademi and Norac* (IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para.28.

⁹⁴ *Trbić* (IT-96-23/2-AR11bis.2), Decision on Referral of Case Under Rule 11bis, 27 April, para.20; *Janković* (IT-96-23-2), Decision on Rule 11bis Referral, 15 November 2005 para.19.

facilitating the transportation and detention of thousands of Muslim men and boys, as well as his personal participation in some killings, “nevertheless he remains an intermediate to lower level perpetrator.”⁹⁵ Although he participated in the joint criminal enterprise to murder the Srebrenica Bosnian Muslim men and boys, Trbić was not a key formulator of the objectives of the enterprise or planner in how it would be implemented. Thus, the Referral Bench did not find that his case was incompatible with referral to the Bosnian War Crimes Chamber.⁹⁶

C. ASSESSMENT OF THE GRAVITY OF CRIMES

The gravity of the crimes charged in the indictments reviewed during the ICTY Rule 11bis referral proceedings differed greatly. The judges have assessed offences ranging from the plunder of civilians’ personal property and livestock⁹⁷ to the participation in the massacre of over 7,000 Muslim men and boys from Srebrenica.⁹⁸ In the context of the completion strategy, the pivotal question is not whether the crimes charged are grave; instead, it is whether the crimes are grave enough to warrant trial before the ICTY? As noted by the Prosecutor in numerous referral proceedings, although the offences allegedly committed by the perpetrator were sufficiently serious to warrant a trial in the ICTY, they could not be considered ‘grave to the extent that demands’ an international trial.⁹⁹ The Prosecutor did not intend on minimising or lessening the seriousness of the crimes in referral cases; however, in view of the completion strategy and the need to transfer intermediate and lower level accused to other courts, determinations had to be made on the ‘relative seriousness of pending cases.’¹⁰⁰

In deciding if a case is compatible with referral to a national court, the referral bench judges appraise the gravity of the crimes charged. Current academic work on gravity testing predominantly focuses on the sentencing jurisprudence of the *ad hoc*

⁹⁵ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.14.

⁹⁶ *Ibid.*, para.23.

⁹⁷ *Ljubičić* (IT-00-41), Indictment, 2 August 2002.

⁹⁸ *Trbić* (IT-05-88/1-PT), Indictment, 18 August 2006, para.9.

⁹⁹ *Mejakić et al.* (IT-02-65-PT), Prosecution’s Further Submissions Pursuant to Chamber’s Order of 9 February 2005, 21 February 2005, para.2; *Ljubičić* (IT-00-41-PT), Prosecutor’s Further Submissions Pursuant to the Referral Bench’s Decision of 5 September 2005, 14 September 2005, para.4.

¹⁰⁰ *Ibid.*, para.6.

Tribunals and developments in the International Criminal Court.¹⁰¹ The ICTY Statute provides that, when determining an appropriate sentence, judges ‘should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person’.¹⁰² Sentences should be decided based on the ‘facts of each case and the individual guilt of the perpetrator’.¹⁰³ Likewise, according to the Appeals Chamber, the gravity of crimes in Rule 11bis proceedings should be assessed based on the charges against the accused in the most recently confirmed indictment.¹⁰⁴ For sentencing purposes, Tribunal case law establishes that the gravity of the offence, rather than the circumstances of the convicted person, is the ‘primary consideration’.¹⁰⁵ In *Stakić*, the Appeals Chamber affirmed this principle noting that the gravity of the crimes ‘remains “the litmus test” in the imposition of an appropriate sentence.’¹⁰⁶ In Rule 11bis proceedings, the seriousness of the offences is not necessarily the litmus test. The Referral Bench has ruled that either the gravity of the crimes or the level of responsibility of the accused, or a combination of the two criteria, may, in any given case, convince the judges that a case should be transferred or not. In *Trbić*, for example, the accused was indicted for genocide and conspiracy to commit genocide. Although the judges agreed that the crimes were among the gravest ever charged by the ICTY, they noted it was never the intention of the Security Council that all perpetrators would be prosecuted by the Tribunal.¹⁰⁷ In light of this directive from the Council, to concentrate trials on the most senior leaders most responsible for the crimes committed during the conflict in the former Yugoslavia, the judges felt it was more appropriate to give ‘emphasis’ to the level of responsibility of *Trbić* rather than the gravity of the crimes he allegedly committed.¹⁰⁸

The most concrete guidance available to the Referral Bench judges on gravity testing stemmed from the Tribunals’ sentencing judgments. It is well established in the

¹⁰¹ For a discussion in relation to the evolution of sentencing practice in the ICTY, see: Theodor Meron, ‘Procedural Evolution in the ICTY’, (2004) 2 *Journal of International Criminal Justice* 520, pp.523-524.

¹⁰² ICTY Statute, Art. 24(2); ICTR Statute, Art. 23(2).

¹⁰³ *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para.101.

¹⁰⁴ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.18.

¹⁰⁵ *Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para.731, citing *Kupreskić et al.* (IT-95-16-T), Judgment, 14 January 2000, para.852.

¹⁰⁶ *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para.375. See also: *Aleksovski* (IT-95-14/1-A), Judgment, 24 March 2000, para.182; *Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para.731; *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para.101.

¹⁰⁷ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.21.

¹⁰⁸ *Ibid.*, para.22.

case law of the *ad hoc* Tribunals that sentences must reflect the inherent severity of the criminal conduct of the accused.¹⁰⁹ The Appeals Chamber has emphasised that the gravity of the crime ‘does not refer to a crime’s “objective gravity”, but rather to the particular circumstances surrounding the case and the form and degree of the accused’s participation in the crime.’¹¹⁰ It is the duty of a Trial Chamber, therefore, ‘to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime, so that “the accused are punished solely on the basis of their wrongdoings” and not on the basis of “abstract distinctions among crimes”’.¹¹¹ Sentences are individualised – a Trial Chamber is not obliged to impose the same sentence in the one case as that in another case, just because the circumstances in the two cases are similar.¹¹² In the same way, the Referral Bench is not obliged to reject the transfer of a case to a national court for trial just because a similar case has been prosecuted by the Tribunal.

Ultimately, both sentencing and referral decisions involve a significant degree of judicial discretion. It is very difficult to lay down hard and fast rules to be applied by judges when they are deciding a penalty or determining to refer a case or not. From an evaluation of the Rule 11bis jurisprudence, it appears the judges have examined the gravity of the crimes charged under two broad headings: firstly, the geographical and temporal scope of conduct of the criminal campaign and the relative seriousness of the campaign in the context of other cases pending before the ICTY and, secondly, the impact the offences have had on victims.¹¹³ The specific factors measured by the judges to test the gravity of the crime are largely the same as those used by judges when they are deciding an appropriate penalty. The factors include the time frame and geographic area in which the crimes were committed; the number of victims affected; the number of

¹⁰⁹ *Kupreškic* (IT-95-16-T), Judgment, 14 January 2000, para.852; *Aleksovski* (IT-95-14/1-A), Judgment, 24 March 2000, para.182; *Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para.731.

¹¹⁰ *Mrkšić et al.* (IT-95-13/1-A), Judgment, 5 May 2009, para.375.

¹¹¹ *Ibid.*

¹¹² *Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para.757.

¹¹³ *Mejakić* (IT-02-65-PT 20), Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis July 2005, para.21; *Janković* (IT-96-23/2-PT), Decision on Referral of Case Under Rule 11bis, 22 July 2005, para.19; *Stanković* (ICTY-IT-96-23/2-PT), Decision on Referral of Case under Rule 11bis, 17 May 2005, para.19; *Ljubičić* (ICTY-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis, 12 April 2006, para.18.

separate incidents in which the accused was implicated and the way in which the crimes were allegedly perpetrated.¹¹⁴

Although the Rules of Procedure and Evidence do not direct the Prosecutor to take gravity into account before requesting a referral, it is logical to think the Prosecutor would use gravity as a criterion to help select cases appropriate for transfer. From a review of some of the ICTY referral requests, however, it is questionable if the well-established gravity principles from sentencing hearings were applied by the Prosecutor before filing for referral. The *Dragomir Milošević* case is instructive in this regard. The allegations in the indictment related to the Sarajevo siege during which thousands of men, women and children were killed or wounded and vast physical destruction was caused. General Milošević was in command of the Republika Srpska army for a fifteen-month period during which time the shelling and sniping campaign intensified. Considering that thousands of people were killed or injured in Sarajevo in a continuous attack sustained over a prolonged period of time, there was a strong argument to be made that the inherent gravity of the offences charged made the case incompatible with referral. The Prosecutor, however, requested referral. She put forward the very flimsy argument that, although the crimes charged were very grave, they had already been adjudicated in the *Galić* case, the former co-accused of General Milošević. In determining the referral, the Prosecutor maintained it was appropriate to consider the case in the context of the overall discharge of the Tribunal's mandate. Since the crimes were already tried in a previous case, there was a historical record of the events and, thus, the Prosecutor bizarrely argued the case was compatible with referral.¹¹⁵ The Government of Bosnia and Herzegovina, which would have been the receiving State, clearly disagreed and argued that due to the gravity of the offences committed in the Sarajevo siege, the case required trial by the ICTY.¹¹⁶ Appropriately, the Referral Bench dismissed the Prosecutor's request for the referral of the case. Observing the established gravity principles from sentencing judgments, the

¹¹⁴ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.19; *Rašević and Todović* (IT-97-25/1-AR11bis), Decision on Savo Todović's Appeals against Decisions on Referral Under Rule 11bis, 4 September 2006, para.25; *Kovačević* (IT-01-42/2-I), Decision on Referral of Case Pursuant to Rule 11bis, 17 November 2006, para.20; *Ljubičić* (IT-00-41-PT), Decision to Refer the Case, 12 April 2006, para.18; *Janković* (IT-96-23/2-PT), Decision on Referral of Case Under Rule 11bis, 22 July 2005, paras.19-20.

¹¹⁵ *Milošević* (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para.11.

¹¹⁶ *Ibid.*, para.15.

judges noted that the crimes, ‘especially in terms of alleged duration, number of civilians affected, extent of property damage, and number of military personnel involved’, required that the case be tried at the Tribunal.¹¹⁷ The decision of the Prosecutor to request the referral of the Milošević case in 2005 was very curious. Had that application been successful, the siege of Sarajevo case would potentially have been the first referral to the new Bosnian War Crimes Chamber located in Sarajevo. Certainly in the Chamber, news of the Prosecutor’s request to transfer the *Milošević* case was greeted with some surprise. Although, the new Chamber did have the capacity to try the case, it was considered that for the first referral of an accused to the country, a less sensitive and complex case would have been better. A less intensive case would have given the ICTY and the Chamber the opportunity to iron out the kinks in their new relationship and would not create media frenzy in Bosnia and Serbia and Montenegro.

In Rule 11bis proceedings, the relative gravity of the crimes allegedly committed by the accused has been examined from two perspectives: firstly, the seriousness of the crimes in the context of other cases pending before the ICTY and, secondly, the gravity of the crimes by virtue of their legal description in the Statute. Regarding the first perspective, there is no legal obligation binding the judges to consider the offences in conjunction with other cases before making a referral decision.¹¹⁸ Nor has the Tribunal been directed by the Security Council to evaluate the gravity of the crimes charged in conjunction with earlier or ongoing cases. It is further established by Rule 11bis case law that ‘[a]lthough the Referral Bench may be guided by a comparison with an indictment in another case it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it.’¹¹⁹ In a number of referral cases, the judges, however, have assessed the gravity of the crimes in the context of ongoing trials before the ICTY. More specifically, the Referral Bench has determined the relative gravity of the crimes charged in Rule 11bis proceedings by examining their geographic and temporal scope in the context of the scope of offences committed in other cases pending before the Tribunal. For instance, the case of *Rašović and Todović* involved two Bosnian Serb commanders who worked at a prison in Foča during the Bosnian war. Over

¹¹⁷ *Ibid.*, para.24.

¹¹⁸ *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.26.

¹¹⁹ *Ibid.*

a significant period of time, Bosnian Muslims were persecuted, tortured and murdered in the prison. In an attempt to convince the Referral Bench that the case should be tried by the ICTY, the Defence argued that the crimes charged were ‘quite serious’ and ‘more grave’ than offences in other trials which had commenced after the resolutions endorsing the completion strategy had been adopted.¹²⁰ Finding that the crimes were limited in geographic scope and due to the relative gravity of the offences when compared to other pending cases before the tribunal, the Referral Bench decided to refer the case to the Bosnian War Crimes Chamber.¹²¹

The geographic scope and temporal frame of the crimes charged in the *Ljubičić* indictment were also factors measured by the judges when they decided to refer the case to Bosnia and Herzegovina for trial.¹²² The Referral Bench recognised the seriousness of the crimes but also considered that they were limited in both their geographic scope and temporal frame. The judges decided that, by comparison with the crimes charged in other cases, the crimes in *Ljubičić* were ‘not so serious to preclude the possibility of trial before another court.’¹²³ Likewise, in *Mejakić et al.*, the judges evaluated gravity by measuring the geographic and temporal scope of the crimes in the context of other pending cases. The charges included the persecution, murder, and inhumane treatment of a large number of victims in two concentration camps over approximately a three-month period of time. Similar crimes had been adjudicated by the ICTY in other cases involving the Omarska, Keraterm and Trnopolje camps.¹²⁴ The sentencing judgments in those cases captured the system of persecution in place in the camps and, undoubtedly, the crimes committed were very grave.¹²⁵ In *Mejakić et al.* the Referral Bench, nevertheless, decided:

When considered in the context of the other cases currently before the Tribunal, it becomes apparent that the crimes alleged in this case, while very serious, are not

¹²⁰ *Rašević and Todović* (IT-97-25/1-PT), Decision on Referral of Case Under Rule 11 *bis*, 8 July 2005, para.19.

¹²¹ *Ibid.*, para.23.

¹²² *Ljubičić* (IT-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina, 12 April 2006, para.18

¹²³ *Ibid.*

¹²⁴ *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001; *Sikirica et al.* (IT-95-8-S), Sentencing Judgment, 13 November 2001.

¹²⁵ *Ibid.*

among the most serious as they are limited in geographical and temporal scope.

Hence, they do not necessarily require the case to remain at the Tribunal.¹²⁶

The other cases at that time included the trials of *Milošević* and *Krajišnik*, two of the most senior political figures who orchestrated the war in Bosnia. In the context of those cases, it is not surprising that the indictment against the commander of a concentration camp and his duty officers was considered appropriate for trial in the Bosnian War Crimes Chamber.

The second perspective, from which the relative gravity of the crimes charged can be assessed, is by reference to their legal description under Articles 2 to 5 of the Statute.¹²⁷ In *Trbić*, the accused was charged with genocide as well as other statutory crimes including conspiracy to commit genocide; extermination as a crime against humanity; murder as a crime against humanity; murder as a violation of the laws or customs of war; persecution as a crime against humanity and forcible transfer as an inhumane act as a crime against humanity. This was the only Rule 11bis case in which the Prosecutor, the accused and the Bosnian Government agreed that the crimes charged, particularly genocide and conspiracy to commit genocide, were too grave to permit referral.¹²⁸ Recalling its prior jurisprudence on gravity principles, the Referral Bench reaffirmed the position that gravity cannot be assessed ‘only, or even primarily, by reference to [the legal description of the crimes] [...] under Articles 2 to 5 of the Statute’.¹²⁹ This principle is well recognised in ICTY jurisprudence. The Appeals Chamber has emphasised that ‘there is no hierarchy of the crimes within the jurisdiction of the Tribunal’; rather, when deciding an appropriate sentence, the ‘concrete gravity’ of the crime remains the appropriate criterion.¹³⁰ No inherent hierarchy exists among the crimes over which the tribunal has jurisdiction, despite references to genocide in some of its jurisprudence as ‘the crime of crimes’.¹³¹ In his seminal work on genocide, Schabas

¹²⁶ *Mejakić et al.* (IT-02-65-PT), Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005 para.21.

¹²⁷ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.19.

¹²⁸ *Ibid.*, para.16.

¹²⁹ *Ibid.*, para.19; *Lukić and Lukić* (IT-02-65-PT), Decision on Referral of Case Pursuant to Rule 11bis, 5 April 2007, para.27.

¹³⁰ *Stakić* (IT-02-65-PT), Appeal Judgment, 22 March 2006, para.375.

¹³¹ *Ibid.* See also: *Rutaganda* (ICTR-96-3-A), Judgment, 26 May 2003, para.590; *Niyitegeka* (ICTR-96-14-A), Judgment, 9 July 2004, para.53.

has examined the shift in position of the *ad hoc* Tribunals to the opinion that genocide, crimes against humanity and war crimes are all of equal gravity. In spite of the opinion of the two Tribunals that no inherent hierarchy exists among the crimes, he has noted that the ICTY and ICTR case law has tended to uphold the distinction between genocide and crimes against humanity.¹³² Schabas has further remarked:

[T]he prohibition of genocide is at the heart of the values that underpin modern international human rights law. Although its direct origins are closely associated with the Holocaust directed against European Jews in the 1940's, it must surely reflect something more general in the public consciousness at the time of its adoption. The Holocaust was the most contemporary and appalling manifestation of a cancer of racism that had gnawed at humanity for many centuries, and that was manifested in such phenomena as the slave trade and colonialism. That is what makes genocide the 'crime of crimes'.¹³³

The other broad heading under which the Referral Bench has examined the relative gravity of the crimes charged is the impact of the offences on victims. It is established in sentencing judgments of the *ad hoc* Tribunals that an assessment of gravity must take into account 'the number of people killed, the physical and mental trauma suffered and still felt by those who survived, and the consequences of the crimes for those close to the victims.'¹³⁴ In deciding an appropriate penalty, a Trial Chamber may also take into account the special vulnerability of some victims, such as children, the elderly, the disabled or wounded, and those held in confinement.¹³⁵ The number of victims of a particular crime and their vulnerability are used, therefore, as a gauge in the overall assessment of the gravity of criminal conduct. The Appeals Chamber has additionally endorsed the concept that when determining gravity the judges should consider the 'particular circumstances of the case, as well as the form and degree of the participation

¹³² William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge: Cambridge University Press, 2009, p.653. Schabas also notes that crimes against humanity incorporate a range of acts of persecution which fall short of physical destruction, and it applies to many other victim categories in addition to the four protected groups enumerated in the chapeau of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

¹³³ *Ibid.*, p.654.

¹³⁴ *Krajišnik* (IT-00-39-T), Judgment, 27 September 2006, para.1148.

¹³⁵ *Nikolić* (IT-02-60/1/A), Judgment on Sentencing Appeal, 8 March 2006, para. 66; *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para.283.

of the accused in the crime.¹³⁶ The Referral Bench has used the same factors to assess gravity in the ICTY referral cases. It is established in Rule 11bis jurisprudence that the judges must consider the scope of the crimes; the number of victims affected and the number of separate incidents in which the accused is implicated as a means to determine the gravity of a crime.¹³⁷ Objecting to the proposed transfer of their case to a national court, several accused have drawn attention to the number of victims of their alleged crimes. In *Janković*, for example, the Appellant maintained the judges had incorrectly assessed only his alleged torture and rape of sixteen females during the referral proceedings. He argued that the Referral Bench should have instead considered the thousands of victims from the broader criminal campaign.¹³⁸

In *Lukić and Lukić*, the Appellant, who was the commander of local paramilitaries during the war, argued that the Referral Bench had erred in finding that the gravity of the crimes charged did not demand trial before the ICTY. The allegations in the case related to several horrendous incidents causing the death of more than 150 men, women and children.¹³⁹ In particular, the indictment described two particularly ruthless episodes when victims were barricaded into houses and set on fire. The judges noted that the Appellant's case differed from that of Gojko Janković, who was also a paramilitary leader during the war. The *Janković* case was appropriate for referral since it involved 'far fewer victims and fewer varied incidents'.¹⁴⁰ The Appeals Chamber concluded that, due to the nature of the crimes committed by Lukić, combined with his leadership role, the case was too significant to be referred to a national court for trial.¹⁴¹ At times, Rule 11bis proceedings seem to be the antithesis of trial hearings, since the traditional roles of the parties appear reversed. For instance, typically the Prosecutor invokes aggravating circumstances such as the 'intrinsic gravity' or the 'extreme gravity' of the crimes committed by an accused in sentencing hearings. In Rule 11bis proceedings, however,

¹³⁶ *Aleksovski* (IT-95-14/1-A), Judgment, 24 March 2000, para.182, citing *Kupreskić et al.* (IT-95-16-T), Judgment, 14 January 2000, para.852; *Kambanda* (ICTR-97-23-A), Judgment, 19 October 2000, para.125.

¹³⁷ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis 27 April 2007, para.19; *Rašević and Todović* (IT-97-25/1-AR11bis.2), Decision on Savo Todović's Appeal Against Decisions on Referral Under Rule 11bis, 4 September 2006, para.25.

¹³⁸ *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.17.

¹³⁹ *Lukić and Lukić* (IT-98-32/1-PT), Second Amended Indictment, 27 February 2006.

¹⁴⁰ *Lukić and Lukić* (IT-98-32/1-AR11bis.1), Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para.25.

¹⁴¹ *Ibid.*

aggravating circumstances, such as a very high number of victims, have been used by the accused in their attempts to persuade judges that the gravity of their offences warrant trial before the ICTY.¹⁴² As noted by Drumbl, some defendants were so anxious to be tried by the ICTY that, in opposing referral to a national court, they potentially risked their future ability ‘to raise lack of gravity or command authority as mitigating factors in sentencing.’¹⁴³

Only one case has been reinstated before the Tribunal in the interests of justice. In *Mrkšić et al.* the three accused were charged with crimes against humanity and war crimes for their alleged involvement in the execution of 264 Croat and other non-Serb persons who had been taken from the Vukovar hospital. In 1998, the Security Council demanded the Federal Republic of Yugoslavia to immediately arrest and transfer the accused to the custody of the ICTY.¹⁴⁴ In spite of the warning contained in Resolution 1207, the three accused were not transferred to the Tribunal for trial. Instead a Military Court in Belgrade commenced proceedings against the accused for the war crimes they allegedly committed in Vukovar. In December 1998, the Prosecutor requested the deferral of the case instituted in the Federal Republic of Yugoslavia to the jurisdiction of the ICTY.¹⁴⁵ Based on Rule 9(iii) of the Rules of Procedure and Evidence, the Prosecutor argued the proceedings in the Belgrade court lacked impartiality and independence and were designed to shield the accused from international criminal responsibility. Yet, less than seven years later, the ICTY Prosecutor requested the transfer of the case to either the authorities of Croatia, or Serbia and Montenegro.¹⁴⁶ Four months later, however, the Prosecutor sought to withdraw the request on the very vague grounds that potential difficulties had come to her attention and, also, in view of the significance of the prosecution of the three accused as reflected in Resolution 1207.

¹⁴² *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005, para.14.

¹⁴³ Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge: Cambridge University Press, 2007, p.140.

¹⁴⁴ UN Doc. S/RES/1207 (1998), para. 3.

¹⁴⁵ ICTY Press Release (CC/PIU/370-E), “‘Vukovar Hospital’ Case: The Prosecutor Seeks the Deferral of the ICTY Proceedings Instituted in Serbia Against M. Mrkšić, V. Slijvancanin and M. Radić, Deferral Hearing to be Held on Wednesday 9 December”, 7 December 1998.

¹⁴⁶ *Mrkšić et al.* (IT-95-13/1), Request by the Prosecutor under Rule 11bis for Referral of Indictment to Another Court, 9 February 2005.

The Prosecutor argued the interests of justice required the case be reinstated before an ICTY Trial Chamber.¹⁴⁷ On 30 June 2005, the Referral Bench granted the Prosecutor's request to withdraw the request for referral. The case had prompted competing claims for transfer from Croatia, the territorial State, and Serbia and Montenegro, the State of nationality of the accused. According to the judges, any decision to transfer the case would have provoked 'deep resentment in one or other country [...] and would not be in the interest of justice.'¹⁴⁸ From the written and oral submissions of the Governments of the competing States, the intensity of feeling in relation to the case was clear. They brought 'into sharp focus the question whether [...] a trial held in either country would be generally accepted as reflecting the fair administration of justice.'¹⁴⁹ The judges felt that the intensity of feeling which supported the Governments' views was 'no doubt matched by that of some potential witnesses and the families of the victims'.¹⁵⁰ As a result, the Referral Bench decided the interests of justice were better met by the case being conducted before the ICTY.¹⁵¹

More than any other referral case, *Mrkšić et al.* exemplifies the ICTY policy shift, away from the deferral of proceedings from national courts, to the actual referral of cases from the Tribunal to national authorities. Notwithstanding the relentless pressure from the Security Council to expedite the completion of its work by transferring intermediary-level accused to other courts, by dismissing the *Mrkšić et al* referral request, the ICTY has shown that it is not prepared to refer cases at any price. Judge Mohamed Shahabuddeen once noted that the reputation of the ICTY would be tarnished if it prioritised the goals of the completion strategy over the rights of the accused.¹⁵² He stated '[...] it would not be correct for the Appeals Chamber to give priority to the Completion Strategy of the Security Council over the rights of the accused; so to do would "leave a

¹⁴⁷ *Mrkšić et al.* (IT-95-13/1-PT), Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral on Indictment Under Rule 11bis, 30 June 2005.

¹⁴⁸ ICTY Press Release (CDP/MOW/977-e), 'Statement by Judge Theodor Meron, President, International Criminal Tribunal for the Former Yugoslavia, to the Security Council', 13 June 2005.

¹⁴⁹ *Mrkšić et al.* (IT-95-13/1-PT), Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral on Indictment Under Rule 11bis, 30 June 2005, Part III – Discussion.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Milošević (IT-02-54-AR73.4), Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Admissibility of Evidence-In-Chief in the form of Written Statements, 31 October 2003, para.21.

spreading stain on the Tribunal’s reputation”, as Judge Hunt has correctly observed.¹⁵³ In this particular case, the judges preserved the reputation of the ICTY. Although two States were vigorously competing for the transfer of the accused to a court in their jurisdiction, the Referral Bench questioned whether a trial in either State could be ever perceived as fair. In spite of the pressing completion strategy timelines, the judges determined that the interests of justice demanded the case be tried by the ICTY. The Tribunal has since completed the proceedings.¹⁵⁴

D. THE IMPACT OF RULE 11BIS PRINCIPLES ON ICC GRAVITY TESTING

How to decide whom, within a vast range of suspects involved in the commission of international crimes, should be selected for prosecution is a particularly vital question for the International Criminal Court. Unlike the *ad hoc* Tribunals, which were created to try the atrocities committed in specific regions,¹⁵⁵ the jurisdictional scope of the Court is more global. Under Article 12(2)(a) of the Rome Statute, the ICC has jurisdiction over crimes committed on the territory of States Parties, regardless of the nationality of the offender. According to Article 12(3), the Court has jurisdiction over crimes committed on the territory of States that accept its jurisdiction with respect to the crime in question. Finally, the ICC can exercise jurisdiction, pursuant to Article 13(b), if the Security Council, acting under Chapter VII of the United Nations Charter, refers to the Prosecutor a situation in which it appears crimes within the jurisdiction of the Court have been committed.¹⁵⁶ This means that, at any given time, the ICC Prosecutor is faced with multiple situations, each involving hundreds of potential cases.¹⁵⁷ The Prosecutor will conduct an analysis of the information received to decide whether there is a reasonable

¹⁵³ *Ibid.*

¹⁵⁴ *Mrkšić et al.* (IT-95-13/1-A), Judgment, 5 May 2009.

¹⁵⁵ For further information on the jurisdiction of the ICTY and the ICTR, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.121-286.

¹⁵⁶ For an examination of the jurisdiction of the ICC, see: William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn., Cambridge: Cambridge University Press, 2007, pp.62-157.

¹⁵⁷ To date, 14 cases in 7 situations have been brought before the ICC, including the situation in Uganda, the Democratic Republic of Congo, the Central African Republic, Darfur, Sudan, Kenya, Libya and Côte d’Ivoire.

basis upon which to proceed.¹⁵⁸ If an investigation starts, individual cases will subsequently have to be selected for prosecution and trial. As one observer has remarked, the ‘consideration of relative gravity is an important factor in the Prosecutor’s discretionary selection of situations and cases to pursue.’¹⁵⁹ The factors considered by the Office of the Prosecutor in determining gravity during the situation selection stage and the case selection stage differ and will be explored below.

The ICC Prosecutor has developed guiding principles to select situations and cases which mirror the standards applied in 1994 by the ICTY Prosecutor.¹⁶⁰ According to Article 42(1) of the Rome Statute, the Office of the Prosecutor ‘shall act independently’ and staff ‘shall not seek or act on instructions from any external source.’¹⁶¹ This means that the selection process should not be influenced by the desires of external sources or the willingness of a particular party to cooperate.¹⁶² The process will be conducted in an impartial manner; ‘the same methods, the same criteria and the same thresholds for all groups’ will be applied when deciding which cases to investigate.¹⁶³ The principle of non-discrimination and objectivity will also be applied for the purposes of choosing cases for prosecution.¹⁶⁴

In accordance with Article 53 (1)(c), the Prosecutor is to take into account ‘the gravity of the crime’ in determining whether to start an investigation.¹⁶⁵ In 2003, the Prosecutor presented a paper outlining the general strategy for his office.¹⁶⁶ The issue of

¹⁵⁸ For further discussion on the initiation of investigations and on investigations more generally, see: William A. Schabas, *An Introduction to the International Criminal Court*, 4th edn., Cambridge: Cambridge University Press, 2011, pp.252-272.

¹⁵⁹ Margaret M. deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’, (2009) 32 *Fordham International Law Journal* 1400, p.1045.

¹⁶⁰ For the case selection principles applied by the ICTY Prosecutor, see: Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’, (1996) 6 *Duke Journal of Comparative and International Law* 7.

¹⁶¹ Rome Statute, Art. 42(1).

¹⁶² Fabricio Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.212; see also, ICC Office of the Prosecutor, ‘The Office of the Prosecutor Report on Prosecutorial Strategy’, September 2006. This report stated: ‘The support of States Parties’ will be needed in all areas, notably in securing suspects against whom arrest warrants have been issued. Without international cooperation to secure arrests the Office will be unable to fulfill its mandate. The Office’s success will therefore necessarily be intertwined with the work of its partners.’

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Rome Statute, Art. 53 (1)(c).

¹⁶⁶ ICC, Office of the Prosecutor, ‘Paper on Some Policy Issues before the Office of the Prosecutor’, 2003.

gravity was not scrutinised in detail in this document. Instead, gravity was raised in the context of the admissibility of a case pursuant to Article 17 of the Rome Statute. There was no strategy outlined in the paper in relation to how the Office of the Prosecutor would assess the gravity of crimes. Nor was there any reference to the factors to be considered in determining gravity. The only practical guidance provided in the paper was that '[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.'¹⁶⁷ If the Rule 11bis gravity principles had been available at that time, hypothetically, they could have been a very useful precedent for the Office of the Prosecutor. Nevertheless, since 2003, the methodologies for assessing gravity have been increasingly explored and applied by the ICC. In fact, the criterion for the selection of the first case against the Lord's Resistance Army was gravity.¹⁶⁸ As noted by the Prosecutor:

In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.¹⁶⁹

The analysis of the gravity of a situation, distinct from the gravity of a case, by the Office of the Prosecutor generally entails three broad areas of examination: the scale of the crimes; the nature of the crimes and the manner of commission of the crimes.¹⁷⁰ The assessment of the scale of the crimes has a quantitative dimension which is the consideration of the number of victims. Contemplation of the scale of the crimes also entails the analysis of the temporal scope or geographical intensity of the crimes.¹⁷¹ There is a qualitative dimension to the assessment of the nature and manner of

¹⁶⁷ *Ibid.*, p.7.

¹⁶⁸ See generally: *Kony et al.* (ICC-02/04-01/05), Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, 8 July 2005.

¹⁶⁹ 'Statement by International Criminal Court Prosecutor, Luis Moreno-Ocampo', Fourth Session of the Assembly of State Parties, December 2005, p.2.

¹⁷⁰ ICC, Office of the Prosecutor, 'Policy Paper on the Interests of Justice', 2007, p.5.

¹⁷¹ Fabricio Guariglia, 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.214.

commission of the crimes. The Prosecutor has noted that all offences within the jurisdiction of the ICC are, by definition, grave; however, he has identified some crimes of particular concern including killing, rape and child conscription.¹⁷² In addition, aggravating circumstances such as crimes directed against defenceless victims or those committed in a particularly cruel and brutal fashion will be considered in a gravity analysis.¹⁷³ The intentional targeting of civilians, vulnerable groups, or persons involved in peacekeeping missions¹⁷⁴ are also factors that will be taken into account.¹⁷⁵ In fact, Prosecutor Moreno-Ocampo has taken a particularly stern position in relation to crimes committed against peacekeepers. In a press statement regarding the attacks by rebel commanders on African Union peacekeepers in Darfur, which resulted in the death of 12 persons, the Prosecutor stated: ‘I will not let such attacks go unpunished.’¹⁷⁶ The application for the arrest warrants for the rebels referred to the opinion of the International Law Commission to emphasise the gravity of attacks on peacekeepers. The Commission has previously stated that such attacks ‘constitute violent crimes of *exceptionally serious gravity* which have serious consequences not only for the victims, but also for the international community.’¹⁷⁷ The Prosecutor’s statement that crimes against peacekeepers will not go unpunished does not necessarily mean that this factor will always be given more weight than the other factors mentioned above when the gravity of a situation is being analysed. In fact, the position of the Office of the Prosecutor is that no fixed weight should be assigned to the criteria used in determining

¹⁷² ‘Statement by International Criminal Court Prosecutor Luis Moreno-Ocampo’, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005, pp.8-9.

¹⁷³ Fabricio Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.214.

¹⁷⁴ *Situation in Darfur, Sudan* (ICC 02/05), Summary of the Prosecutor’s Application under Article 58, 20 November 2008, para.7. In relation to the gravity of attacks on peacekeepers, see also: Sesay et al. (SCSL-04-15-T), Judgment, 25 February 2009, paras.188-202. The Trial Chamber ruled that the inherent gravity of crimes involving attacks on the UNAMSIL peacekeepers was exceptionally significant and, accordingly, it imposed harsh sentences ranging between 25 – 51 years.

¹⁷⁵ Fabricio Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.214.

¹⁷⁶ ICC Press Release (ICC-OTP-20081120-PR374), ‘Attacks on Peacekeepers Will Not be Tolerated: ICC Prosecutor Presents Evidence in Third Case in Darfur’, 20 November 2008.

¹⁷⁷ *Situation in Darfur, Sudan* (ICC 02/05), Summary of the Prosecutor’s Application under Article 58, 20 November 2008, para.7.

gravity.¹⁷⁸ The factors applied by the Office of the Prosecutor in determining the gravity of a situation are not strict tests. Ultimately, the decision whether to proceed with an investigation or not, is made based on the facts and circumstances of each situation. The quantitative and qualitative factors used by the ICC Prosecutor are broadly the same as the principles applied by the ICTY judges in the Rule 11bis proceedings. The Referral Bench has also considered the time frame and geographic scope of the crimes; the number of victims affected and the manner in which the crimes were allegedly perpetrated.¹⁷⁹

The ICC Office of the Prosecutor has also stated its intention to intervene only in situations and cases which reach a certain gravity threshold, consistent with the spirit of the Rome Statute.¹⁸⁰ Consequently, in February 2006, the Prosecutor dismissed the communications related to crimes allegedly committed by States Parties in Iraq.¹⁸¹ The Prosecutor adopted a quantitative analysis of gravity in this situation. The decision, that the crimes committed in Iraq were not sufficiently grave to warrant further investigation, was reached in the context of the scale of other crimes being dealt with by the Office of the Prosecutor at that time. Referring to the Northern Uganda, Democratic Republic of Congo and Darfur investigations, the Prosecutor noted that these situations involved thousands of victims of wilful killings, large-scale sexual violence and abductions. The number of victims in the Iraq situation was limited, 4-12 victims of wilful killing and a limited number of victims of inhuman treatment.¹⁸² Thus, in the context of the three investigations and other situations under analysis, featuring thousands of victims, Prosecutor Moreno-Ocampo decided the Iraq situation did not meet the required gravity threshold of the Rome Statute.¹⁸³ Schabas has opined that this comparative methodology

¹⁷⁸ Fabrizio Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.214.

¹⁷⁹ *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis, 27 April 2007, para.19; *Kovačević* (IT-01-42/2-I), Decision on Referral of Case Pursuant to Rule 11bis, 17 November 2006, para.20; *Ljubičić* (IT-00-41-PT), Decision to Refer the Case Pursuant to Rule 11bis, 12 April 2006, para.18; *Janković* (IT-96-23/2-PT), Decision on Referral of Case Under Rule 11bis, 22 July 2005, paras.19-20.

¹⁸⁰ ‘Statement by International Criminal Court Prosecutor Luis Moreno-Ocampo’, Fifth Session of the Assembly of State Parties, 2006.

¹⁸¹ *Ibid.*, p.5.

¹⁸² ICC, Office of the Prosecutor, ‘Response to Communications Received Concerning Iraq’, 2006, p.9.

¹⁸³ *Ibid.*

seems flawed. He has remarked that, if the Prosecutor was comparing the total number of fatalities in Iraq with those in Uganda or the Democratic Republic of the Congo, the Iraq situation would be more serious. Schabas has stated: ‘Thus, the quantitative analysis of gravity, which has certain persuasive authority, appears to get totally muddled in imprecise comparisons.’¹⁸⁴

The assessment of gravity by the ICC Prosecutor during the case selection phase entails an analysis of the same factors as prescribed in Rule 11bis(C) of the ICTY Rules of Procedure and Evidence. Both the Referral Bench and the ICC Prosecutor consider the gravity of the crimes and the level of responsibility of the suspect. When selecting cases inside a situation for prosecution, the Office uses a sequenced approach choosing cases according to their gravity.¹⁸⁵ The assessment of the gravity of the crimes entails the examination of the same three broad areas applied during the situation selection stage.¹⁸⁶ In relation to the level of responsibility of the accused, in 2003, the Prosecutor presented a policy focused on senior leaders. He declared:

The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*¹⁸⁷

ICTY Rule 11bis jurisprudence establishes the principle that judges should interpret the term level of responsibility to include both the position of the accused in a hierarchy and

¹⁸⁴ William A. Schabas, ‘Prosecutorial Discretion and Gravity’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p. 245. To further highlight the flawed methodology, Professor Schabas has also remarked that the Prosecutor could not have been comparing the total number of deaths in Iraq with the deaths attributed to Lubanga, because Lubanga was not charged with killing anybody. See also: William A. Schabas, ‘Complementarity in Practice: Some Uncomplimentary Thoughts’, (2008) 19 *Criminal Law Forum* 5, p.33. Professor Schabas commented: ‘Although a resistance to tackle the more difficult situations may be disappointing, it may also reflect a laudable caution in establishing priorities of a still fragile institution.’

¹⁸⁵ ICC, Office of the Prosecutor, ‘Report on Prosecutorial Strategy’, 14 September 2006, p.5.

¹⁸⁶ Fabricio Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.214.

¹⁸⁷ ICC, Office of the Prosecutor, ‘Paper on Some Policy Issues before the Office of the Prosecutor’ 2003, pp.6-7.

their actual role in the commission of the crimes.¹⁸⁸ Likewise, the ICC Office of the Prosecutor has interpreted the term to take into account ‘the alleged status or hierarchical level of the accused or implication in particular serious or notorious crimes.’¹⁸⁹ However, unlike the current ICTY and ICTR prosecution policies, the ICC strategy is not only focused on those who bear the greatest responsibility for crimes within the jurisdiction of the Court. Prosecutor Moreno-Ocampo has not ruled out the possibility of targeting intermediary-rank perpetrators. He has remarked that investigations ‘may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.’¹⁹⁰ This policy is reminiscent of the ‘pyramidal prosecution strategy’ employed by the ICTY Prosecutor, Richard Goldstone, in 1995. This approach involved the initial targeting of lower-rank suspects and the gradual move on to military and political leaders. At that time, the judges overtly criticised the strategy, arguing that the role of the Tribunal was to immediately target leaders.¹⁹¹

In the ICC, in addition to the situation selection phase and the case selection phase, gravity is also an issue related to the admissibility of a case. In accordance with Article 17(1)(d), the ICC shall not proceed in a case if it is ‘not of sufficient gravity to justify further action’.¹⁹² The influence of the completion strategy, in particular the application of the seniority criterion by the *ad hoc* Tribunals, can be seen in two rulings of Pre-Trial Chamber I on admissibility. In *Lubanga* and *Ntaganda*, the Chamber considered the purpose of the gravity threshold at the admissibility stage. It said the threshold was intended to ensure that the Court initiated cases only against the most senior leaders suspected of being most responsible for the crimes committed in any given

¹⁸⁸ *Ademi and Norac* (IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para.29.

¹⁸⁹ ICC, Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’, 2007, p.7.

¹⁹⁰ ICC, Office of the Prosecutor, ‘Paper on Some Policy Issues before the Office of the Prosecutor’, 2003. See also: *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006, para.66.

¹⁹¹ Antonio Cassese, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585, pp.586-588.

¹⁹² For a discussion in relation to the interplay between Articles 17 and 53 of the Rome Statute and the issue of gravity, see: Mohamed M. El Zeidy, ‘The Gravity Threshold Under the Statute of the International Criminal Court’, (2008) 19 *Criminal Law Forum* 35.

situation under investigation.¹⁹³ The Chamber developed a three-pronged test to assess gravity. It concluded that any case arising from an investigation will meet the gravity threshold under Article 17(1)(d) if the following questions can be answered affirmatively:

- i) Is the conduct which is the object of a case systematic or large-scale (due consideration should be given to the social alarm caused to the international community by the relevant type of conduct)?;
- ii) Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders for the situation under investigation?; and
- iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?¹⁹⁴

Pre-Trial Chamber I emphasised the principles and rules of international law, developed as part of the completion strategy of the ICTY and ICTR, in their reasoning, supporting the concentration of ICC cases on most senior leaders.¹⁹⁵ The Chamber granted the Prosecutor's application for an arrest warrant against Thomas Lubanga; however, it rejected the application for a warrant against Bosco Ntaganda on the grounds that it was not of sufficient gravity. The decision was appealed by the Prosecutor and overturned by the Appeals Chamber, in July 2006.

The *Ntaganda* appeal judgment is the authoritative ICC ruling on the issue of gravity. The Appeals Chamber declared that the Pre-Trial Chamber's interpretation of gravity under Article 17(1)(d) of the Rome Statute was erroneous, and the three-prong

¹⁹³ *Ntaganda* (ICC-01/04-02/06-20), Decision on the Prosecutor's Application for Warrants of Arrest, 10 February 2006, para. 51. See also: *Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para.50.

¹⁹⁴ *Ibid.*, para.64 (*Ntaganda*) and para.63 (*Lubanga*).

¹⁹⁵ *Ibid.*, para.56 (*Ntaganda*).

test developed in previous cases was incorrect. The first prong of the Pre-Trial Chamber test introduced factors in relation to conduct for the purposes of deciding admissibility. Under this prong, Pre-Trial Chamber I stated that the conduct must be either systematic or large-scale and cause social alarm. The Appeals Chamber has held that these factors were introduced on the basis of a ‘flawed contextual interpretation of the Statute.’¹⁹⁶ The *Ntaganda* judgment explains:

The Prosecutor is correct in arguing that imposing a legal requirement of “large-scale or systematic” within article 17(1)(d) of the Statute would not only render inutile article 8 (1) of the Statute contrary to the principles of interpretation but would further contradict the express intent of the drafters in rejecting any such fixed requirement therein [...] Indeed, it would be inconsistent with article 8 (1) of the Statute if a war crime that was not part of a plan or policy or part of a large-scale commission could not, under any circumstances, be brought before the International Criminal Court because of the gravity requirement of article 17(1)(d) of the Statute.¹⁹⁷

With respect to the ‘social alarm’ caused to the international community by the conduct, the Appeals Chamber decided that the criterion is not a consideration appropriate for determining the admissibility of a case under Article 17(1)(d).¹⁹⁸

The second and third prongs of the Pre-Trial Chamber test required that the person could be categorised as a most senior leader. According to the *Ntaganda* arrest warrant decision, ‘only by concentrating on this type of individual can the deterrent effects of the Court be maximized.’¹⁹⁹ The Appeals Chamber considered this assertion questionable stating that the deterrent effect of the Court is maximized ‘if no category of perpetrators is *per se* excluded from potentially being brought before the Court.’²⁰⁰ It

¹⁹⁶ *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006, para.69.

¹⁹⁷ *Ibid.*, para.71.

¹⁹⁸ *Ibid.*, para.72.

¹⁹⁹ *Ntaganda* (ICC-01/04-02/06-20), Decision on the Prosecutor’s Application for Warrants of Arrest, 10 February 2006, paras. 54-55.

²⁰⁰ *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006, para.73.

determined that the imposition of a most senior leader rigid criterion may result ‘in neither retribution nor prevention being achieved.’²⁰¹ As the Appeals Chamber explained:

The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.²⁰²

Rather than applying very formalistic grounds, the Appeals Chamber favoured determining the role of a person, or an organisation, on the circumstances of each individual case. It considered that the criteria applied by the Pre-Trial Chamber ignored the vast differences in the operations of different organisations and, thus, could potentially ‘encourage any future perpetrators to avoid criminal responsibility before the International Criminal Court simply by ensuring that they are not a visible part of the high-level decision-making process.’²⁰³ The Chamber stated:

Also, individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes. In other words, predetermination of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future.²⁰⁴

Additionally, the Chamber determined that the teleological interpretation of Article 17(1)(d) by the Pre-Trial Chamber conflicted with the contextual interpretation of the Statute. It highlighted that a number of provisions of the Rome Statute could relate to persons who could not be categorised as the most senior leaders. Particular emphasis was placed on Article 33 and Article 27(1). As the Chamber explained, Article 33 sets down rules relating to the irrelevance of superior orders; if only senior leaders could be brought

²⁰¹ *Ibid.*, para.74.

²⁰² *Ibid.*, para.75.

²⁰³ *Ibid.*, para.77.

²⁰⁴ *Ibid.*

before the ICC, those rules would be irrelevant.²⁰⁵ Also, Article 27(1) provides that the Statute ‘shall apply equally to all persons without any distinction based on official capacity.’²⁰⁶ Finally, the Chamber stated that, if the drafters of the Statute intended to create a jurisdictional limitation based on seniority, they could have done so expressly. Instead, the Preamble to the Rome Statute refers to the ‘most serious crimes’ but not to the ‘most serious perpetrators.’²⁰⁷

In the *Ntaganda* decision, Pre-Trial Chamber I stated that the three-prong gravity test was supported by the applicable principles and rules of international law. In this respect, the Chamber emphasised the current practice and law of the ICTY and the ICTR which regulate the completion strategy.²⁰⁸ It referenced Security Council Resolution 1534 which directs the Tribunals to ‘concentrate on the most senior leaders suspected of being most responsible’. Also ICTY Rule 28 (A) and Rule 11 *bis* (C) of the Rules of Procedure and Evidence were discussed to justify the Pre-Trial Chambers proposition that the ICC should focus on senior leaders.²⁰⁹ The Appeals Chamber was totally dismissive of this approach. It stated that the reliance of the Chamber on the practice and procedural law of the ICTY and ICTR was flawed. The *Ntaganda* judgment explained:

The International Criminal Court is not in the same position in that it is beginning, rather than ending, its activities. In addition, being a permanent institution, it may face a variety of different and unpredictable situations. For the foregoing reasons, the reference made by the Pre-Trial Chamber to the current criteria applicable to the ICTY and the ICTR does not lead the Appeals Chamber to the conclusion that article 17(1)(d) of the Statute should be interpreted as imposing the extremely high threshold attributed to it by the Pre-Trial Chamber, thereby also weakening the preventive effect of the proceedings of the Court.²¹⁰

²⁰⁵ *Ibid.*, para.78.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, para. 79.

²⁰⁸ *Ibid.*, paras. 56-59.

²⁰⁹ For a general discussion in relation to the prosecution of senior leaders, see: William A. Schabas, ‘Prosecutorial Discretion and Gravity’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.243

²¹⁰ *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006, para.80.

One leading commentator has remarked that it is hardly shocking that the ICTY completion strategy law and practice was cited in the decisions of Pre-Trial Chamber I. Judge Jorda, the President of Pre-Trial Chamber I, was President of ICTY in 2002 and actually presented the completion strategy to the Security Council at that time.²¹¹ In the *Ntaganda* judgment, however, the Appeals Chamber has resoundingly rejected the proposition that the law and practice governing the completion strategy of the *ad hoc* Tribunals, in particular the rules and Security Council resolutions designed to ensure concentration of the Tribunals' work on the most senior leaders, are of any relevance to the operations of the ICC. The Chamber observed that the ICC is not in the same position as the Tribunals, in that it is a permanent institution beginning, rather than completing, its work. In many ways, nonetheless, there are valuable lessons to be gleaned from the completion strategy. After all, some of the problems that the strategy was designed to resolve stemmed from the prosecution policy adopted in the ICTY, at the start of its work. Prosecutor Moreno-Ocampo has stated that, as a general rule, he will focus investigative efforts and resources on those who bear the greatest responsibility.²¹² Intermediary-rank perpetrators may also be targeted if the investigation is required to support the whole case.²¹³ The 'pyramidal prosecution strategy' used by the first ICTY Prosecutor, Richard Goldstone, was very similar to the latter policy of the ICC Prosecutor. Yet the ICTY strategy seems to have been loosely applied resulting in too many cases against low-rank accused. One observer explained that the problem with the strategy was that investigations were targeted at 'figures too uninvolved in the chain of command to incriminate the major leaders.'²¹⁴ The completion strategy was designed to counteract the crushing case backlog caused, in part, by the initial policy adopted by the ICTY Prosecutor. As part of the completion strategy, some ICTY cases were transferred to Bosnia for trials almost 10 years after the accused were first indicted. The explanation given by the ICC Prosecutor as to why his Office may initiate cases against intermediary-

²¹¹ See: William A. Schabas, 'First Prosecutions at the International Criminal Court', (2006) 27 *Human Rights Law Journal* 25, p.36.

²¹² ICC, Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor', 2003, pp.6-7.

²¹³ *Ibid.* See also: *Ntaganda*, (ICC-01/04-02/06-20), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest', 13 July 2006, para.66.

²¹⁴ Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton: Princeton University Press, 2002, p.228.

rank perpetrators is compelling. It appears the intention of the Prosecutor is to target persons who can incriminate leaders.²¹⁵ The ICC strategy, therefore, is still focused on senior leaders; lower level offenders will be targeted in the context of a ‘whole case’ rather than as individual cases. Thus, although the Appeals Chamber in *Ntaganda* has dismissed the formalistic adoption of the seniority criterion by the ICC, it does not mean that in practice the Prosecutor will not concentrate cases on the leaders most responsible for the crimes committed in a situation.

CONCLUSION

An integral part of the Completion Strategies of the *ad hoc* Tribunals is the referral process governed by Rule 11bis of the Rules of Procedure and Evidence. ICTY Rule 11bis(C) directs the judges to consider the gravity of crimes charged and the level of responsibility of the accused before ordering the referral of a case to competent national authorities. Although one might expect that the most comprehensive guidance on whether crimes are grave enough and an accused senior enough to warrant trial before the ICTY would emanate from the Office of the Prosecutor, as a result of the Rule 11bis proceedings it is in fact the ICTY judges that have extensively deliberated these questions. In determining whether an accused person fell into the category of most senior leader most responsible for the crimes within the Tribunal’s jurisdiction the judges have articulated a broad set of principles that may be used to decide the level of seniority of suspects and the gravity of crimes they committed. The principles are a very solid precedent for other tribunals and national courts. In the context of investigating and prosecuting international crimes, the selection of cases for trial is a key issue. The Rule 11bis principles may assist the development of future prosecution strategies both at a national and international level by providing clear criteria to be applied in the selection of cases for trial based on the gravity of the crimes committed and the seniority of accused persons. From the perspective of implementing a complementary approach to the

²¹⁵ ICC, Office of the Prosecutor, ‘Paper on Some Policy Issues before the Office of the Prosecutor’, 2003. See also: *Ntaganda* (ICC-01/04-02/06-20), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest’, 13 July 2006, para.66.

prosecution of suspects based on a division of labour between an international tribunal and national courts the Rule 11*bis* jurisprudence is also instructive.

CHAPTER IV – RULE 11BIS CASE REFERRALS: POSITIVE COMPLEMENTARITY IN PRACTICE

INTRODUCTION

Unlike the Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court does not have primacy over national courts.¹ According to the Rome Statute, ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.² Paragraph 10 of the preamble and Article 1 of the Statute declare that the International Criminal Court ‘shall be complementary to national criminal jurisdictions’.³ The principle of complementarity, enshrined in Article 17, provides that the Court may only proceed with a case when the State responsible for prosecution is ‘unwilling or unable’ to genuinely proceed with the investigation or prosecution.⁴ Conversely, as discussed in Chapter I, the ICTY can assume jurisdiction as of right, without having to establish the inability of a State to carry out proceedings.⁵ In the event of corresponding or competing prosecutions in national courts, if the Tribunal invokes its primacy, the Rules of Procedure and Evidence do provide a mechanism for

¹ Parts of this Chapter are reproduced in Fidelma Donlon, ‘Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal’s Evidence in the Srebrenica Trials before the War Crimes Chamber’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge: Cambridge University Press, 2011, pp.920-952.

² Rome Statute, Preamble, para.6.

³ *Ibid.*, para. 10, which declares: ‘Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’. Article 1 of the Statute provides ‘An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.’

⁴ To determine unwillingness, Article 17(2) of the Rome Statute directs the Court to consider in light of ‘the principles of due process recognized by international law’, whether the proceedings are designed to shield the accused from criminal responsibility, whether there has been an unjustified delay, or whether the proceedings are not being conducted impartially or independently or ‘in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’. To determine the inability of a state to genuinely prosecute a person, Article 17(3) directs the Court to consider if ‘due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’.

⁵ See: ICTY Statute, Art. 9, declaring that the ICTY ‘shall have primacy’ over national courts.

the deferral of cases to its jurisdiction.⁶ If it appears that the act being investigated is characterised as an ordinary crime, if the proceedings are partial or designed to shield the accused from international criminal responsibility, or if the case involves significant factual or legal questions which have implications for investigations by the Tribunal, the competent Trial Chamber can request the State to defer to the competence of the ICTY.⁷

Under the principle of classical complementarity enshrined in the Rome Statute, the International Criminal Court tests the adequacy of national systems to determine if cases are admissible pursuant to Article 17 of the Rome Statute. If the State is ‘unwilling or unable’ to conduct a genuine investigation or prosecution, the ICC can assume jurisdiction. To determine unwillingness, Article 17 (2) of the Rome Statute directs the Court to consider in light of ‘the principles of due process recognized by international law’, whether the proceedings are designed to shield the accused from criminal responsibility, whether there has been an unjustified delay, or whether the proceedings are not being conducted impartially or independently or ‘in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.’⁸ To an extent, the principle of complementarity is also reflected in the ICTY Rules of Procedure and Evidence, albeit reversed. Pursuant to the Rule 11bis “reverse complementarity regime”, the ICTY Referral Bench tests the adequacy of national systems to determine if cases are transferable to national courts rather than to decide whether they are admissible before the Tribunal.⁹ As noted by Professor Carsten Stahn, under Article 17 of the Rome Statute the jurisdiction of the ICC ‘is triggered by domestic

⁶ See: ICTY RPE, Rules 9 and 10. See also: Mohamed M. El Zeidy, ‘From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the *ad hoc* Tribunals’, (2008) 57 *International and Comparative Law Quarterly* 403, pp.405-406. El Zeidy argues that the Tribunal’s practice has shaped at least three distinct models of complementarity that may stand alongside the current 1998 Rome Statute model. The first model presented is derived from the ICTY’s practice of deferring jurisdiction to the national courts on the basis of a division of labour, exercised within the framework of the discretionary powers of the Prosecutor. Secondly, the Rule 11bis model, which the author compares to the Nuremberg International Military Tribunal strategy and highlights that the Rule reflects a new angle in the understanding of primacy and complementarity. The third model of complementarity presented appears in the decision of the ICTY to revoke an order of referral of a case to a state due to its failure to ‘diligently prosecute’ or provide a ‘fair trial’. Under this model, the primacy of domestic courts is subject to a test of genuine proceedings.

⁷ ICTY RPE, Rules 9(i), (ii), (iii) and 10(A).

⁸ Rome Statute, Art. 17(2).

⁹ ICTY RPE, Rule 11bis(A) and (B).

failure'.¹⁰ On the other hand, under Rule 11bis, the authority of the ICTY to refer a case is triggered by the success of the domestic system. Once the Referral Bench judges are satisfied that the State is ‘willing and adequately prepared’ and the accused will receive a fair trial and that the death penalty will not be imposed or carried out, the case can be referred to a national court for trial.¹¹

In 2002, the Secretary-General presented an assessment of the Bosnian judicial system and its capacity to deal with war crimes cases that the ICTY might transfer to it for trial.¹² The assessment was damning, identifying serious concerns about trials that had taken place both during and after the war. It also expressed fears that the transfer of cases from the ICTY to Bosnia could inflame local ethnic tensions; rather than contributing to the restoration of peace, the trials could destabilise weak judicial and governmental structures.¹³ Yet, since 2005, the Tribunal has transferred six cases involving ten accused to the War Crimes Chamber.¹⁴ In addition to the trials of the accused transferred from the ICTY, in 2008, the Chamber was running trials against approximately fifty other suspects.¹⁵ The first instance trials have been completed and many cases have also finished the appeal hearings. In addition, the cases have been closely monitored by the Organisation for Security and Cooperation in Europe, and it is reported that the proceedings met the international fair trial standards required by the Tribunal. The combination of multi-lateral negotiations, solid partnership between the

¹⁰ Carsten Stahn, ‘Complementarity: A Tale of Two Notions’, (2008) 19 *Criminal Law Forum* 87, p.93.

¹¹ *Lukić and Lukić* (IT-98-32/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 5 April 2007, para.26.

¹² ‘Report of the Secretary-General Pursuant to the letter of the President of the Security Council dated 15 March 2002’, 18 June 2002, <http://archives-trim.un.org/webdrawer/rec/538075/view/Item-in-KAA%20Countries%202002%20-%20Bosnia%20and%20Herzegovina.PDF>

The assessment was compiled from information provided by the United Nations Mission in Bosnia and Herzegovina, in particular, the reports of its Judicial System Assessment Programme and the observations made by its Criminal Justice Advisory Unit. Reports from the Office of the High Representative and the Independent Judicial Commission were also considered.

¹³ *Ibid.*, para.109.

¹⁴ *Stanković* (IT-96-23/2-AR11bis.1), Decision on Rule 11bis Referral, 1 September 2005; *Ljubičić* (IT-00-41-AR11bis), Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006; *Janković* (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005; *Rašević and Todović* (IT-97-25/1-AR11bis.2), Decision on Savo Todović’s Appeal Against Decisions on Referral Under Rule 11bis, 4 September 2006; *Mejakić et al.* (IT-02-65-AR11bis.1), Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006; *Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis with Confidential Annex, 27 April 2007.

¹⁵ For War Crimes Chamber statistics, see: ‘Annual Report of the Registry for Section I and II of the Court of Bosnia and Herzegovina’, 2008. For a critical assessment of the work of the War Crimes Chamber, see: Human Rights Watch, ‘Narrowing the Impunity Gap: Trials before Bosnia’s War Crimes Chamber’ (2007).

Office of the High Representative, the ICTY and the Bosnian authorities, an international donors' conference and an institution-building project of considerable proportions created the War Crimes Chamber with the capacity to conduct trials respecting international standards of due process and the rule of law.¹⁶ The successful functioning of the Chamber, the adoption of the required national laws and the stronger relationship between the ICTY and the national authorities has yielded positive results. Almost fifteen years after the war, some of the most serious crimes of concern to the international community as a whole, including the Srebrenica genocide, are being prosecuted at the international and national level. The lessons to be extracted from the creation of the Bosnian War Crimes Chamber are extremely relevant to the future enforcement of international justice. In this regard, the catalytic effect of the ICTY Completion Strategy on the Bosnian justice sector will be analysed in this Chapter.

The first ICC Prosecutor, Luis Moreno-Ocampo, advocated the notion of positive complementarity. He has stated that:

[...] [I]ntervention by the office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.¹⁷

William Burke-White has remarked that the concept of positive complementarity 'suggests a far more active role for the Court, not merely stepping in where national courts fail to prosecute, but actively encouraging prosecutions by national governments

¹⁶ For the contribution of the ICTY to the creation of the Chamber and subsequent trials, see: David Tolbert and Aleksander Kontic, 'The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.147.

¹⁷ For the principles guiding the ICC prosecution strategy, see: ICC, Office of the Prosecutor, 'Report on Prosecution Strategy', September 2006, p.5.

of crimes within the ICC's jurisdiction.¹⁸ To combat impunity, the Office of the Prosecutor has stated that it will operate with a two-tiered approach to prosecutions.¹⁹ As a general rule, it will focus cases on persons who bear the most responsibility for the crimes committed in a situation.²⁰ At the same time, the Office will promote national prosecutions for intermediary-and lower-rank accused.²¹ Prosecutor Moreno-Ocampo has pointed out that any strategy underpinned by concentration on the most senior leaders 'may leave an "impunity gap" unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.'²² The Office also intends to encourage states to ratify the Rome Statute and adopt complementary implementing legislation to create a legal framework to give police, prosecutors and judges the required laws to combat impunity.²³ Article 93(10) of the Rome Statute foresees the option of 'reverse' cooperation by the ICC.²⁴ Pursuant to Article 93 (10)(b)(i)(1), the ICC may support a State carrying out proceedings by providing statements, documents or other types of evidence obtained during an investigation or trial conducted by the Court. At some point in the future, the ICC's evidence will be critical for the effective trial of perpetrators in domestic courts. From the perspective of a state that is willing and genuinely able to carry out trials, it is critical that the ICC's evidence can be introduced and used in domestic proceedings

¹⁸ William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *Criminal Law Forum* 59, p.60.

¹⁹ ICC, Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor', 2003, p.3. For a detailed discussion of the two-tiered approach and complementarity in practice, see: William Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo', (2004) 18 *Leiden Journal of International Law* 557.

²⁰ The Prosecutor has not ruled out cases against intermediary level perpetrators if their investigation is required to contribute to the entire case. See: ICC, Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor', 2003.

²¹ See: William A. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 19 *Criminal Law Forum* 5, p.23. Schabas states: 'Although the pronouncements of the Prosecutor indicate his commitment to national justice, in practice, however, the Prosecutor's actions seem inconsistent with his profession of faith in the importance of national justice.' He remarks that, in the situation in Uganda, it was never suggested the Ugandan courts were unable to prosecute. Instead, the Prosecutor and the Government of Uganda decided it would be more convenient to hold trials in the International Criminal Court rather than Uganda.

²² *Ibid.*

²³ See: Christopher Keith Hall, 'Developing and Implementing an Effective Positive Complementarity Prosecution Strategy', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.220.

²⁴ Carsten Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 *Criminal Law Forum* 87, p.93.

without jeopardising the fair trial rights of the accused. With this in mind, and to highlight the lessons learned from the Bosnian process, this Chapter scrutinises the challenges to the admissibility of evidence collected by an international tribunal in proceedings before a national court. The Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence collected by the ICTY in Proceedings before the Courts in Bosnia²⁵ will be examined and suggested as a model national legal framework for the implementation of a ‘reverse’ cooperation regime.

A. THE COMPLETION STRATEGY – CATALYST FOR BOSNIAN REFORM

By creating the ICTY in 1993, the international community focused its interest on criminal accountability and prosecution at an international level. Although the provision of assistance to Prosecutors investigating war crimes cases in the former Yugoslavia was not a planned component of the original ICTY prosecution strategy, in 1996, the Tribunal did get involved in the oversight of national cases in accordance with the terms of what was colloquially known as the ‘Rules of the Road’ agreement.²⁶ Even though the primary motivation for the agreement was the desire of the international community to prevent arbitrary arrests which were proving a formidable threat to the newly brokered Dayton Peace Agreement,²⁷ there are valuable lessons to be extracted from the Rules of the Road process which are relevant to the ICC’s formulation of plans to support national investigations.

Under the terms of the agreement, the ICTY, the international community and the parties to the Dayton Peace Agreement purported to combat impunity in the former Yugoslavia. The Rules of the Road agreement declared that;

²⁵ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06.

²⁶ See generally: David Tolbert and Aleksandar Kontic, ‘The ICTY: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, pp.139-145.

²⁷ Arbitrary arrests were common directly after the war in Bosnia and Herzegovina. In February 1996, local police arrested two senior Bosnian Serb officers, General Djukić and Colonel Krsmanović, who, having misread a signpost, accidentally drove into Bosniac-held territory near Sarajevo. The ICTY Prosecutor, Richard Goldstone, subsequently issued a warrant for the two officers as he wanted them for questioning and possible indictment. Meanwhile, in Belgrade, Milošević demanded their immediate release. The situation was defused when the two men were delivered to The Hague.

Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.²⁸

In accordance with the procedures which were later developed, national authorities could only arrest and detain persons after the ICTY Prosecutor had reviewed a case file and determined there was sufficient evidence – consistent with international standards – to believe that a suspect may have committed a serious violation of international law.²⁹ In practice, in Bosnia and Herzegovina this meant that the indictment of a person for war crimes was only possible if the ICTY's Prosecutor, following a recommendation of the ICTY Rules of the Road Unit, had approved the prosecution.³⁰

A critical lesson to be learned from the implementation of the Rules of the Road process is that if an international jurisdiction gets involved in national procedures, for example, by acting as an independent oversight mechanism of national war crimes investigations, it must have the required resources to fulfil the role efficiently. Otherwise, the legitimacy of the support function and the credibility of the international jurisdiction will be challenged. The ICTY Office of the Prosecutor was hesitant to sign the Rules of the Road agreement. Due to the limited resources available in 1996, the Prosecutor wanted to focus on international indictments rather than authorisation procedures for national cases. Finally, after considerable pressure from the United States, the Prosecutor agreed to review the Bosnian files.³¹ Unfortunately, the funding for the ICTY's Rules of the Road Unit was not included in the Tribunal's annual budget. The United Nations took

²⁸ *Rome Agreement*, signed by Presidents Izetbegovic, Tudjman and Milošević, 18 February 1996, para.5.2.

²⁹ ICTY, Office of the Prosecutor, ‘Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996’, on file with author.

³⁰ Janet Manuell and Aleksander Kontic, ‘Transitional Justice: The Prosecution of War Crimes Cases in Bosnia and Herzegovina under the “Rules of the Road”’, (2002) 5 *Yearbook of International Humanitarian Law* 331.

³¹ Mark. S. Ellis, ‘Bringing Justice to an Embattled Region – Creating and Implementing the “Rules of the Road” for Bosnia and Herzegovina’, (1999) 17 *Berkeley Journal of International Law* 1, p.8.

the position that the review process fell outside the statutory obligations of the Office of the Prosecutor. Therefore, funds had to be raised from other sources. Although the Unit did receive valuable assistance over the years, outside legal experts were only available to support the process on a temporary basis. Thus, from its creation, the Unit was hampered by a lack of financial and human resources to effectively manage the review of cases submitted by the Bosnian authorities. It has been reported that the unsystematic return of decisions from the ICTY resulted in lost momentum in Bosnia - prosecutors reported waiting almost two years for a reply from the ICTY. Although many Bosnian prosecutors considered that the review process was required after the war to prevent arbitrary arrests, many others felt that, in later years, the procedure slowed down the national processing of war crimes cases.³² If the ICTY Rules of the Road unit had been given the resources it required to manage the large number of files received from Bosnian authorities for review, the problem of long delays before the return of files to national prosecutors could have been avoided.

Another valuable lesson to be garnered from the Rules of the Road process is the importance of having legal clarity at the national level regarding the status of any agreement with an international tribunal which may define new criminal procedures that are not reflected under national law. Bosnia did not ratify the Rules of the Road agreement nor was it ever published in any of the Official Gazettes in the country. In *Hermas v the Federation of Bosnia and Herzegovina*, the Human Rights Chamber declared that the Rules of the Road agreement did apply as domestic law in the Bosniac/Croat Federation.³³ However, the Chamber's determination was based on the fact that the Federation Ministry of Justice distributed the agreement to all courts and informed them that it was legally binding. The Chamber did not discuss whether the agreement was applicable as domestic law in the other Bosnian entity, the Republika Srpska. In fact, even in 2004, it remained unclear whether the Republika Srpska Ministry of Justice had ever disseminated the agreement to courts at all. The uncertainty in relation to the legal status of the Rules of the Road agreement caused confusion among both the

³² Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', March 2005, p.50.

³³ *Samy Hermas against the Federation of Bosnia and Herzegovina* (CH/97/45), Decision on Admissibility and Merits, 18 February 1998, paras.17 and 46.

national authorities and international organisations in relation to the obligations created under the procedures.³⁴ Moreover, there were no penalties foreseen under the agreement for non-compliance by the parties or under domestic law for non-compliance by national authorities. This may, in part, explain why two of the three parties to the agreement, Croatia and the former Federal Republic of Yugoslavia, without consequence, completely ignored their obligations and never participated in the review process with the ICTY.³⁵

The examination of the Bosnian case files by the ICTY's Rules of the Road Unit staff was very limited. In determining whether there was sufficient evidence to provide reasonable grounds that a person had committed a crime within the Tribunal's jurisdiction, the ICTY staff only reviewed the material contained in the case file. Witnesses were not interviewed; no decision was made as to whether the national authorities had complied with international legal standards in relation to the gathering of evidence and the national criminal laws were not reviewed for their compliance with international standards.³⁶ Moreover, there was some concern that under-investigated files were intentionally submitted for review in order to exonerate persons.³⁷

Considering that the intent of the Rules of the Road agreement was to ensure freedom of movement for refugees throughout Bosnia by preventing arbitrary arrests and detentions, the review process conducted by the ICTY Prosecutor appears to have been adequate and effective. Implementation of the agreement did help to curb arbitrary arrests.³⁸ It did not, however, improve the prosecution and trial of war crimes cases in Bosnia.³⁹ The reform of the Bosnian justice sector was not part of the ICTY's mandate and the Tribunal could do little to counteract the problems in the country. According to the terms of the Rules of the Road agreement, unless the ICTY exercised primacy by

³⁴ Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', March 2005, p.48.

³⁵ Mark S. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the "Rules of the Road" for Bosnia and Herzegovina', (1999) 17 *Berkeley Journal of International Law* 1, pp.8-9.

³⁶ For the ICTY Office of the Prosecutor case review, see: *ibid.*

³⁷ Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', March 2005, p.47.

³⁸ *Ibid.*

³⁹ See generally: Ulrich Garms and Katharina Peschke, 'War Crimes Prosecution in Bosnia and Herzegovina (1992-2002): An Analysis through the Jurisprudence of the Human Rights Chamber', (2006) 4 *Journal of International Criminal Justice* 2, pp.258-282.

requesting the national courts to refer a case to the Tribunal, responsibility for further investigation and trial of that case remained with national police, prosecutors and courts. This effectively meant that cases were returned from the Rules of the Road Unit to a biased and frequently corrupt judicial system. Ensuring compliance with international standards by the police, prosecutors and courts, after a case was reviewed by the ICTY and returned for trial to Bosnia, was not part of the Rules of the Road agreement. It is unlikely that this was an intentional oversight by the drafters; as noted above, the impetus for the Rules of the Road agreement was the urgent political need to maintain a fragile peace rather than to create a positive complementary relationship with national courts to try cases. In the years after the war, expectations that the Rules of the Road process would encourage prosecutions and help guarantee fair trials were misplaced, and, indeed, the net effect of the process may have been to make prosecution of suspected war criminals more difficult.⁴⁰

During the first thirteen years of its existence, the ICTY grew exponentially, employing 28 judges and over eleven hundred staff with budget allocations of over 1.2 billion dollars.⁴¹ Arguably, the vast financial and human resources required by the ICTY diverted the discussion and funding away from building a domestic war crimes capacity in Bosnia, and only when the international community's attention turned towards winding-down the ICTY did the need for a domestic process become more urgent. The Peace Implementation Council is an international body charged with implementing the Dayton Peace Agreement.⁴² In 1998, the Council concluded an agenda outlining the main tasks for the international community and the national parties to implement a self-sustaining peace in Bosnia.⁴³ The establishment of the rule of law was declared a top

⁴⁰ *Ibid.*

⁴¹ David Wippman, 'The Costs of International Justice', (2006) 100 *American Journal of International Law* 861.

⁴² The Peace Implementation Council was established at an implementation conference held in London in December 1995, after the negotiations of the Dayton Peace Agreement the preceding month. It is comprised of 55 countries and agencies that support the peace process. The Council directs the Office of the High Representative to Bosnia and Herzegovina in relation to its responsibilities as the main implementing organization of the civilian aspects of the Dayton Peace Agreement. The direction and support of the Council was a prerequisite to the reform of the Bosnian judicial system to build its capacity to prosecute serious violations of international law.

⁴³ Declaration of the Peace Implementation Council, Madrid, (16 December 1998). Also see annexed document: 'The Peace Implementation Agenda, Reinforcing Peace in Bosnia and Herzegovina – The Way Forward.'

priority. A detailed judicial reform program was developed, aiming at the creation of an independent, impartial and multi-ethnic judiciary. Judicial institutions were to be created at the Bosnian State level to deal with criminal offences perpetrated by public officials in the course of their duties, as well as administrative and electoral matters. The judicial reform program was detailed and commendable. However, blatantly absent from this list of key reforms was any reference to efforts to strengthen the prosecution of serious violations of international humanitarian law in Bosnia and Herzegovina. Instead – not unlike the Dayton agreement – the Peace Implementation Council called on all states to cooperate with the ICTY and condemned those governments that had failed to execute arrest warrants issued by the Tribunal. The Council insisted upon compliance with the Rules of the Road agreement, even though, as noted above, this had no bearing on the conduct of trials in Bosnia. It also called for compliance with international standards in national war crimes trials and requested the international community to monitor proceedings.⁴⁴ Bearing in mind that the International Covenant on Civil and Political Rights provides that ‘...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...’,⁴⁵ it seems bizarre that the Council identified the creation of an independent, impartial and multi-ethnic judiciary in Bosnia as an urgent priority, yet, at the same meeting, called upon the existing partial and mono-ethnic Bosnian judiciary to fully comply with international standards in war crimes trials. It was unwise to expect that any semblance of international standards would be met in war crimes proceedings conducted by the national justice system at that time or that monitoring of proceedings would rectify the problem.

One possible reason why the national prosecution of war crimes was not singled out as a key reform in 1998 was that the statistics and information chronicling the lack of prosecutions or the prejudiced nature of trials was not yet available. Since 1996, a small number of staff from other international organisations had been monitoring trials, but, until 2003, this monitoring took place on a relatively *ad hoc* basis. Implementing the peace agreement in Bosnia involved immense tasks for the international community, including: coordinating the reconstruction and return of more than a million people to

⁴⁴ *Ibid.*, Section II – Rule of Law, para.15.

⁴⁵ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 14(1).

their homes; reforming and reconstructing the economy; maintaining military stability and re-establishing the rule of law.⁴⁶ Without solid facts on the political, technical and institutional impediments to war crimes trials, it would have been exceptionally difficult to push this topic onto the overburdened peace implementation agenda. Additionally, in the author's experience, many diplomats misconstrued the Rules of the Road agreement as a mechanism to ensure fair trials in national courts rather than one to prevent arbitrary arrests. Frequently, this misconception caused people to believe that there were procedures in place to address problems with national trials, when in fact there were not.

Perhaps even the concept of bringing to justice those who perpetrated barbaric crimes during the war was construed by the international community in a very limited sense, as something to be performed by the Yugoslavia Tribunal rather than the national courts. Yet, this appears to have been the position of the Peace Implementation Council, when it stated, in 1997, that until persons indicted for war crimes were detained by the ICTY, there would be no reconciliation or rule of law in Bosnia.⁴⁷ Domestic investigation and trial of the thousands of suspects not indicted by the Tribunal was not mentioned. Arguably, the statement of the Council was correct but it was also incomplete; thousands of suspects not indicted by the ICTY posed equally as significant a threat to reconciliation and restoration of the rule of law in Bosnia.

The lack of an independent judiciary was not the only obstruction to fair trials. Efficient and effective war crimes trials were further hampered by the lack of basic equipment and infrastructure and of qualified defence lawyers and criminal procedure laws to effectively prosecute war criminals.⁴⁸ Even if projects aimed at alleviating these problems were on the agenda, securing donor funds would have been very difficult at that time. Governments were already funding the long list of priority tasks outlined in the 1998 Peace Implementation Agenda; as noted above, national war crimes prosecutions was not one of them. Additionally, the same governments were contributing to the budget

⁴⁶ See generally: Charles Philpott and Rhodri C. Williams, 'The Dayton Dialectic: The Significance of Property Deprivation and Repossession in the Context of Ethnic Cleansing', pp.149-176 and Ric Bainter, 'The Elephant in the Room: Defense Reform in Bosnia and Herzegovina', pp.235-256, both in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, Aldershot, Hampshire: Ashgate Publishers, 2008.

⁴⁷ Peace Implementation Council, Bonn Peace Implementation Conference, 10 December 1997, para.4.

⁴⁸ Mark S. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the "Rules of the Road" for Bosnia and Herzegovina', 1999 17 *Berkeley Journal of International Law* 1.

of the ICTY which, in 1998, was US\$ 62,331,660.⁴⁹ The substantial investment in the Tribunal was considered by many donors to fulfil their obligation to bring the perpetrators of the wartime atrocities to justice; they were investing in the international rather than the national justice system to do so. Thus, during the early post-war period, there was very little impetus from the international community to develop a robust domestic counterpart to the international criminal process. Moreover, as David Tolbert has remarked, due to the location of the Yugoslavia Tribunal in The Hague, by 2002, the ICTY had done little to prepare the national courts and prosecutors to conduct war crimes investigations and trials.⁵⁰

With the benefit of hindsight, the Peace Implementation Agenda of 1998 was an opportunity to place the national prosecution of war crimes cases firmly on the work plan of the international community and the Bosnian government. It was an opportune time for the international community to comprehensively audit the work of the national authorities in relation to war crimes cases and to develop a strategy to combat impunity. Ideally, the national prosecution of cases would then have been incorporated into the judicial reform plans, together with plans to deal with corruption and organized crime. Unfortunately, it was a lost opportunity. However, almost four years later, and seven years after the Dayton peace agreement, in 2002, the opportunity arose to include national trials in the judicial reform plan, albeit, limited to the Bosnian State level rather than the entire country. The Security Council's 2002 Presidential Statement, which endorsed the ICTY completion strategy, noted the recommendations of the Tribunal and the Office of the High Representative to create a War Crimes Chamber in the State Court of Bosnia and Herzegovina.⁵¹ Subsequently, the Peace Implementation Council agreed '[to] ask [its members] to identify as rapidly as possible the resources and the organizations necessary to help [Bosnia] develop the capacity within the [State Court of Bosnia] to try war

⁴⁹ ICTY Fifth Annual Report, UN Docs. A/53/219 and S/1998/737, p.3.

⁵⁰ David Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings', (2002) 26 *Fletcher Forum World Affairs* 8, p.12. Tolbert also notes that when the vast resources of the ICTY - approximately \$242 million for the biennial budget 2002-03 – are taken into account, the lack of impact on preparing the national courts for war crimes prosecutions is troubling.

⁵¹ UN Doc. S/PRST/2002/21.

crimes'.⁵² The request of the Peace Implementation Council was a direct consequence of the adoption of the ICTY Completion Strategy by the Security Council.

The first round of negotiations between the ICTY and the Office of the High Representative on the War Crimes Chamber project took place in January 2003. By that time, many Governments wanted to see both institutions cooperate on a common strategy to prepare the War Crimes Chamber for trials. The ICTY and the OHR reached consensus quite quickly that the Chamber should be a national institution with international participation applying domestic legislation. Nobody wanted to recreate an international tribunal in Sarajevo with an exorbitant budget – indeed the donor Governments would have rejected that concept outright. Bosnia was no longer a funding priority for most countries. Critics of the completion strategy and the War Crimes Chamber have argued that ‘the process should not [have been] driven by international budgetary and political factors’.⁵³ Perhaps not, but analysing the various proposals and discussions on the completion strategy and the transfer of intermediate- and lower-level offenders to Bosnia, it is clear that the process was driven by those factors. The budget of the ICTY for the biennium 2002-2003 was US\$ 242,791,600;⁵⁴ in a climate of donor fatigue caused by the escalating costs of the Tribunal, it was both logical and necessary for member States to consider how much any alternative to the ICTY would cost. Ultimately, the same governments would have to financially support an alternative institution whilst still funding the ICTY during the completion phase, thus, international budgetary factors were critical in elaborating plans. Therefore, to bring the donors to the table, the negotiators responsible for designing the War Crimes Chamber project had to accept the political and financial realities and develop the project budget in a pragmatic manner.

During the OHR and ICTY negotiations, there was some debate on whether Rules of the Road cases should be processed by the War Crimes Chamber from its inception. At that time, the ICTY Prosecutor, Carla del Ponte, had identified six indictments involving thirteen accused persons for referral under Rule 11bis and, also, a large number of

⁵² Communiqué by the Peace Implementation Council, Steering Board, Political Directors, November 2002.

⁵³ Amnesty International, ‘Bosnia-Herzegovina, Shelving Justice – War Crimes Prosecutions in Paralysis’, 2003.

⁵⁴ UN Doc. S/2002/985, p.314.

partially investigated files to be handed over to the Bosnian authorities. The ICTY was facing considerable pressure to complete its investigations around 2004 and first instance trials around 2008. Therefore, the Tribunal's priority was to have the Chamber in place to enable the transfer of cases to it for trial. The ICTY did not want the new War Crimes Chamber overburdened with Rules of the Road cases that might render it unable to accept Rule 11bis referrals. Approaching the project from a broader judicial reform perspective, the OHR – although ready to work towards the implementation of the Completion Strategy – was adamant that sensitive Rules of the Road cases would also be dealt with by the Chamber. For OHR, the main goal was to build a sustainable justice sector at the Bosnian state level which could trigger reform in the entities as well as having the capacity to deal with cases transferred from the Tribunal. Finally, it was agreed that sensitive Rules of the Road cases would be tried by the Chamber. There was some debate as to whether the ICTY referral cases should take priority over these national cases, but in the end the negotiators agreed that there would be no prioritisation.

In February 2003, the OHR and the ICTY presented their Joint Conclusions providing for the creation of the War Crimes Chamber.⁵⁵ The Chamber would have jurisdiction over three types of cases: cases referred from the ICTY, partially investigated cases returned by the ICTY Prosecutor, and sensitive Rules of the Road cases. The Joint Conclusions were endorsed by the Peace Implementation Council in June 2003.⁵⁶ After signing the Joint Conclusions, the OHR and the ICTY presented a more unified front, generating support for the War Crimes Chamber project. The High Representative and the new ICTY President, Theodor Meron, briefed the Security Council about the progress in Bosnia, telling the Council that the pace of reform remained too slow in the country, and that the new state-level judicial institutions were weak and did not receive sufficient funding from the Bosnian Government.⁵⁷ They appealed for maximum attendance at an upcoming donors' conference, arguing that it was critical to understand how much work remained to be done before cases could be transferred to Bosnia; this included construction of courtrooms and a detention facility, renovation of buildings for office

⁵⁵ 'Joint Conclusions of the Working Group of the ICTY and OHR Regarding the Domestic Prosecution of War Crimes in Bosnia and Herzegovina', The Hague, 21 February 2003, on file with author. See also: ICTY Press Archives (OHR/P.I.S./731e), 21 February 2003.

⁵⁶ Communiqué of the Peace Implementation Council, Steering Board, Political Directors, June 2003.

⁵⁷ *Ibid.*

space, enactment of laws to allow for the transfer of evidence and suspects from the ICTY, and hiring and training of local and international staff and judges and prosecutors.

In August 2003, the Security Council weighed in with Resolution 1503 calling on the international community to assist national jurisdictions to improve their capacity to prosecute cases transferred from the ICTY.⁵⁸ In September, the Peace Implementation Council called on the Bosnian authorities and potential contributors to attend the upcoming donors' conference and urged them to consider how they might support building the war crimes capacity in the Bosnian justice sector as soon as possible.⁵⁹

The broader political decision to bring the ICTY to completion provided a catalyst for turning the new commitment to judicial reform in Bosnia into a more concrete commitment to create a domestic judicial mechanism to handle war crimes trials. Without the political momentum to close the ICTY and the endorsement of the completion strategy by the Security Council, the War Crimes Chamber, with the capacity to try cases referred from the ICTY, would not have been created. Because of the completion strategy, the desperately needed funds and political consensus required to push forward national prosecutions and trials were provided for the first time since the end of the war. The War Crimes Chamber was largely born from the desire to shut down the ICTY rather than a long-term strategic plan to prosecute serious violations of international humanitarian law in Bosnia. Nevertheless, as some observers have pointed out, both the ICTY and the War Crimes Chamber have benefited from the completion process.⁶⁰ Due to the successful referral of cases to the Chamber, the Tribunal has been able to concentrate on its remaining caseload, including principally the most senior accused. On the other hand, the War Crimes Chamber has had the advantage of trying cases on which considerable preparatory work had been done by ICTY prosecutors.⁶¹

⁵⁸ UN Doc. S/RES/1503 (2003).

⁵⁹ Communiqué of the Peace Implementation Council, Steering Board, Political Directors, September 2003.

⁶⁰ David Tolbert and Aleksandar Kontic, 'The ICTY: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.156.

⁶¹ *Ibid.*

B. THE BOSNIAN WAR CRIMES CHAMBER

The hybrid war crimes sections in the Court and Prosecutor's Office of Bosnia and Herzegovina, commonly known as the War Crimes Chamber, were officially inaugurated on 9 March 2005. They have jurisdiction to investigate, prosecute and try cases transferred from the Tribunal for the former Yugoslavia under Rule 11bis of the Rules of Procedure and Evidence and highly sensitive national cases. The Court and Prosecutor's Office are independent national legal entities operating under and created by national law. The Court is composed of three divisions: the Criminal Division; the Administrative Division; and the Appellate Division. Within the Criminal and Appellate Divisions, two hybrid sections were created: Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption. During a five-year transitional period from 2005-2009, international judges were initially appointed by the High Representative to the hybrid Sections of the Criminal and Appellate Divisions.⁶² The authority to appoint international judges to the court subsequently transitioned to the independent national body the High Judicial and Prosecutorial Council.⁶³ The War Crimes Section in the Criminal Division was comprised of five hybrid trial panels. A panel was composed of three judges: two international and one national. As a rule, the President of a panel was a Bosnian judge.

In the Appellate Division, the War Crimes Section consisted of one second-instance panel. The panel was composed of three judges: two international and one national. Appeals against decisions of the hybrid trial panels were adjudicated by the judges of the Appellate War Crimes Section. The President of the appellate panel was Bosnian. The appointment of international judges to the Court was challenged before the Bosnian Constitutional Court in 2007. The appellant, who had been convicted of war crimes, alleged that the participation of international judges appointed by the High Representative, violated the independence and impartiality of the court since the judges

⁶² For the structure of the Court, the composition of panels and the appointment of international judges, see: Law on Court of Bosnia and Herzegovina -Consolidated Version-, Official Gazette of Bosnia and Herzegovina, No. 49/09.

⁶³ Article 8 of the amended Agreement between the High Representative and Bosnia and Herzegovina on the establishment of the Registry for the War Crimes and Organized Crime sections of the Court, Official Gazette of Bosnia and Herzegovina, No. 93/06.

‘exclusively depend [on] the entity which appointed them’.⁶⁴ Examining the jurisprudence of the European Court of Human Rights, the Constitutional Court held that the national laws regulating appointment created the mechanisms required to ensure the independence of judges from interference or influence by the executive or international authorities.

Unlike the *ad hoc* Tribunals or the Special Court for Sierra Leone, the Prosecutor’s Office of Bosnia and Herzegovina is not an integral part of the Court. As previously noted, the institution is an autonomous legal entity. There were two hybrid departments in the Prosecutor’s Office: the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption. The office was managed by a Bosnian Chief Prosecutor. Corresponding to the law regulating the hybrid Chambers in the Court, the Law on the Prosecutor’s Office declared that during the five-year transitional period international prosecutors could be appointed to the Special Departments.⁶⁵ The War Crimes department had six mixed prosecution teams: five regional teams and a special team dedicated to the Srebrenica massacre. One commentator has remarked that the role of the Registry in the Bosnian hybrid model should not be underestimated.⁶⁶ Established by an international agreement between the High Representative and Bosnia and Herzegovina, the Registry was an independent international institution which provided management and administrative support to the Court and Prosecutor’s Office of Bosnia and Herzegovina.⁶⁷ The Registry created the Witness and Victims Support Section in the Court. Witnesses were given assistance by psychologists before their appearance in court, during trials and also after proceedings ended. The Criminal Defense Office was created with responsibility for compiling and maintaining a roster of qualified defense lawyers. The Office organised training in

⁶⁴ *Abduladhim Maktouf* (AP-1785/06), Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, 30 March 2007.

⁶⁵ Law on the Amendments to the Law on the Prosecutor’s Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 61/04.

⁶⁶ See generally: William W. Burke-White, ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina’, 46 *Columbia Journal of Transnational Law*, 2008, pp.279-350.

⁶⁷ For the mandate of the Registry, see: Agreement between the High Representative and the Bosnian Presidency on the establishment of the Registry, Official Gazette of Bosnia and Herzegovina, International Agreements, No. 12/04. Also see: Law on the Amendments to the Law on the Prosecutor’s Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 61/04; Law on Court of Bosnia and Herzegovina -Consolidated Version-, Official Gazette of Bosnia and Herzegovina, No. 49/09.

criminal procedure, international criminal law and advocacy. A team of international and national lawyers provided legal advice, research and support in drafting motions. The Registry also supported and promoted the application of international standards by other actors in the state justice sector. It supported the creation of the State Police Witness Protection Department and provided an international advisor to train and manage the police officers. In addition, the Registry managed the construction of a maximum security detention facility and worked with the Ministry of Justice to guarantee respect for international standards in the detention of accused persons.

A distinctive feature of the Bosnian hybrid model was the pioneering policy developed by the Registry. A five-year transition strategy and implementation timelines were incorporated into the work plan of the institution from its inception.⁶⁸ The Registry initially introduced and paid for international staff in management and litigation positions in the Court and Prosecutor's Office. Over the five-year transition period from 2005-2009, internationals were gradually phased out by transferring authority to Bosnian staff and financial responsibility to the Bosnian State. Building the long-term sustainable capacity of the national institutions to try cases of genocide, crimes against humanity and war crimes was a primary objective of the Registry. The Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code was the effective criminal law in Bosnia during the 1991-1995 war. In 2003, as part of the judicial reform programme in Bosnia, substantive and procedural criminal laws – the Criminal Code and the Criminal Procedure Code of Bosnia and Herzegovina – were introduced at State level.⁶⁹ The Law regulating the transfer of cases and the use of evidence collected by the Yugoslavia Tribunal was subsequently implemented.⁷⁰ The 2003 Criminal Code aimed to clarify the international offences enumerated in the SFRY Code. Effectively, the 2003 law codified international obligations which were applicable in Bosnia at the time of the conflict. Chapter XVII includes detailed provisions on genocide, war crimes, and crimes against humanity.

⁶⁸ In 2006, the Registry Agreement was amended: the international Registrar was replaced by two national Registrars, one for the Court and one for the Prosecutor's Office. A Transition Council with monitoring and advisory role on issues affecting the transition and integration of national staff to the Bosnian institutions and budget was also created.

⁶⁹ Criminal Code and the Criminal Procedure Code, Official Gazette of Bosnia and Herzegovina, No.3/03.

⁷⁰ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06.

The death penalty was formally abolished in Bosnia in 1997. Consequently, under the 2003 Code, the maximum penalty is life imprisonment. Regarding the prohibition on retroactive application of criminal law, Article 4(1) of the Criminal Code provides that the law in effect at the time the offence was perpetrated shall be applied. However, the Code further provides that Article 4 (1) ‘shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.’ In 2007, Abduladhim Maktouf, who had been convicted for war crimes by the Court, challenged his sentence before the Constitutional Court. He argued that the retroactive application of a penalty in the 2003 Criminal Code violated Article 7 of the European Convention on Human Rights, which calls for application of the more lenient law. The Constitutional Court rejected his challenge, noting that the SFRY Code provided for the death penalty, thus, could not be considered more lenient. The Constitutional Court found that the retroactive application of the 2003 Criminal Code in sentencing for war crimes was permissible because such acts, at the time of their commission, were already criminal according to the ‘general principles of law recognized by civilized nations’.⁷¹ In addition, Article III (3)(b) of the Constitution established that ‘the general principles of international law shall be an integral part’ of Bosnian law.⁷²

C. THE LAW ON TRANSFER OF CASES AND EVIDENCE: A MODEL NATIONAL LEGAL FRAMEWORK FOR ‘REVERSE’ COOPERATION

(1) THE INTERNATIONAL AND NATIONAL PROCEDURAL REGIMES

In 2003, the Peace Implementation Council tasked the Office of the High Representative to establish and co-chair with the Bosnian Ministry of Justice an Inter-Agency Implementation Task Force to coordinate issues related to the creation of the War Crimes Chamber.⁷³ By the end of the year, nine working groups were striving to implement various aspects of the project, including the legal framework required to

⁷¹ *Abduladhim Maktouf* (AP-1785/06), Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, 30 March 2007, paras.70-79.

⁷² *Ibid.*, para.70.

⁷³ Peace Implementation Council, ‘Declaration by the PIC Steering Board’, 12 June 2003.

facilitate the transfer of cases from the ICTY.⁷⁴ One of the critical questions addressed by the joint ICTY-OHR working group on the legal framework was the future admissibility of evidence and information collected by the ICTY in trials before the War Crimes Chamber.⁷⁵ The fundamental legal issue was whether evidence collected in accordance with the procedural regime of the ICTY could be used in national trials without offending the fair trial rights of the accused. Two separate and distinct procedural regimes governing the conduct of criminal trials were at play, one international and the other national.

The rules of evidence before the ICTY are derived from the Rules of Procedure and Evidence and various principles established in the Tribunal's case law.⁷⁶ In accordance with Rule 89(A), a Chamber shall apply the rules of evidence set forth in the Rules and shall not be 'bound by national rules of evidence'.⁷⁷ Rule 89(A) is reinforced by pronouncements of the various Trial Chambers. In *Milošević*, Judge Patrick Robinson noted that 'the Tribunal's jurisprudence warns against the importation of domestic procedures "lock, stock and barrel" into the Tribunal's legal system'.⁷⁸ Appropriate rules of evidence, which would guarantee the accused a fair trial while at the same time protecting victims and witnesses, were explored in the *Tadić* case. Noting that Article 21 of the Statute, entitled 'Rights of the Accused', is drawn from Article 14 of the International Covenant for Civil and Political Rights, the Trial Chamber indicated that 'the terms of that provision must be interpreted within the "object and purpose" and

⁷⁴ See: Mechtild Lauth, 'Ten Years after Dayton: War Crimes Prosecutions in Bosnia and Herzegovina', (2005) 16 *Helsinki Monitor* 253, p.258. The Legal Working Group drafted a number of vital pieces of legislation, such as amendments to the Bosnian Criminal Code and Criminal Procedure Code, the Law on the Protection of Vulnerable Witnesses, amendments to the Law on Court and the Law on the Prosecutor's Office and the law on the transfer of cases from the ICTY to the Prosecutor's Office of BiH and the admissibility of evidence. In December 2004, the national Parliament adopted all the laws.

⁷⁵ See generally, David Tolbert and Aleksander Kontic, 'The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers 2009, p.147.

⁷⁶ For a detailed discussion in relation to evidence see, William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.452-500.

⁷⁷ ICTY RPE, Rule 89.

⁷⁸ *Milošević* (IT-02-54-T), Decision on Motion for Judgment of Acquittal (Separate Opinion of Judge Patrick Robinson), 16 June 2004, para.7.

unique characteristics of the Statute.⁷⁹ The decision of the Chamber in relation to the Prosecutor's request for protective measures for victims and witnesses declared:

The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.⁸⁰

Thus, the Tribunal interprets the provisions of its Statute and Rules within its own context to determine the meaning of fair trial; it is not bound by the jurisdiction or interpretation of other judicial bodies.⁸¹

However, the situation in Bosnia and Herzegovina differs considerably. Pursuant to Article II.2 of the Constitution, the European Convention of Human Rights is directly applicable in Bosnia with priority over all other law.⁸² Courts are precluded from basing a decision on evidence obtained in violation of international human rights law or through an essential violation of the Bosnian procedural laws. Thus, unlike the ICTY, the BiH State Court is bound by the European Convention of Human Rights. Prior to the establishment of the War Crimes Chamber, problems had occurred in other Bosnian courts regarding the admissibility of the ICTY's evidence. Judges had interpreted the criminal procedure law in a restrictive manner and dismissed, in trials, the use of evidence which had not been collected in accordance with national law. In the case of

⁷⁹ *Tadić* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para.26.

⁸⁰ *Ibid.*, para.28.

⁸¹ See Olivia Q. Swaak-Goldman, 'The ICTY and the Right to a Fair Trial: A Critique of the Critics', (1997) 10 *Leiden Journal of International Law* 215, p.218.

⁸² See: The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4, Article II - 'Human Rights and Fundamental Freedoms', 14 December 1995, initialled in Dayton, OH, 21 November 1995, printed in (1996) 35 *International Legal Materials* 75; Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms', (1950) 213 UNTS 222.

Dominik Ilijašević, the Zenica Cantonal Court dismissed an application by the prosecutor to admit into evidence videotaped interviews made by the ICTY Office of the Prosecutor with one of the witnesses in the case.⁸³ The Cantonal Court ruled that the videotaped interviews were inadmissible because the evidence was not obtained in accordance with the Federation Criminal Procedure Code.⁸⁴

In January 2003, the High Representative enacted a package of legislation to enable the BiH State Court to start work. The State Criminal Procedure Code set forth the mandatory procedure to be applied in proceedings before the War Crimes Chamber. Regarding the validity of evidence in national trials, Article 10(2) of the Code prescribes:

The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.⁸⁵

Since the State Criminal Procedure Code did not explicitly regulate the use of the ICTY's evidence in national trials, the joint ICTY-OHR working group raised concerns that decisions similar to the *Ilijašević* case, which rendered the Tribunal's evidence inadmissible, could in theory be issued by the War Crimes Chamber. This issue had to be resolved to ensure the Court had access to evidence which would be vital for the trial of cases referred under Rule 11bis and other national indictments. The primary objective was to create a legal framework which would ensure that the Chamber could use as much of the ICTY's evidence as possible and, thus, reduce the risk of a future conviction of the Chamber being overturned by the Constitutional Court or the European Court of Human Rights on procedural grounds. Even though the ICTY's evidence was collected in full

⁸³ See: Organisation for Security and Co-operation in Europe ('OSCE') Mission to Bosnia and Herzegovina, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', 2005, p.31.

⁸⁴ Article 8(2) of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina declares: 'The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties, nor on evidence obtained through essential violation of this Code'. Criminal Procedure Code of the Federation of Bosnia and Herzegovina, Official Gazette of FBiH No.43/98. This Code was replaced by the reformed Federation Criminal Procedure Code, Official Gazette of FBiH, No. 35/03.

⁸⁵ Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03.

respect of international human rights treaties, the possibility remained that the evidence did not comply with the national evidence rules.

To clarify the legal situation regarding the admissibility of the ICTY's evidence, one option was to introduce new legislation in Bosnia stipulating that evidence legally obtained by the ICTY should *ipso facto* be considered admissible.⁸⁶ The adoption of legislation similar to the Croatian Law on the Implementation of the Statute of the International Criminal Court was discussed.⁸⁷ The Croatian law regulates the admissibility of evidence collected by the ICC in national trials. Article 28(4) stipulates:

Evidence gathered by the organs of the International Criminal Court may be used in the criminal proceedings in the Republic of Croatia subject to conditions that they were taken in the manner prescribed by the Statute and the Rules on procedure and evidence of the International Criminal Court and may be used before that Court. The existence or nonexistence of facts sought to be proved by the aforementioned evidence shall be evaluated in accordance with Article 9 of the Criminal Procedure Act.⁸⁸

The provision applies *mutatis mutandis* to evidence collected by the ICTY. Therefore, if the two criteria stipulated in Article 28(4) are satisfied, evidence collected by the ICC or the ICTY is admissible in Croatian courts. Firstly, the evidence must be collected in accordance with the Statute and Rules of Procedure and Evidence of the respective courts. Secondly, the evidence must be admissible before the international courts. Although the adoption of similar legislation in Bosnia may have created an adequate

⁸⁶ The argument that the ICTY's evidence was *ipso facto* admissible before Bosnian courts was discussed in the context of cooperation mechanisms. International cooperation mechanisms in criminal matters recognize the principle of mutual recognition between states. The principle is found in the European Convention on the International Validity of Criminal Judgments (1970). Article 26 of the European Convention on the Transfer of Proceedings in Criminal Matters (1972) provides: 'Any act with a view to proceedings, taken in the requesting State in accordance with its law and regulations, shall have the same validity in the requested State as if it had been taken by the authorities of that State, provided that assimilation does not give such act a greater evidential weight than it has in the requesting State'. The issue was whether the principle of mutual recognition applies to international cooperation between a state dealing with an international tribunal with primacy over its national courts. However, Bosnia had not signed either convention, and there was no guarantee that the principles that apply between states shall apply between one state and an international tribunal.

⁸⁷ Unofficial translation of relevant extracts of the Croatian Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Criminal Offences Against International Law of War and Humanitarian Law (2003).

⁸⁸ *Ibid.*

basis for the use of evidence that was admitted before an ICTY Trial Chamber, the situation pertaining to information collected by the Office of the Prosecutor which had not been used in trials was slightly more complicated. Since the information had not previously been entered into evidence before the ICTY, to satisfy the second criteria, it remained to be determined whether the information could in fact be used before the Tribunal. Additionally, even if new legislation stipulating that evidence legally obtained by the ICTY should *ipso facto* be considered admissible in proceedings, the fact remained that the evidence had not been collected in accordance with the State Criminal Procedure Code. Considering the *Tadić* decision, Rule 89 of the ICTY Rules and the fact that the European Convention of Human Rights was directly applicable in Bosnia, it was decided that the adoption of legislation specifically regulating how each type of the ICTY's evidence could be introduced in national proceedings was the better approach.

(2) THE LAW ON TRANSFER OF CASES AND EVIDENCE

The Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence collected by the ICTY in Proceedings before the Courts in BiH⁸⁹ ('Law on Transfer') was designed as *lex specialis* to avert the risk of the ICTY's evidence being unusable in national trials. As *lex specialis*, the Law provides special rules for the transfer of cases with a confirmed indictment under Rule 11bis from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina; the adaptation of the ICTY indictment to make it compliant with the Criminal Procedure Code;⁹⁰ and the admissibility of evidence collected by the ICTY in proceedings before the Bosnian courts. In relation to the use of evidence collected by the ICTY in national trials, naturally, the Law on Transfer does not remove the obligation of the Bosnian courts to assure fairness in proceedings to accused persons. In fact, one of the main purposes of the

⁸⁹ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06.

⁹⁰ Rather than proceeding with a transferred case on the basis of the ICTY indictment and Statute, Article 2(1) provides that, when a case is transferred with a confirmed indictment pursuant to Rule 11bis, the Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment. The indictment shall be adapted to make it compliant with the Bosnian Criminal Procedure Code and the Court shall confirm the indictment if it is ensured that the ICTY indictment has been adequately adapted. Additional charges can be added. Furthermore, for cases transferred without a confirmed indictment, criminal proceedings shall be initiated under Bosnian law.

Law is to ensure that the defendants' right to a fair trial pursuant to Article 6 of the European Convention of Human Rights and Article 14 of the International Covenant on Civil and Political Rights are protected by national procedures, while also enabling the use of the ICTY's evidence in national proceedings.

In *Doorson vs. The Netherlands*, the European Court of Human Rights (European Court) reiterated two key principles in relation to the admissibility and use of evidence in national trials.⁹¹ Firstly, the Court stated that the admissibility of evidence in national trials should primarily be regulated by national law. Secondly, it stated that as a general rule it is for national courts to assess the evidence before them.⁹² The role of the European Court under the European Convention on Human Rights is not to decide whether the statements of witnesses were properly admitted as evidence. Rather, the Court's task is to decide whether the proceedings as a whole, and the manner in which the evidence was taken, were fair.⁹³ Thus, the European Court does not lay down specific rules of evidence to be applied by states; instead, it will consider whether the use of evidence in a given case violated the right of the accused to a fair trial. This was the human rights framework contemplated during the drafting of the Law on Transfer. Consequently, the provisions of the Law regulate the admission and use of different categories of the ICTY's evidence in national proceedings, while also containing safeguards which are designed to protect the fair trial rights of the accused. Article 3(1) of the Law establishes the general rule that evidence collected in accordance with the ICTY Statute and Rules may be used in proceedings before Bosnian courts. Article 3(2) reflects the principle enunciated by the European Court that courts shall not exclusively or to a decisive extent base a conviction on the prior statements of witnesses who the accused did not have the opportunity to cross-examine.⁹⁴

The concept of the BiH State Court taking judicial notice of adjudicated facts from other proceedings was not foreseen in the Criminal Procedure Code. There was little doubt that the trial of Rule 11bis and Srebrenica cases would be more effective if the War Crimes Chamber was empowered to take judicial notice of facts already adjudicated by

⁹¹ *Doorson v. The Netherlands*, Judgment, 26 April 1996, [1996] 22 EHRR 330.

⁹² *Ibid.*, para.67.

⁹³ *Ibid.*

⁹⁴ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 3(2).

the ICTY. Thus, to enable the Court to admit as much of the ICTY's evidence as possible, Article 4 of the Law on Transfer provides that, at the request of a party or *proprio motu*, the Court is authorised to 'accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.'⁹⁵ Furthermore, it was understood that the use of oral testimony given by witnesses in the ICTY's trials would also be crucial to the success of national proceedings. Consequently, it was essential to ensure that the national criminal procedural regime permitted for the use as evidence of transcripts of witness' testimony before the ICTY and depositions. Thus, Article 5(1) of the Law declares:

Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY [Rules], shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.⁹⁶

However, the introduction of the trial testimony of witnesses protected by the ICTY in national proceedings was a more complex matter in terms of compliance with the European Convention on Human Rights.⁹⁷ In numerous cases, the European Court has considered the use of statements of anonymous witnesses as evidence.⁹⁸ The Court has ruled that, although Article 6 of the Convention does not explicitly state that the interests of witnesses and victims should be taken into consideration, the principles of fair trial do

⁹⁵ *Ibid.*, Art. 4.

⁹⁶ *Ibid.*, Art. 5(1).

⁹⁷ See: ICTY RPE. Under Rule 75, a judge or chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided the measures are consistent with the rights of the accused. A Chamber can prevent disclosure to the public of the identity or location of a victim or a witness by expunging names and identifying information from the Tribunal's public records; assigning a pseudonym; permitting testimony by voice- or face distortion or closed circuit television; and not disclosing to the public any records identifying the victim.

⁹⁸ *Kostovski v. The Netherlands*, Judgment, 20 November 1989, [1990] 12 EHRR 234. In *Kostovski*, the Court found that the defendant's right to a fair trial had been violated. The defendant was found guilty in a judgment which predominantly relied on the minutes of testimonies of police officers who testified before an examining magistrate. In the course of the main trial, the witnesses were not heard again; their identities were not disclosed; and the defence was not given the opportunity to question the witnesses. The Court declared that, in principle, all evidence must be produced in the presence of the accused at a public hearing and, as a rule, that Article 6 rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.

require that, in appropriate cases, the interests of the defence are balanced against those of witnesses called to testify.⁹⁹ Obviously, this principle is of acute importance in war crimes trials when, frequently, the security and well-being of witnesses is at stake. Thus, Article 5(2) of the Law on Transfer provides that ‘courts may exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value’.¹⁰⁰ In addition, to protect the right of the accused to a fair trial, Article 5(3) prescribes that the defendant is entitled to request the attendance of witnesses for the purpose of cross-examination if transcripts of their ICTY testimony or records of their depositions are admitted as evidence.

The admissibility of statements made by expert witnesses in proceedings before the ICTY is also regulated by the Law on Transfer. Pursuant to Article 6(1), if the statement of an expert witness has been entered into evidence before an ICTY Trial Chamber it shall be admissible as evidence in national criminal proceedings, whether or not the expert attends to give oral evidence in those proceedings. In accordance with Article 6(3), the court shall admit an expert witness’ testimony by using the transcript of the testimony given before a Trial Chamber. Similar to the provisions of the Law governing the admission of witness’ transcripts and depositions, in order to protect the accused’s right to a fair trial, Article 6 (4) stipulates that the defendant is entitled to request the attendance of the expert witness for cross-examination or to call an expert witness on his behalf to challenge the statement of an expert witness given before the ICTY. Article 7 of the Law provides that the transcripts of testimonies given by persons during an ICTY investigation can be read out at the main trial in accordance with the terms stipulated in the Criminal Procedure Code. Finally, the Law regulates the admissibility of documents and forensic evidence collected by the ICTY. In accordance with Article 8(1), original documents, certified copies, and certified electronic copies can

⁹⁹ See: *Doorson v. The Netherlands*, Judgment, 26 April 1996, [1996] 22 EHRR 330, paras.70-76. Distinct from *Kostovski*, the Court held in *Doorson* that there had been no violation of the right to a fair trial because the Convention required the court to balance the interests of the defendants with the security of the witnesses. In this case, the defense counsel had been admitted to hearings held by an investigating judge regarding granting the witnesses anonymity before the main trial. Without knowing their identity, Counsel was put in a position to ask the witnesses whatever questions he considered in the interests of the defense except in so far as they might lead to the disclosure of the identity.

¹⁰⁰ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 5(2).

be used in national proceedings. In addition, forensic evidence collected by the ICTY can be used as evidence. Documents and forensic evidence shall be treated by the domestic courts as if they were collected by the competent national authorities.

In 2006, the Defence Counsel in the '*Kravica Warehouse*' case attempted to initiate proceedings before the Constitutional Court of Bosnia and Herzegovina challenging the constitutionality of the Law on Transfer.¹⁰¹ They maintained that Article 4, Article 5(3) and Article 6 of the Law violated the accused's right to a fair trial as protected by Article 6 of the European Convention and Article II.2 of the Constitution. Specifically, the argument was advanced that the respective articles of the Law on Transfer violated the rule of the direct presentation of evidence which guarantees an accused person the right to ensure the presence of a witness for cross-examination. The judges examined the Law on Transfer in the context of the established jurisprudence of the European Court. In accordance with the case law of the European Court, the judges agreed that the admissibility and evaluation of evidence are mainly issues on which the BiH State Court should decide. In addition, the Court is obliged to ensure that the entire proceedings are fair pursuant to Article 6 (1) of the European Convention. In this regard, the judges enumerated several guiding principles from the jurisprudence of the European Court to be applied by the BiH State Court. The judges explained that, as a rule:

[A]ll evidence has to be presented in the presence of the accused at the public hearing in order to present counter arguments; however, the use of the statements obtained in the pre-trial phase itself is not in contravention of Article 6 (1) and 3 (d) of the convention;

Nevertheless, the use has to be in line with the rights of the defence, which implies that the accused has to be given a suitable opportunity to challenge and examine a witness testifying against him either during the testimony of that witness or in the later phase of the proceedings;

¹⁰¹ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.*, First Instance Verdict, X-KR-05/24, 29 July 2008, para.240.

In cases where the accused did not have an opportunity to challenge the evidence presented by the witnesses, a national court may not base a convicting verdict on such evidence exclusively or to a decisive extent.¹⁰²

The Court was satisfied that the Law on Transfer was not inconsistent with the Constitution of Bosnia and Herzegovina or the European Convention on Human Rights since the guiding principles were incorporated in its provisions. In the judges' opinion:

The use of evidence obtained in the proceedings before the ICTY and accepting as proven the facts established in those proceedings is not, ... in violation of the European Convention, given that such use of the evidence does not call into question the fairness of the proceedings as a whole[...]¹⁰³

At some point in the future, the use of evidence collected by the ICTR and the ICC may be critical to the successful investigation and trial of perpetrators by domestic authorities. In this regard, the Law on Transfer offers valuable lessons regarding the admissibility of evidence collected in accordance with an international procedural regime, in proceedings before a national court governed by a different set of rules. Commenting on the mission of the ICC and the protection of human rights, the Appeals Chamber has declared:

Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.¹⁰⁴

Presumably, the philosophy of the Appeals Chamber in relation to the protection of fair trial standards in ICC trials is the same for domestic proceedings. Currently, cases from

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Lubanga* (ICC-01/04-01/06-772), Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para.39; see also: *Lubanga* (ICC-01/04-01/06-OA 12), Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo', 21 October 2008.

the situation in Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Côte d'Ivoire, and Kenya are at various stages of the proceedings before the ICC. The respective countries have acceded to the International Covenant on Civil and Political Rights. Therefore, the accused' right to a fair trial, as enumerated in Article 14 of the Covenant, should be protected in national proceedings. Pursuant to Article 93(10)(b)(i)(1), the Court may assist a State conducting proceedings by providing statements, documents or other types of evidence obtained during an investigation or trial carried out by the ICC. If, in the future, any of the above mentioned states are willing and genuinely prepared to carry out trials, the introduction and use of evidence collected by the ICC may be invaluable. It is suggested that the Law on Transfer is a model legal framework for the implementation of 'reverse' cooperation. As part of the positive complementarity regime, the Office of the Prosecutor intends to encourage states to ratify the Rome Statute and adopt complementary implementing legislation to create a legal framework to give police, prosecutors and judges the required laws to combat impunity.¹⁰⁵ Considering the pronouncement of the Appeals Chamber, it is reasonable to expect that the ICC will only transmit evidence it has collected to a State that is willing and genuinely prepared to conduct criminal proceedings and respect the internationally recognised fair trial standards. The Law on Transfer has given Bosnian police, prosecutors, and judges the necessary legal basis to use critical evidence collected by the ICTY while, at the same time, guaranteeing the rights of the accused. It constitutes complementary legislation designed to implement the Rule 11bis referral process and better equip the Bosnian authorities to combat impunity. Similarly, the Rwandan Organic Law which regulates the transfer of cases from the ICTR aims to achieve the same goal.¹⁰⁶ Following the decision of the ICTR Appeals Chamber to refer the *Uwinkindi* case in accordance with the terms of Rule 11bis to Rwanda for trial, the effectiveness of

¹⁰⁵ See: Christopher Keith Hall, 'Developing and Implementing an Effective Positive Complementarity Prosecution Strategy', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.220.

¹⁰⁶ Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 16 March 2007, as amended by Organic Law No.3/2009 modifying and complementing the Organic Law No.11/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of Republic of Rwanda, 26 May 2009.

the Organic Law may be determined by an analysis of its application in future national trials.¹⁰⁷

D. POSITIVE COMPLEMENTARITY AND REVERSE COOPERATION IN PRACTICE: THE SREBRENICA TRIALS IN BOSNIA

Following the fall of Srebrenica in July 1995, the VRS and the Republika Srpska Ministry of Interior devised and implemented the plan to execute the Bosnian Muslim men from the enclave. The VRS and police forces captured, detained, forcefully relocated, summarily executed, and buried over 7,000 Muslim men from Srebrenica and forcefully relocated the Bosnian Muslim women and children out of the enclave.¹⁰⁸ Ten years later, the Prosecutor's Office of Bosnia and Herzegovina indicted 11 suspects for their participation in the massacre of over 1,000 Muslim men and boys at the Kravica Warehouse. The introduction of the ICTY's evidence from various Srebrenica trials was essential to the effective trial of the Kravica case. For example, the final ICTY verdict against Radislav Krstić and the first instance verdict in Blagojević and Jokić determined that the Kravica Warehouse was used by the VRS and police as an execution site.¹⁰⁹ In addition, due to the work of the ICTY investigators in Bosnia directly after the war, forensic evidence which would otherwise have been destroyed, was secured and preserved. Ten years later, this forensic evidence assisted the War Crimes Chamber in getting an objective picture of what had taken place at Srebrenica.¹¹⁰

Evidence from the ICTY is admitted in the majority of war crimes proceedings before the War Crimes Chamber. The various categories of evidence and the most contentious issues in relation to its use in the Bosnian Srebrenica trials will be examined below. In addition, the relationship between the Law on Transfer, the Criminal Procedure Code and the jurisprudence of the European Court of Human Rights will also be analysed in the context of the proceedings before the Chamber.

¹⁰⁷ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

¹⁰⁸ See generally: *Krstić* (IT-98-33-T), Judgment, 2 August 2001.

¹⁰⁹ *Blagojević and Jokić* (IT-02-60-T), Judgment, 17 January 2005, paras.296-303. The accused were sentenced to 15 and nine years imprisonment, respectively, by the ICTY for aiding and abetting in the persecutions of the Srebrenica Bosnian Muslim population.

¹¹⁰ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KR-05/24), Indictment, 19 December 2005, pp.8-18.

(1) PRIOR ICTY STATEMENTS AND TESTIMONY OF THE ACCUSED

During the Srebrenica massacre, Captain Milorad Trbić was the assistant of Drago Nikolić, the Chief of Security of the VRS Drina Corps' Zvornik Brigade. In 2005, the ICTY joined six Srebrenica cases against nine accused, including Trbić and Nikolić, into a single case – *Popović et al.* The indictment charged the accused with genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war.¹¹¹ Subsequently, the case of Trbić was severed from the *Popović et al.* indictment.¹¹² On 27 April 2007, pursuant to Rule 11bis, the ICTY Referral Bench ordered the referral of the *Trbić* case to the War Crimes Chamber for trial.¹¹³ On 16 October 2009, the BiH State Court sentenced Trbić to 30 years imprisonment.¹¹⁴

Although the provisions of the Law on Transfer regulate the admissibility of transcripts of witness' testimony given before the ICTY, the law does not explicitly set forth rules on the admission of statements or testimony an accused person may have previously given to the Tribunal in their capacity as a suspect. In proceedings before the War Crimes Chamber, the admissibility of self-incriminating statements of the accused in their own trials has raised the critical question whether their use would offend the basic principles of fair procedure inherent in Article 6(1) of the European Convention. Although the right to silence and the right not to incriminate oneself are not specifically mentioned in Article 6, in *Saunders v. the United Kingdom*, the European Court recalled that the rights are generally accepted as international standards central to the notion of fair procedure.¹¹⁵ During the *Trbić* trial, the Prosecutor's Office requested the court to admit as evidence various statements the accused had given to the ICTY in his capacity as a suspect. The Prosecutor argued that the transcripts of previous examinations of the

¹¹¹ *Popović et al.* (IT-05-88-PT), Second Consolidated Amended Indictment, 14 June 2006. The cases joined to the trial were: *Beara* (IT-02-58); *Borovčanin* (IT-02-64); *Drago Nikolić* (IT-02-63); *Pandurević and Trbić* (IT-05-86); and *Popović* (IT-02-57).

¹¹² *Popović et al.* (IT-05-88-T), Decision on Removal of Charges Against Milorad Trbić and Zdravko Tolimir, 14 September 2006.

¹¹³ *Milorad Trbić* (IT-05-88/1-PT), Decision on Referral of Case Under Rule 11bis with Confidential Annex, 27 April 2007.

¹¹⁴ *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić* (X-KR-07/386), Judgment, 16 October 2009. An Appellate Panel in the Court of Bosnia and Herzegovina upheld the trial verdict in its entirety, see: *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić* (X-KRŽ-07/386), Second Instance Verdict, 21 October 2010.

¹¹⁵ *Saunders v. United Kingdom*, Judgment, 17 December 1996, [1996] 23 EHRR 313.

accused by the ICTY investigators were admissible under Article 3 of the Law on Transfer.¹¹⁶ In addition, the court was requested to admit the testimony given by the accused during the *Blagojević* trial. Trbić had testified in that trial as a suspect and was fully informed of his rights under Rule 42 of the ICTY Rules of Procedure and Evidence. He had voluntarily waived his rights and, at no point during the trial testimony, did the Trial Chamber compel him to answer any questions. Trbić gave all of his testimony freely and voluntarily.

To determine whether the statements were admissible, the judges examined the relevant provisions of Bosnian law, the ICTY Rules of Procedure and Evidence and the jurisprudence of the European Court. Article 3 (1) of the Law on Transfer sets forth the general principle that evidence collected in accordance with the ICTY Rules may be used in proceedings before the Bosnian courts. Thus, when determining if the statements given by Trbić before the ICTY Trial Chamber in the *Blagojević* trial could be used, the first element the judges had to establish was whether the evidence was legally collected. In this regard the panel referred to Rule 42 and Rule 92 of the ICTY RPE. Rule 42 enumerates the rights of suspects during investigations which include the rights to remain silent and to be cautioned that statements will be recorded and may be used in evidence. Rule 92 prescribes that it shall be presumed that a confession given by the accused during an examination by the Prosecutor was given voluntarily unless it is proven otherwise. In addition, the Court referred to the relevant provisions of the Criminal Procedure Code. Article 10 (1) of the Code provides that it is forbidden ‘to extort a confession or any other statement from the suspect, the accused or any other participant’ in criminal proceedings. Article 10(2) additionally stipulates that:

The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of [the code].¹¹⁷

¹¹⁶ *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić* (KT-RZ-139/07), Decision on the Motion of the Prosecutor's Office of Bosnia and Herzegovina dated 29 October 2007 for the Acceptance of Previous Accused Questioning Records and the Records from the Trials before ICTY, 18 January 2008.

¹¹⁷ Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03, Art. 10(2).

Citing *Murray v. United Kingdom*, the judges noted that the right to silence is not absolute and that the accused may waive his right to silence and his right to avoid self-incrimination during the proceedings.¹¹⁸ Based on Article 6 of the European Convention, the relevant provisions of Bosnian law, and the Rules of Procedure and Evidence, the Court identified a set of criteria to be applied when determining whether self-incriminating statements of the accused should be used in their own trials before the War Crimes Chamber.¹¹⁹ It should be determined whether the accused was informed of his rights in a language he understood; whether the accused was informed of his right to be assisted by counsel of his choice or to be assigned legal assistance without payment; whether the accused was informed of his right to remain silent and cautioned that any statement he made shall be recorded and may be used in evidence. In the case of questioning without counsel, it should be determined whether the accused voluntarily waived the right to counsel.¹²⁰ In the *Trbić* trial, the Court found that the testimony given by the accused before the ICTY satisfied the requirements of the ICTY Statute and Rules. Therefore, it constituted admissible evidence within the meaning of Article 3(1) of the Law on Transfer. Trbić had been cautioned by the ICTY of his right to silence and his right to avoid self-incrimination. Nevertheless, he had voluntarily waived those rights on the record. Consequently, the judges found that the evidence had not been obtained in violation of Article 6 of the Convention and was not legally invalid evidence within the meaning of Article 10(2) of the Criminal Procedure Code.¹²¹ Therefore, the transcripts of statements made by Trbić during interviews with the ICTY Office of the Prosecutor, an FBI deposition given in the USA, and his testimony in the *Blagojević* trial were used as evidence in his trial pursuant to the Law on Transfer.¹²²

Nevertheless, in the *Kravica Warehouse* trial, the judges ruled that the evidence given by one of the accused, Miloš Stupar, during his testimony in the *Blagojević* trial

¹¹⁸ *Murray v. United Kingdom*, Judgment, 8 February 1996, [1996] 22 EHRR 29.

¹¹⁹ *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić* (KT-RZ-139/07), Decision on the Motion of the Prosecutor's Office of Bosnia and Herzegovina dated 29 October 2007 for the Acceptance of Previous Accused Questioning Records and the Records from the Trials before ICTY, 18 January 2008, p.7.

¹²⁰ *Ibid.*, p.8.

¹²¹ *Ibid.*, p.9.

¹²² *Ibid.*, p.1.

was inadmissible.¹²³ Unlike Trbić, who voluntarily waived his rights and freely testified, Stupar was in fact compelled to answer questions and disclose everything he knew about the matters on which he was questioned during the ICTY trial.¹²⁴ Thus, Rule 90(E) of the ICTY Rules was applicable to his testimony. Rule 90(E) provides that a witness may object to making any statement which may be self-incriminating. However, the Chamber may compel the witness to answer any question. In accordance with Rule 90(E), the protection then afforded to the witness is that the compelled testimony shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. Consequently, the judges determined that the use of any self-incriminating statements given by Stupar in the *Blagojević* trial in accordance with Rule 90 would compromise his right to a fair trial as protected by Article 6 of the European Convention and the Criminal Procedure Code. Although the accused had testified before the Tribunal, he did not knowingly and voluntarily waive his right to silence and his right to avoid self-incrimination.¹²⁵ Thus, his trial testimony was not admissible as evidence in his trial before the War Crimes Chamber.

During the *Kravica* proceedings, the Prosecutor also proposed that the statements of the accused, Miloš Stupar and Milenko Trifunović, given to the ICTY investigators, in their capacity as suspects, be admitted and used as evidence. The use of the ICTY's investigation statements as evidence in national trials is regulated by Article 7 of the Law on Transfer. Article 7 provides that statements given during an investigation may be used as evidence by reading them out at the main trial in accordance with Article 273(2) of the Criminal Procedure Code.¹²⁶ Article 273 of the Code constitutes an exception to the direct presentation of evidence at the main trial if certain criteria are satisfied. Article 273(2) provides that testimony given during an investigation may be used as evidence 'only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important

¹²³ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KR-05/24), First Instance Verdict, 29 July 2008, pp. 277-278. See also: *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KRŽ-05/24), Appellate Verdict, 9 September 2009, paras.58-69.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, p.278.

¹²⁶ Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 7.

reasons.¹²⁷ In the *Kravica* case, the statements of the accused, which the Prosecutor sought to have admitted as evidence, were given to ICTY investigators during suspect interviews in 2002. The accused did not give the statements to the national authorities during their investigation of the *Kravica* case in 2005. The Court ruled that Article 273(2) does not refer to persons who gave their statements as suspects in a previous investigation, and who subsequently are accused persons in their own case. Rather, the provision regulates the use of statements given during the investigation phase of the case in which the introduction of those statements is sought. In addition, none of the criteria set forth in Article 273(2) were applicable to the accused in their own case since the presence of the accused was a prerequisite for trial and their death, insanity, or absence would stop the main trial from going ahead. The judges determined that Article 7 does not apply to the accused in their own case.¹²⁸ Thus the statements of the accused, Miloš Stupar and Milenko Trifunović, given to ICTY investigators in 2002, were excluded.

(2) PRIOR ICTY STATEMENTS AND TESTIMONY OF WITNESSES

In the case of *Radomir Vuković et al.*, the accused were indicted by the Prosecutor's Office of Bosnia and Herzegovina and charged with genocide for their participation in the 1995 Srebrenica massacre.¹²⁹ During the trial, the Prosecutor petitioned the Court to admit transcripts of witness' testimony from the ICTY cases against *Radislav Krstić*, *Vidoje Blagojević*, *Popović et al.* and *Momir Nikolić*.¹³⁰ The Prosecutor also requested the Court to admit into evidence the statements of witnesses given to the ICTY's Office of the Prosecutor as well as statements of a deceased witness.¹³¹

The admission and use as evidence of transcripts of witness' testimony given during proceedings before the ICTY raised the issue of the right of the accused to cross-

¹²⁷ Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03, Art. 273(2).

¹²⁸ *Ibid.*, p.277.

¹²⁹ *Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković et al.* (KT-RZ-53/08), Indictment, 26 August 2008.

¹³⁰ See generally: *Krstić* (IT-98-33-A), Judgment, 19 April 2004; *Blagojević* (IT-02-60-A), Judgment, 9 May 2007; *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010; *Nikolić* (IT-02-60/1-S), Judgment, 2 December 2003.

¹³¹ *Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković et al.* (KT-RZ-53/08), Indictment, 26 August 2008, para.55.

examine witnesses. In accordance with Article 262(1) of the Criminal Procedure Code, direct, cross, and redirect examination of witnesses shall always be permitted. The limited exceptions to the direct presentation of evidence are enumerated in Article 273(2) of the Code. Although the Law on Transfer was designed as *lex specialis* to eliminate the risk of the ICTY's evidence being excluded on the grounds that it was not in compliance with provisions of the Criminal Procedure Code, the Law did not eliminate the overriding obligation of the BiH State Court to guarantee the accused a fair trial. In accordance with the jurisprudence of the European Court, the general principles of a fair trial include the right of the accused to confront witnesses at a public hearing as well as the right to contest evidence and cross-examine witnesses. Consequently, Article 5(3) of the Law on Transfer provides that an accused is entitled to request cross-examination of a witness if the Court decides to admit as evidence transcripts of testimony given before the ICTY or records of depositions. If transcripts of the testimony of a witness in proceedings before the ICTY are used in a national trial but it is not possible to cross-examine the witness, as prescribed by Article 3(2), a court shall not base a conviction solely or to a decisive extent on the prior testimony of the witness.¹³² Therefore, if the accused in proceedings before the War Crimes Chamber does not have the opportunity to cross-exam witnesses, the prior testimony or transcripts of the witnesses can, at most, be used solely for corroboration of other direct evidence of guilt.¹³³

In *Vuković et al.*, the transcripts of witness' testimony from various ICTY Srebrenica trials were admitted and used as evidence.¹³⁴ This evidence included the testimony of a number of perpetrators who had previously been convicted by the Tribunal for their participation in the atrocities committed in Srebrenica. For example, the testimony of Momir Nikolić, the former Assistant Commander for Security and Intelligence of the Bratunac Brigade of the VRS, in the *Blagojević* trial was admitted.¹³⁵

¹³² ICTY Statute, Art. 3(2).

¹³³ Unofficial Translation of *Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković et al.* (KT-RZ-53/08), Decision on the Prosecutor's Motion to Admit Transcripts of ICTY Testimony, 19 February 2009, p.6.

¹³⁴ Transcripts from: *Blagojević and Jokić* (IT-02-60-A), Judgment, 9 May 2007; *Krstić* (IT-98-33-A), Judgment, 19 April 2004; *Popović et al.* (IT-05-88-T) Revised Second Consolidated Amended Indictment, 4 August 2006; *Momir Nikolić* (IT-02-60/1-A), Judgment, 8 March 2006.

¹³⁵ The transcripts of testimony of witness Momir Nikolić in the *Blagojević* trial given on 19, 22, 23, 25, 26, 29 and 30 September 2003 were admitted.

Nikolić was sentenced to 20 years imprisonment by the ICTY.¹³⁶ Additionally, the testimony given by Dragan Obrenović, the former Deputy Commander of the Drina Corps of the VRS, in ICTY proceedings was admitted.¹³⁷ Obrenović was sentenced to 17 years imprisonment for his participation in the execution of approximately 1,200 Bosnian Muslim civilians from Srebrenica at the Branjevo Farm.¹³⁸ Although the testimony given by Miloš Stupar in the *Blagojević* trial could not be used in his own trial, the court did admit the transcripts in the *Vuković et al.* trial.¹³⁹ Even though the records of testimony were admitted as evidence, the witnesses did not attend the trial for cross-examination. Consequently, to protect the accused' right to a fair trial, the use of the evidence was subject to the limitation that the BiH State Court could not base a conviction solely or to a decisive extent on the prior statements of Momir Nikolić or Dragan Obrenović.

In addition, in the *Vuković* case, under Article 3 of the Law on Transfer, the Court used statements given during investigations that were admitted into evidence in proceedings before the ICTY's Trial Chambers. These pieces of evidence included transcripts of interviews conducted during ICTY investigations which had subsequently been admitted in the *Blagojević*, and *Popović et al.* trials. However, the Panel refused to use as evidence statements of witnesses given to the ICTY Office of the Prosecutor which were not used as evidence in ICTY proceedings. The principle is set forth in Article 3 of the Law on Transfer that evidence collected in accordance with the ICTY Statute and Rules may be used by national courts. Therefore, unless the statements were used as evidence before the ICTY, the judges decided that the Law on Transfer did not apply and the material could not be used in national proceedings. Finally, pursuant to Article 273(2) of the Criminal Procedure Code, the Court permitted four statements of the deceased witness Miroslav Deronjić to be read out at the trial.¹⁴⁰

(3) JUDICIAL NOTICE OF PROVEN FACTS

¹³⁶ See: *Nikolić* (IT-02-60/1-A), Judgment, 8 March 2006.

¹³⁷ The transcripts of testimony of witness Dragan Obrenović in the *Blagojević* trial given on 1, 2, 6, 7, 8, 9, 10 October 2003 were admitted.

¹³⁸ *Obrenović* (IT-02-60/2-S), Sentencing Judgment, 10 December 2003.

¹³⁹ The transcripts of testimony of witness Miloš Stupar in the *Blagojević* trial given on 28 and 29 April 2004 were admitted.

¹⁴⁰ The transcript of testimony of witness Miroslav Deronjić in the *Momir Nikolić* trial given on 28 October 2003 was admitted. See also: *Deronjić* (IT-02-61-A), Judgment, 20 July 2005.

At the request of the parties or *proprio motu*, pursuant to Article 4 of the Law on Transfer, Bosnian courts have the discretion to ‘accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.’¹⁴¹ To an extent, this provision mirrors Rule 94 (B) of the ICTY Rules of Procedure and Evidence, which permits a Trial Chamber to take judicial notice of adjudicated facts.

Although Article 4 permits the BiH State Court to accept as proven facts proposed by the Prosecutor, neither the Law on Transfer, nor the Criminal Procedure Code stipulate criteria to guide the judges in their determination whether it is possible to accept the facts as proven or not. In the *Kravica* case, in an effort to exercise their discretion in a transparent manner, the Trial Panel listed the criteria it applied in accepting the facts.¹⁴² The judges developed the criteria to ensure the protection of the rights of the accused afforded under national law. In addition, although the BiH State Court is not bound by the jurisprudence of the ICTY, in determining the criteria, the judges did take into account the Tribunal’s interpretation of Rule 94. In *Kravica*, the Court considered, *inter alia*, the following criteria for accepting an established fact as proven: a fact must truly be a ‘fact’, that is: Sufficiently distinct, concrete and identifiable; not a conclusion, opinion or verbal testimony; not a characterisation that is of a legal nature; the fact must not directly or indirectly confirm the criminal liability of the accused; and a fact must be “established by a legally binding decision” of the ICTY, which means that the fact was either affirmed or established on appeal or not contested on appeal, and that no further opportunity to appeal is possible.¹⁴³ The Trial Panel also concluded that the legislative purpose of giving the Court the discretion to accept as proven adjudicated facts included: the promotion of the accused’ right to be tried without delay; the need to establish a balance between the right of the accused to a fair trial and the need to minimise the number of appearances of witnesses who must repeat their testimony in several cases;

¹⁴¹ See: Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 4.

¹⁴² *Prosecutor’s Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KR-05/24), First Instance Verdict, 29 July 2008, p.248.

¹⁴³ *Ibid.*, p.249.

and judicial economy.¹⁴⁴ At the same time, the judges stated that the intent of the law had to be balanced with the accused' right to the presumption of innocence and a fair trial. The Panel ruled that the acceptance of adjudicated facts was not in violation of Article 6, provided that it does not threaten the fairness of the proceedings as a whole. In this regard, in order to preserve the fairness of the trial as a whole, the parties were entitled to challenge a fact at trial. They could present to the Court evidence which would challenge the validity of the established fact.¹⁴⁵ The Appellate Panel agreed with the position of the Trial Panel that the decision to accept established facts basically represents a decision to admit exhibits into evidence.¹⁴⁶ The Court was not bound to accept adjudicated facts in its final verdict. In fact, the weight each piece of evidence was given, if any, would be determined by the Panel in its final deliberations and verdict.

In the course of the *Kravica* trial, the Prosecutor requested the court to accept as proven a variety of facts established by the final judgments of the ICTY in the *Krstić*, *Momir Nikolić*, and *Obrenović* trials.¹⁴⁷ In accordance with the criteria set forth, the judges accepted as proven a variety of concrete facts, including;

In July 1995, following the takeover of Srebrenica, Bosnian Serb forces executed several thousand Bosnian Muslim men. The total number of the victims is likely to be within the range of 7,000-8,000 men;¹⁴⁸ and

[t]he personal documents and items were taken from both the Bosnian Muslim men in Potočari, and the men captured in the column, then piled up and burnt.¹⁴⁹

The Prosecutor also sought to have facts from the *Krstić* judgment accepted as proven. The time that the accused in the *Kravica* case allegedly committed the offences charged, was the same period of time, according to the *Krstić* judgment, that genocide and a widespread and systematic attack on the civilian population took place in Srebrenica. The

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, p.250.

¹⁴⁶ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KRŽ-05/24), Appellate Verdict, 9 September 2009, para.291.

¹⁴⁷ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KR-05/24), First Instance Verdict, 29 July 2008, pp.244-253.

¹⁴⁸ *Ibid.*, p.245.

¹⁴⁹ *Ibid.*, p.247.

proposed facts established that there was a joint criminal enterprise, the common purpose of which was to capture and summarily execute all Bosnian Muslim males from the Srebrenica area. The participants in the enterprise included personnel from the VRS and the police. The Prosecutor opined that the facts did not unduly prejudice the rights of the accused, who were police officers, since the trial panel would still have to decide if the accused possessed the *dolus specialis* for the offence of genocide. However, the judges decided that the proposed facts did not satisfy the criteria since they represented legal conclusions of the ICTY chambers and directly or indirectly incriminated the accused.¹⁵⁰

In addition, the proposed facts derived from the *Nikolić* and *Obrenović* plea agreements were not allowed. The defence argued that facts derived from judgments based on plea agreements with the ICTY did not meet the requirements set out in Article 4 of the Law on Transfer.¹⁵¹ Since judgments derived from plea agreements lacked the entire trial and evidentiary proceedings, it could not be said that the facts were established. Instead, the facts were derived from an accused in whose interest it may have been to admit certain things for certain benefits. In accordance with the criteria, the acceptance of the *Nikolić* and *Obrenović* facts was not allowed since there was no common interest of the accused in the case before the ICTY and the accused in the *Kravica Warehouse* case.

(4) FORENSIC EVIDENCE AND EXPERT REPORTS FROM THE ICTY SREBRENICA TRIALS

Pursuant to the Law on Transfer, the War Crimes Chamber is entitled to accept documentary evidence from ICTY proceedings relating to matters at issue in the national trial.¹⁵² Under Article 8, original documents, certified copies, certified electronic copies, and forensic evidence collected by the ICTY shall be treated as if they were obtained by the competent authorities in Bosnia. In addition, the expert witness' statements entered into evidence before an ICTY Trial Chamber are admissible, whether or not the expert

¹⁵⁰ *Ibid.*, p.250.

¹⁵¹ *Ibid.*, p.248.

¹⁵² Bosnian Law on Transfer of Cases and Evidence, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06 and 76/06, Art. 4.

attends to give oral evidence at the trial.¹⁵³ Of fundamental importance to the Srebrenica proceedings before the War Crimes Chamber was the ICTY's forensic evidence. Since 1996, the ICTY Office of the Prosecutor conducted exhumations of 21 graves related to the crimes committed at Srebrenica. Experts in ballistic analysis and analysis of soil and fabrics worked with the Office of the Prosecutor to make comparative tests of the fabrics and remains found in primary and secondary graves to establish connections between certain graves and execution sites.¹⁵⁴ Essentially the forensic evidence was required in the Bosnian trials to corroborate the allegations by the Prosecutor that following the fall of Srebrenica, thousands of Bosnian Muslim men were summarily executed and buried in mass graves.¹⁵⁵

During the *Kravica* trial, the Prosecutor requested the Trial Panel to use a variety of evidence collected by the ICTY. This included the reports and testimony of ICTY investigators, who were involved in the exhumation and the coordination of all evidence from the Srebrenica exhumation project. A variety of other reports were put forward, including the US Navy Investigative Service's report on review and finding of evidence from the Kravica warehouse; the report on the number of missing and the dead in Srebrenica; the report on blood and tissue samples found in the warehouse; the report on digging out and exhumation of mass graves; and the report by the Chief Pathologist on mass burial sites of Srebrenica, ICTY, 1999.¹⁵⁶ The War Crimes Chamber judges interpreted the word statement contained in Article 6(1) to be the equivalent of a written report or 'findings and opinion of an expert'.¹⁵⁷ Consequently, the various reports were considered as the findings of persons recognised by the ICTY as experts and were accepted as evidence in the *Kravica* trial.

As outlined in this Chapter, during the war in the former Yugoslavia, members of the Bosnian Serb Political and Governmental organs; the commanders and senior officers of the Army of the Republika Srpska (VRS) and the Bosnian Serb Ministry of Internal Affairs participated in a joint criminal enterprise to eliminate the Bosnian Muslims in

¹⁵³ *Ibid.*, Art. 6(1).

¹⁵⁴ See generally: *Prosecutor's Office of Bosnia and Herzegovina v. Milos Stupar et al.* (KT-RZ-10/05), Indictment, 12 December 2005.

¹⁵⁵ *Ibid.*, p.33.

¹⁵⁶ *Ibid.*, p.27.

¹⁵⁷ *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.* (X-KR-05/24), First Instance Verdict, 29 July 2008, p.261.

Srebrenica.¹⁵⁸ In July 1995, over 7,000 Bosnian Muslim men and boys from Srebrenica were summarily executed and the Muslim women, children and elderly were forcibly removed from the enclave.¹⁵⁹ Considering the number of perpetrators, for an appropriate judicial response to the atrocities committed in Srebrenica, it remains critically important that justice is delivered both at the international and national level. As a result of the Rule 11bis case referral process, the ICTY and the War Crimes Chamber complement each other in the shared effort to hold the perpetrators of the Srebrenica genocide accountable. The most senior Bosnian political and military leaders who allegedly orchestrated the genocide, Radovan Karadžić and General Ratko Mladić, are on trial before the ICTY.¹⁶⁰ The Tribunal has already convicted senior figures including Radislav Krstić, the Chief of Staff of the Drina Corps.¹⁶¹ Other Srebrenica proceedings are ongoing before the ICTY against senior members of the VRS main staff and the Commander of the Ministry of Internal Affairs joint police units.¹⁶² In Bosnia, some Srebrenica trials have been completed and others are ongoing before the War Crimes Chamber.¹⁶³ The successful transfer of cases to the War Crimes Chamber under Rule 11bis and the *de facto* two-tiered prosecution strategy between the Tribunal and the national authorities which has evolved as a consequence of the referral process are a solid example of positive complementarity in practice. The application of the Law on Transfer in the trials before the War Crimes Chamber also shows how the theory of positive complementarity can actually be successfully applied in practice.

¹⁵⁸ *Karadžić* (IT-95-5/18-PT), Third Amended Indictment, 19 October 2009, para.22.

¹⁵⁹ *Ibid.*, para.47.

¹⁶⁰ *Mladić* (IT-09-92), Amended Indictment, 10 October 2002.

¹⁶¹ *Krstić* (IT-98-33-A), Judgment, 19 April 2004.

¹⁶² *Popović et al.* (IT-05-88), Revised Second Consolidated Amended Indictment, 4 August 2006.

¹⁶³ *Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković et al.* (X-KR-06/180-2), Indictment, 26 August 2008; *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar* (X-KRŽ-05/24), Appellate Verdict, 9 September 2009. Note: Regarding the accused Miloš Stupar, the Appellate Panel found that the Verdict's Operative Part did not contain the factual grounds specifying the acts of the accused that constituted a criminal offense, nor did it encompass all the elements of the offense. Therefore the Appellate Panel found that the Verdict's Operative Part could not be examined. The Trial Verdict against Stupar was revoked and a retrial ordered to correct the violations of the Criminal Procedure Code. The sentences ranging between 28 – 33 years for 5 other co-accused were upheld by the Appellate Panel; see: *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić* (X-KRŽ-07/386), Second Instance Verdict, 21 October 2010. Trbić was found guilty of genocide and was sentenced to 30 years imprisonment.

CONCLUSION

The broader political decision to end the mandate of the ICTY provided a catalyst for including the creation of the War Crimes Chamber in the comprehensive judicial reform plan in Bosnia.¹⁶⁴ Without the political momentum to close the ICTY and the endorsement of the Completion Strategy by the Security Council, the War Crimes Chamber with the capacity to try cases referred from the ICTY would not have been created. To implement the Completion Strategy the ICTY formalised a two-tiered approach to the prosecution of the atrocities committed during the Bosnian war. The Tribunal concentrates cases on the most senior leaders, intermediary and lower rank accused are transferred under Rule 11*bis* to the War Crimes Chamber for trial. The principle of classical complementarity enshrined in the Rome Statute is reflected in Rule 11*bis*. However in accordance with the terms of Rule 11*bis* complementarity operates in reverse. The ICC tests the adequacy of national systems to determine if cases are admissible pursuant to Article 17. On the other hand, pursuant to Rule 11*bis* the ICTY Referral Bench tests the adequacy of national systems to determine if cases are transferable to national courts for trial.

Since 2005, the Tribunal has transferred six cases involving ten accused to the War Crimes Chamber. In addition to the trials of the accused transferred from the ICTY, in 2008, the Chamber ran trials against approximately fifty other suspects.¹⁶⁵ The division of labour between the ICTY and the Bosnian authorities is an example of the two-tiered prosecution strategy referred to by Prosecutor Moreno-Ocampo as part of the ICC positive complementarity regime. Another element of the positive complementarity regime is the intention of the Office of the Prosecutor to encourage states to adopt complementary implementing legislation to create a legal framework to give national

¹⁶⁴ The Comprehensive Judicial Reform plan for Bosnia, coordinated by the Office of the High Representative was extremely ambitious. It included the creation of the High Judicial and Prosecutorial Councils to vet and reappoint all the judges and prosecutors in the country; the restructuring of all courts and prosecutors' offices; the drafting and adoption of reformed substantive and procedural criminal laws at the Bosnian State and Entity levels and the creation of the State Court of BiH and the Prosecutor's Office of BiH with a special chamber and department for organised crime, economic crime and corruption in the respective institutions.

¹⁶⁵ For War Crimes Chamber statistics, see: 'Annual Report of the Registry for Section I and II of the Court of Bosnia and Herzegovina', 2008. For a critical assessment of the work of the War Crimes Chamber see: Human Rights Watch, 'Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber', February 2007.

authorities the required laws to combat impunity.¹⁶⁶ This policy is in line with an outcome of the ICC Review Conference, held in Kampala in 2010. The Review Conference adopted a Resolution on complementarity which noted the ‘importance of States Parties taking effective domestic measures to implement the Rome Statute’.¹⁶⁷ Pursuant to Article 93(10)(b)(i)(1) of the Rome Statute, the ICC may support a State carrying out proceedings by providing statements, documents or other types of evidence obtained during an investigation or trial conducted by the Court. From the perspective of a state that is willing and genuinely able to carry out trials, it is critical that the ICC’s evidence can be introduced and used in domestic proceedings without jeopardising the fair trial rights of the accused. Consequently, the Law on Transfer is presented as a model national legal framework to complement Article 94(10) of the Rome Statute and to implement an effective ‘reverse’ cooperation relationship with the ICC.

The War Crimes Chamber stands as a valuable model for the future enforcement of international justice. The successful functioning of the Chamber, the adoption of the required national laws and the stronger relationship between the ICTY and the national authorities has yielded positive results. As the international tribunals prepare for their transition to their Residual Mechanisms some of the most serious crimes of concern to the international community as a whole, are being prosecuted at the international and national level. The lessons to be extracted from the Rule 11bis case referral process are extremely relevant and may serve to reinforce the ICC positive complementarity regime.

¹⁶⁶ See: Christopher Keith Hall, ‘Developing and Implementing an Effective Positive Complementarity Prosecution Strategy’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p.220.

¹⁶⁷ See: ICC Review Conference, Resolution RC/Res.1, ‘Complementarity’, 8 June 2010, para.4. At its seventh plenary meeting, held on 3 June 2010, the Review Conference held a stocktaking exercise on complementarity. See also: Annex V – ‘Stocktaking of International Criminal Justice - Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap’, panel discussion moderated by Professor William A. Schabas, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.c-ENG.pdf.

CHAPTER V – THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE

INTRODUCTION

Although the *ad hoc* Tribunals and the Special Court may be perceived as similar to national criminal courts to the extent that their core responsibility is to bring the perpetrators of violent crimes to trial, unlike national courts, the Tribunals incorporate far more structures which would typically be independent entities in the national context.¹ Each of the Tribunals is composed of three primary organs: the judges' Chambers, the Office of the Prosecutor and the Registry.² Additionally, the obligations of the institutions extend beyond their core judicial functions. For example, the Registry, the organ responsible for administering and servicing the Tribunals, has the authority to manage detention facilities; negotiate agreements with States and execute enforcement of sentence and witness relocation agreements.³ Describing the legal nature of the Special Court, the Appeals Chamber has ruled that, as a *sui generis* treaty-based organ, the institution has ‘the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members)’.⁴ Accordingly, as one commentator has remarked ‘[c]losing a criminal court is not a usual affair’.⁵ There are ‘legal and ethical obligations’ incumbent on the Tribunals and the United Nations which must be performed after the closure of the institutions to guarantee and protect the rights of the accused, convicted

¹ See: the explanation of the Secretary-General on the structure of ICTY, in the ‘Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)’, UN Doc. S/1993/25704, para. 69. See also the comments of Trudy Huskamp Peterson in ‘Temporary Courts, Permanent Records’, United States Institute of Peace, Special Report, August 2006, p.3.

² See: William A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.587-623.

³ See: David Tolbert, ‘Reflections on the ICTY Registry’, (2004) 2 *Journal of International Criminal Justice* 480, pp.481-484. See: Dorothee de Sampayo Garrido, ‘Problems and Achievements as Seen From the Viewpoint of the Registry’, (2004) 2 *Journal of International Criminal Justice* 474.

⁴ Taylor (SCSL-03-01-I), Decision on Immunity from Jurisdiction, 31 May 2004, para.41.

⁵ Cecile Aptel, ‘Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues’, (2008) 14 *New England Journal of International and Comparative Law* 169, p.169.

persons and others who participated in the proceedings.⁶ However, neither Security Council Resolution 827 nor Resolution 955, which created the ICTY and the ICTR respectively, regulate how these obligations will be fulfilled after the Tribunals end their mandates.⁷ The formal agreement between the Government of Sierra Leone and the United Nations which established the Special Court is also silent on what will happen after the Court completes all trials and appeals.⁸

It has been reported that during the initial discussions regarding the judicial, administrative and archiving issues that will arise after the closure of the Tribunals, all matters were clumped together in the misleading term ‘legacy issues’.⁹ More recently, however, as the dates for the closure of the Tribunals approach, the discourse among practitioners and academics is hallmarked by two separate but at times overlapping concepts. The first is the notion of the legacy of the Tribunals; the second refers to the obligations of the Tribunals that will need to be managed after their closure – the so-called ‘residual functions’.¹⁰ As a rule, the legacy of the Tribunals is not defined in strict terms. Instead the concept frequently seems to incorporate the ‘lasting impact’ of the Tribunals carrying out fair and effective trials on enhancing the rule of law in the affected countries to contribute to ending impunity.¹¹ On the other hand, the Tribunals’ residual functions may be defined in more definitive terms. By creating the *ad hoc* Tribunals and

⁶ *Ibid.*, p.184.

⁷ UN Doc. S/RES/827 (1993). Prior to the adoption of Resolution 827, the Council adopted UN Doc. S/RES/808 (1993), which stated at para.1 that: ‘an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.’ See also:UN Doc. S/RES/955 (1994).

⁸ ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’, Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II.

⁹ David Tolbert, ‘The Ends of International Justice: Closing International Tribunals’, in Cruvellier, Johnson, Richmond and Waldorf (eds.), 2007: *Year of Assessment – Issues and Prospects at the Closing of the First International Courts*, International Justice Tribune Series No. 2, Paris: Justice Memo, 2007, p.14.

¹⁰ See generally: Guido Acquaviva, ““Best Before Date Shown”: Residual Mechanisms at the ICTY”, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, pp.507-536.

¹¹ For a definition of legacy, see: Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States, ‘Maximizing the Legacy of Hybrid Courts’, 2008, p.4; Caitlin Reiger, International Centre for Transitional Justice Briefing, ‘Where To From Here for the International Tribunals? Considering Legacy and Residual Issues’, September 2009, p.1. Although legacy and completion were not necessarily contemplated at the time of the creation of the respective courts, it would appear that lessons have been learnt and policies have evolved in the United Nations since that time. Thus, the Report of the Secretary General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ states: ‘And it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned.’ UN Doc. S/2004/616, para.46.

the Special Court, the United Nations affirmed that ‘the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law’.¹² To uphold international standards and ensure the ongoing protection of the rights of the accused, convicted persons, as well as victims and witnesses, there are, however, certain legal and administrative obligations of the Tribunals which will not terminate upon the completion of all trials and appeals.¹³ The term ‘residual functions’ is used to denote the obligations derived from the constituent instruments of the *ad hoc* Tribunals and the Special Court which will continue after these courts close.¹⁴

Due to the desire of the Security Council to close down the international tribunals, the notion whether it would be possible to transfer some or all of the residual functions to a State, another international court or an international organisation was canvassed.¹⁵ For example, the Secretary-General has advised the Security Council on the transfer to national courts of residual functions which relate back to proceedings previously completed by the international courts (such as the authority to review the Tribunals’ judgments or amend their protective measures). Pointing out that the Tribunals’ referral of cases under Rules 11bis may be considered ‘as the restoration by the Security Council of a jurisdiction that the national authorities would have exercised’ if the ICTY and the ICTR were not created,¹⁶ the Secretary-General has cautioned that the transfer of other residual functions linked to completed proceedings would involve the creation of a new jurisdictional relationship between the international Tribunals and national courts rather

¹² UN Doc. S/RES/1315 (2000).

¹³ For the ICTR functions, see: Erik Møse, ‘The ICTR’S Completion Strategy – Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667, p.667.

¹⁴ See: Special Court for Sierra Leone ‘Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone’, December 2008, p.14; ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, paras.13-14. For a general discussion in relation to the functions, see: Caitlin Reiger, International Centre for Transitional Justice Briefing, ‘Where To From Here for International Tribunals? Considering Legacy and Residual Issues’, September 2009.

¹⁵ See generally: Guido Acquaviva, ‘Was a Residual Mechanism for International Criminal Tribunals Really Necessary?’, (2011) 9 *Journal of International Criminal Justice* 4 , pp.793-795.

¹⁶ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.76.

than the restoration of national jurisdiction. Thus, the Security Council might in fact be required to confer new authority on national authorities to determine matters that previously had been under the exclusive jurisdiction of the *ad hoc* Tribunals.¹⁷ As noted by the Secretary-General, it may be difficult for a national court to conduct review proceedings in a case that it was not involved in and to do so pursuant to the Tribunals' Statutes and Rules of Procedure and Evidence.¹⁸ Moreover, if the authority to review the Tribunals' judgments would be transferred to a variety of national jurisdictions this could result in inconsistencies of approach among the various jurisdictions.¹⁹ In fact, the opinion of many commentators is that '[e]stablishing effective links and hierarchies of authority among different states and/or international organisations [...] each responsible for different residual judicial, prosecutorial and registry functions would be impractical if not impossible.'²⁰

The *ad hoc* Tribunals and the Special Court have also been advised on the potential transfer of residual functions to the ICC. From the outset, the future trial of fugitives has been flagged as an essential function to be managed after the closure of the courts. It has been explored whether, instead of creating a residual mechanism to conduct trials, the Security Council could in fact refer the fugitives' cases to the ICC Prosecutor for trial as a measure to maintain international peace and security. By application of Article 13(b) of the Rome Statute, it seems, however, that the answer must be a resounding no. Article 13 (b) specifically states that the ICC can exercise its jurisdiction if the Security Council acting under Chapter VII refers a 'situation' to the Prosecutor.²¹ In no way does the provision provide that the Council can refer indictments against accused persons to the ICC Prosecutor. Hypothetically, even if Article 13 (b) permitted

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para.80.

¹⁹ *Ibid.*, para.251.

²⁰ Both the Special Court's Residual Functions Report and the Secretary-General's Residual Mechanism(s) Report cautioned that the separation of the functions among the Residual Mechanisms, national jurisdictions, and, perhaps, other international organisations could have a negative impact on the effective performance of the functions and the rights of the individuals concerned. See also: Open Society Justice Initiative and International Criminal Law Services, Briefing Paper (marked draft), 'The Residual Functions of the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and the Potential Mechanisms to Address Them', January 2008, para.74.

²¹ See generally: Nigel White and Robert Cryer, 'The ICC and the Security Council: An Uncomfortable Relationship in The Legal Regime of the International Criminal Court', in Doria, Gasser and Bassiouni (eds.), *Essays in Honour of Professor Igor Blyshchenko*, Leiden: Martinus Nijhoff Publishers, 2009, pp.455-484.

the ICC to exercise jurisdiction over individual cases referred to it from the Security Council, another obstacle exists which excludes the ICC from conducting the trials of fugitives. Article 11 (1) of the Rome Statute sets down the temporal jurisdiction of the ICC: the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute on 1 July 2002.²² The ICTR's and the SCSL's fugitives are all indicted for crimes which were committed prior to the entry into force of the Rome Statute - broadly, a period of time spanning from 1994-2000. Thus, in relation to the fugitive cases, the ICC clearly does not have temporal jurisdiction. Moreover, considering the drafting history of Article 11, it seems totally unrealistic to expect that the Rome Statute will be amended to empower the ICC to prosecute the crimes committed prior to July 2002 in Rwanda or Sierra Leone. Commenting on the creation of the ICC, William Schabas has pointed out that few States would have been prepared to establish a court with the ability to investigate crimes committed prior to the entry into force of the Rome Statute. He notes that the 'idea was unmarketable and was never really entertained during the drafting' of the Rome Statute'.²³

In 2007, the Security Council turned its attention to the Tribunals' post-closure period. More specifically, the key task for the Council was to identify and agree upon the essential residual functions of the *ad hoc* Tribunals and how these functions would be managed after the closure of the Tribunals. An informal working group on the international tribunals comprised of legal advisers representing the members of the Security Council was created to focus on the issue.²⁴ The working group was assisted by

²² Rome Statute, Art. 11(2) provides that, if a state becomes a party to the Rome Statute after its entry into force, the ICC may exercise jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has accepted the jurisdiction of the Court in accordance with Article 12(3).

²³ William. A. Schabas, *An Introduction to the International Criminal Court*, 4th edn., Cambridge: Cambridge University Press, 2011, p.72. Also, neither the Special Court's Residual Functions Report nor the Secretary-General's Residual Mechanism(s) Report recommends the transfer of residual functions to the ICC. However, from an efficiency perspective, the Reports do refer to the ICC. The Secretary-General has noted that the SCSL and the Special Tribunal for Lebanon will require residual mechanisms to perform residual functions similar to the *ad hoc* tribunals. In terms of long-term strategic planning, it may be wise to consider having one common administrative hub for the various mechanisms. The ICC has been suggested; see: Secretary-General Report, para.248. Likewise, the Special Court was advised to approach the Bureau of the Assembly of State Parties to commence a dialogue regarding the possibility of the SCSL residual mechanism sharing an administrative platform with the ICC. See: Secretary-General Report, para.124.

²⁴ UN Doc. S/2008/849, para.2. The working group was initially established on an informal basis in 2000 to cover matters related to the international tribunals. Until 2007, its chairmanship rotated with the monthly rotation of the presidency of the Security Council. Due to the intensive work in relation to the question of a

the Office of Legal Affairs and discussions were based on the 2007 Joint Paper of the *ad hoc* Tribunals on residual functions submitted to the Security Council.²⁵ In December 2008, by Presidential Statement, the Council acknowledged:

[t]he need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals. In view of the substantially reduced nature of these residual functions, this mechanism should be small, temporary, and efficient structure. Its functions and size will diminish over time. Its expenses will be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.²⁶

Subsequently, in 2009, the Secretary-General's Report on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the Residual Mechanism(s) (hereinafter, the Secretary-General's Residual Mechanism(s) Report) presented eight residual functions and discussed the establishment of residual mechanisms to manage them.²⁷ In February 2008, the Special Court hosted an international conference, attended by members of the Court's Management Committee and UN Security Council representatives, to consider its residual issues.²⁸ Afterwards, the SCSL recruited an advisor to prepare a report that would analyse the Court's residual functions and design a residual mechanism to manage the obligations after the closure of the institution. In December 2008, the Report on Residual Functions and Residual Institution Options of the Special Court for Sierra Leone

residual mechanism, at the end of 2007, the group decided that the matter would better progress under the chairmanship of a single delegation. Belgium assumed the chairmanship. The UN Office of Legal Affairs acted as a secretariat and provided legal advice to the group.

²⁵ *Ibid.*, para.3. See also: 'Residual Functions of the Ad Hoc Tribunals – Joint Paper of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 28 September 2007, on file with author.

²⁶ UN Doc. S/PRST/2008/47.

²⁷ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258.

²⁸ See: SCSL Press Release, 'Special Court Convenes International Conference to Consider Residual Issues', 18 February 2008.

(hereinafter, the Special Court's Residual Functions Report) was presented to the Management Committee.²⁹

The central theme of this Chapter is the creation, jurisdiction and structure of the residual mechanisms of the *ad hoc* Tribunals and the Special Court for Sierra Leone. The residual functions of the international Tribunals will be identified and analysed in the context of whether the obligations must be performed after closure of the courts to protect the rights of the accused; convicted persons and victims and witnesses. In addition, the steps taken by the Security Council to prompt the speedy transfer of functions from the ICTY and the ICTR to the residual mechanism will be explored as a means to ensure closure. Other courts supported by the United Nations – The Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon - will close in the future. Just like the *ad hoc* Tribunals and the Special Court, those institutions will require residual mechanisms to perform the functions which will be discussed below. Accordingly, it is not only important to record this period in the evolution of the Tribunals to contribute to the overall body of academic work in the field of international criminal law, there are also valuable lessons for future tribunals.

A. THE RESIDUAL MECHANISMS

(1) ESTABLISHMENT OF THE MECHANISMS

Having called on the ICTY and the ICTR to complete their work no later than 31 December 2014, acting under Chapter VII, the Security Council has used its power to establish the institution that will manage the residual functions of the *ad hoc* Tribunals after their closure.³⁰ Resolution 1966, adopted by the Security Council on 22 December 2010, establishes the International Residual Mechanism for Criminal Tribunals (IRMCT) that will continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR.³¹ The Resolution provides that the Mechanism will have two

²⁹ Fidelma Donlon, 'Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone', 16 December 2008.

³⁰ UN Doc. S/RES/1966, para.3.

³¹ UN Doc. S/RES/1966, para. 4.

branches – a branch for the Rwanda Tribunal and a branch for the Yugoslavia Tribunal.³² 1 July 2012 is marked as the start date for the ICTR branch and 1 July 2013 for the ICTY branch.³³ The Statute of the IRMCT is Annex 1 of Resolution 1966. The Security Council also requested the Secretary-General to prepare, no later than 30 June 2011, the draft Rules of Procedure and Evidence of the Mechanism, which, according to the Resolution, would be adopted by the judges of the Mechanism ‘unless the Security Council decides otherwise.’³⁴ The Resolution establishes the IRMCT as a subsidiary organ of the Security Council.³⁵ Article 30 of the IRMCT Statute declares that the expenses of the Mechanism will be the expenses of the Organization in accordance with Article 17 of the UN Charter.³⁶

It is interesting to question how the Security Council, acting under Chapter VII, has justified the creation of the IRMCT to maintain international peace and security. In accordance with Article 39 of the United Nations Charter, if the Security Council determines the existence of a threat to or breach of the peace or an act of aggression, it is empowered to decide the measures required in accordance with Articles 41 and 42 of the Charter to re-establish peace and security. Pursuant to Article 41, the Council has discretionary power to decide ‘what measures not involving the use of armed forces are to be employed to give effect to its decisions’, so long as those measures are necessary to maintain and restore international peace and security.³⁷ When the ICTY and the ICTR were first set up in 1993 and 1994 respectively, it was understood that the conflict in the former Yugoslavia and the Rwandan genocide constituted a threat to and breach of international peace and security. The ICTY Appeals Chamber has remarked that even if the conflict in the former Yugoslavia was classified as an internal armed conflict it would still have been considered a threat to peace ‘according to the settled practice of the

³² *Ibid.*, para. 1.

³³ *Ibid.*

³⁴ *Ibid.*, paras. 5 and 6. See also: UN Doc. S/RES/1966 (2010), Annex 1 – Statute of the International Residual Mechanism for Criminal Tribunals, (hereinafter IRMCT Statute), Art. 13.

³⁵ UN Doc. S/PRST/2008/47. Also see: UN Charter, Chapter VII, Art. 29, which states: ‘The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.’ Regarding the authority of the Security Council to invoke Chapter VII and establish a subsidiary organ with judicial powers, see: *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.15.

³⁶ IRMCT Statute, Art. 30.

³⁷ IRMCT Statute, Art. 41.

Security Council and the common understanding of the United Nations membership in general.³⁸ Almost two decades after the Balkan war and the Rwanda genocide and in the absence of conflict in the affected countries, the question, however, is whether the Council has determined that the closure of the ICTY and the ICTR without the delegation of the Tribunals' residual functions to another entity would constitute a threat to the peace in the territory of the former Yugoslavia and the African Great Lakes region.³⁹

In the preamble of Resolution 1966, the Council recalls Resolution 827 and Resolution 955 which established the *ad hoc* Tribunals. The contribution made to international criminal justice by the Tribunals and the entrenchment of the rule of law in the countries of the former Yugoslavia and Rwanda as a consequence of their work is also acknowledged. From the perspective of the Council acting under Chapter VII to establish the IRMCT, in the preamble reference is also made to the fact that the *ad hoc* Tribunals were set up 'in the particular circumstances of the former Yugoslavia and Rwanda as *ad hoc* measures contributing to the restoration and maintenance of peace'.⁴⁰ The Council does not go so far, however, as to explicitly declare in Resolution 1966 that the creation of the IRMCT is required for the maintenance of peace. Instead, Resolution 1966 refers to the Council's 'determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and the ICTR are brought to justice'.⁴¹ Moreover, the Resolution recalls the 2008 Presidential Statement declaring the need for an *ad hoc* residual mechanism(s) to manage some of the essential functions of the Tribunals, including the trial of fugitives suspected of being the most senior leaders responsible for crimes, after the closure of the Courts.

In August 2010, the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone was

³⁸ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.30.

³⁹ *Ibid.*, para.29. The ICTY stated that the Council does not have an unfettered discretion to decide that a threat to international peace exists; it must remain within the limits of the purposes and principles of the United Nations. According to Article 1(1) of the Charter, the main purpose of the organisation is to maintain international peace and security and, to that end, the United Nations can take measures to prevent threats to the peace.

⁴⁰ UN Doc. S/RES/1966 (2010), Preamble, para. 4.

⁴¹ *Ibid.*, para.5.

signed by the parties. The United Nations and the Government have agreed to establish a Residual Special Court for Sierra Leone (RSCSL) to carry out the residual functions of the Special Court that will continue after its closure.⁴² The Statute of the RSCSL is annexed to the Agreement. The parties to the Agreement do not intend to prepare a new set of Rules for the RSCSL. Instead, Article 16 of the RSCSL Statute states that the Rules of Procedure and Evidence of the Special Court in force at the time of closure of the court shall apply *mutatis mutandis* to proceedings before the RSCSL.⁴³ Strikingly, in spite of the fact that the SCSL has experienced chronic funding problems since its inception and on two occasions has had to apply to the General Assembly for emergency funds to cover its operations, the RSCSL will also be funded by donations from States. Article 3 of the Agreement provides that the costs of the court shall be covered by voluntary contributions from the international community.⁴⁴

Although the Special Court is not an institution created under Chapter VII of the Charter, in Resolution 1315, the Secretary-General was directed to negotiate the creation of the SCSL by way of a treaty between the United Nations and the Government of Sierra Leone. The Council also stated in Resolution 1315 that a threat to international peace and security had arisen in Sierra Leone.⁴⁵ Thus, the Resolution followed the trend of Resolutions 827 and 955, which provide the legal basis for the ICTY and the ICTR, by linking accountability for international crimes with the restoration and maintenance of peace and security. Although the Council did not go further to say it was acting under Chapter VII to create the SCSL, like the creation of the *ad hoc* Tribunals, the intervention of the Security Council in creating the SCSL was based on the maintenance of international peace and security in the region.⁴⁶ The preamble of the Agreement between

⁴² Residual Special Court for Sierra Leone Agreement (Ratification) Act, Annex 1 – Statute of the Residual Special Court for Sierra Leone (hereinafter RSCSL Statute), Art. 1(1), Supplement to the Sierra Leone Gazette Vol CXLII. No.28 dated 19th May 2011.

⁴³ RSCSL Statute, Art. 16(1).

⁴⁴ Residual Special Court for Sierra Leone Agreement (Ratification) Act, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (hereinafter RSCSL Agreement), Art. 3, Supplement to the Sierra Leone Gazette Vol CXLII. No.28 dated 19th May 2011.

⁴⁵ UN Charter, Chapter VII, Article 39 ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

⁴⁶ UN Doc. S/RES/1315 (2000), para.13.

the United Nations and the Government of Sierra Leone on the Establishment of a RSCSL makes reference to Resolution 1315 but does not refer to the role of the Residual Court in terms of maintaining peace in Sierra Leone. Instead, it is stated that ‘in anticipation of the completion of the judicial activities of the Special Court, the United Nations and The Government of Sierra Leone are convinced of the need to establish a small and efficient residual court [...].’⁴⁷

Resolution 1966 not only establishes the IRMCT, it also sets out the commencement date for its functioning. In the preamble, the timelines set out in the completion strategy – the completion of investigations by the end of 2004, trial activities at first instance by the end of 2008 and all work in 2010 – are recalled, and it is also noted ‘that those envisaged dates have not been met’.⁴⁸ Although the ICTY and the ICTR were requested to do everything possible to complete their remaining work by no later than 31 December 2014, interestingly, rather than wait for that date to commence the operations of the IRMCT, the Council decided that the ICTR branch would commence functioning on 1 July 2012 and the ICTY branch on 1 July 2013.⁴⁹ In some respects, by setting up the IRMCT before the closure of the Tribunals, the Council could be seen to be reprimanding the ICTY and the ICTR for not meeting the original completion timelines. The Council intended for the Tribunals to gradually transfer their authority to the Mechanism in advance of their closure. Annex 2 of Resolution 1966, entitled ‘Transitional Arrangements’, sets out how the ICTY and the ICTR should co-exist with the Mechanism and distributes the competences. As of the commencement date of the respective branch of the Mechanism, the *ad hoc* Tribunals shall have the authority to finish all trial and referral proceedings that are pending.⁵⁰ Likewise, if a fugitive is arrested more than 12 months, or if a retrial is ordered more than 6 months, before the start date of the respective branches, the *ad hoc* Tribunals have the competence to complete the trial, or to refer the case to a State for trial.⁵¹ However, if a fugitive is

⁴⁷ RSCSL Agreement, Preamble, para.3.

⁴⁸ UN Doc. S/RES/1966 (2010), Preamble, para.2.

⁴⁹ *Ibid.*, paras. 1and 3.

⁵⁰ *Ibid.*, Annex 2 – Transitional Arrangements, Art. 1(1). For a discussion on the transitional arrangements, see: Catherine Dennis, ‘Critical Overview of the “Residual Functions” of the Mechanism and its Date of Commencement (Including Transitional Arrangements), (2011) 9 *Journal of International Criminal Justice* 819, pp.819-837.

⁵¹ UN Doc. S/RES/1966 (2010), Annex 2 – Transitional Arrangements, Art. 1(2).

arrested 12 months or less, or if a retrial is ordered 6 months or less, before the start date of the respective branch of the Mechanism, the Tribunals are only authorized to prepare the trial or refer the case to a national jurisdiction.⁵² After the ICTY and the ICTR branch of the IRMCT start functioning, if a fugitive is arrested or if a retrial is ordered the respective branch shall have competence over the case.⁵³ In relation to Appeals and Review proceedings, the *ad hoc* Tribunals have the competence to conduct and finish all proceedings for which the notice of appeal or application for review is filed before the commencement date of the respective branch of the Mechanism.⁵⁴ The Mechanism shall have competence to conduct appellate or review proceedings if the notice of appeal or application for review is filed on or after the commencement date of the respective branch of the Mechanism.⁵⁵ Regarding contempt proceedings, if the indictment is confirmed before the start date of the branch of the Mechanism, the ICTY and the ICTR shall have the power to prosecute the case.⁵⁶ If the indictment is confirmed after that date the Mechanism shall have the competence to conduct the proceedings.⁵⁷

Unlike Resolution 1966, the Agreement on the Residual Special Court does not specify transitional arrangements for the Special Court and RSCSL. Most likely this is because it is intended that the SCSL will have completed its current trials and appeals before its closure.

(2) STRUCTURE OF THE RESIDUAL MECHANISMS

From the outset of discussions on the structure of the Mechanisms for the *ad hoc* Tribunals and the SCSL, the policy adhered to by the Member States and the SCSL Management Committee was to avoid creating mechanisms of the size and cost of the international tribunals. One commentator has correctly remarked that the process entails striking a balance between two sets of requirements: ‘on the one hand, the need to respect “due process” and “fairness” and, on the other hand, demands for “efficiency” and “cost-

⁵² *Ibid.*, Art. 1(3).

⁵³ *Ibid.*, Art. 1(4).

⁵⁴ *Ibid.*, Arts. 2(1) and 3(1).

⁵⁵ *Ibid.*, Arts. 2(2) and 3(2).

⁵⁶ *Ibid.*, Art. 4(1).

⁵⁷ *Ibid.*, Art. 4(2).

effectiveness’’.⁵⁸ As the completion timelines slipped by, speakers in the Security Council emphasised the need for the creation of an effective residual mechanism to take care of all the residual functions.⁵⁹ In addition, the sentiments expressed by the Security Council were echoed by the informal working group on international tribunals that agreed that the ‘mechanism or mechanisms is or are to be small, temporary and efficient, commensurate with a reduced workload in the post-completion period.’⁶⁰ By Presidential Statement, dated 19 December 2008, the Security Council requested the Secretary-General to prepare a report on the administrative and budgetary aspects of the options for the potential locations for the archives of the ad hoc Tribunals and the seat of the residual mechanism or mechanisms for the courts.⁶¹ At that time, some of the critical decisions to be made by the Security Council were whether there should be one mechanism or two for the Tribunals; what would be the location or locations of the mechanisms; what the structure of the mechanism would be; and whether the Tribunals’ archives would be co-located with the mechanism(s).⁶² The opinion of the *ad hoc* Tribunals was that there should be two independent residual mechanisms, which could share an Appeals Chamber and possibly a Registry.⁶³ The Secretary-General pointed out that since each Tribunal is ‘context-specific, and was established to restore peace and reconciliation in the affected countries’, it may be desirable to set up two mechanisms, or one mechanism with two branches. The ICTY branch would be located in Europe and the ICTR branch in Africa.⁶⁴ The Special Court’s 2008 Residual Functions Report identified the critical residual functions of the Special Court and explored the various structures of a Mechanism.

⁵⁸ See: Guido Acquaviva, “‘Best Before Date Shown’: Residual Mechanisms at the ICTY”, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, pp.507-536.

⁵⁹ See generally: UN Doc. S/PV.6134 (2009).

⁶⁰ *Ibid.*, p.15. See also: UN Doc. S/PRST/2009/47, in which the council acknowledged the need to establish an *ad hoc* mechanism to manage the essential functions of the Tribunals after closure.

⁶¹ UN Doc. S/PRST/2009/47.

⁶² ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.239.

⁶³ *Ibid.*, para.109.

⁶⁴ *Ibid.*, para.255. To facilitate the future trial of fugitives and the monitoring of protected witnesses, the Secretary-General additionally suggested that the mechanism should be located somewhere close to the affected countries.

Taking account of the future workload of the Special Court, it was recommended in the report that the Mechanism should be ‘effective, cost-efficient and flexible.’⁶⁵

Considering the opinion of the Security Council, expressed before the adoption of Resolution 1966, it is not at all shocking that the Resolution emphasizes that ‘in view of the substantially reduced nature of the residual functions, the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions’.⁶⁶ Likewise, in the preamble of the Agreement on the Residual Special Court, the United Nations and the Government of Sierra Leone express their belief that there is a need to set up ‘a small and efficient residual court...to carry out essential functions of the Special Court after its closure.’⁶⁷ As noted previously, the Security Council decided to establish one Mechanism with two branches: The ICTR branch with its seat in Arusha and the ICTY branch with its seat in The Hague.⁶⁸ Article 6 of the RSCSL Agreement states that although the Court shall have its principal seat in Sierra Leone, it shall manage its functions ‘at an interim seat in The Netherlands, with a branch or sub-office in Sierra Leone for witness and victim protection and support, until such time as the parties agree otherwise.’⁶⁹

According to Article 4 of the IRMCT Statute and Article 2 of the RSCSL Agreement, similar to the current structure of the *ad hoc* Tribunals and the SCSL, the Mechanisms shall be comprised of three organs: the Chambers, the Office of the Prosecutor and the Registry. With reference to the IRMCT, the Chambers shall be comprised of a Trial Chamber for each branch of the Mechanism and an Appeals Chamber that is common to both branches.⁷⁰ According to Article 8, the Mechanism shall have a roster of not more than 25 independent judges.⁷¹ The Secretary-General shall

⁶⁵ Fidelma Donlon, ‘Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone’, 16 December 2008, p.2.

⁶⁶ UN Doc. S/RES/1966 (2010), Preamble, para.7.

⁶⁷ RSCSL Agreement, para.3.

⁶⁸ See also: UN Doc. S/RES/1966 (2010), para.1.

⁶⁹ RSCSL Agreement, Art. 6.

⁷⁰ IRMCT Statute, Art. 4(a).

⁷¹ IRMCT Statute, Art. 8(1). IRMCT Statute, Art. 9, entitled the ‘Qualification of Judges’, specifies that ‘judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.’

request nominations from United Nations Member States and non-member States maintaining permanent observer missions at the United Nations Headquarters.⁷² Subsequently, taking into particular account the experience of judges of the *ad hoc* Tribunals and adequate representation of the principal legal systems of the world, the Secretary-General is requested to forward a list of not less than 30 candidates to the President of the General Assembly.⁷³ The General Assembly shall elect 25 judges for the Mechanism.⁷⁴ Article 11 provides that the Secretary-General shall appoint a full-time President following consultation with the President of the Security Council and the judges of the Mechanism.⁷⁵ In order to exercise his or her functions, the President may be present at either seat of the branches of the Mechanism.⁷⁶ It appears the Council is exercising somewhat tighter control over the terms of service of the judges than it did at the time the Tribunals were created. To this extent, it is clearly stated in the IRMCT Statute that the judges shall only be present at the seats of the branches of the Mechanism as required to carry out their functions.⁷⁷ It is also noted that the judges shall not receive remuneration for being on the roster. Instead the terms and conditions of service of the IRMCT judges for each day they exercise their functions shall be those of the *ad hoc* judges of the International Court of Justice.⁷⁸

The RSCSL shall have a roster of no fewer than 16 judges – ten judges shall be appointed by the Secretary-General and six judges by the Government of Sierra Leone.⁷⁹ Unlike the President of the IRMCT, it is not expected that the RSCSL President will work on a full time basis. Instead, as indicated by Article 12 of the Residual Court's Statute, the President shall as much as possible carry out his or her work remotely and shall be remunerated on a pro-rata basis.

⁷² IRMCT Statute, Art. 10.1(a)

⁷³ *Ibid.*, Art. 10.1(c).

⁷⁴ *Ibid.*, Art. 10.1(d).

⁷⁵ *Ibid.*, Art. 11.1.

⁷⁶ *Ibid.*, Art. 11.2.

⁷⁷ IRMCT Statute, Art. 8(3). See also: RSCSL Statute, Art. 13(4), which also states that judges assigned to Chambers shall only be present at the seat of the RSCSL as required to carry out their functions and as much as possible will work remotely.

⁷⁸ IRMCT Statute, Art. 8(4).

⁷⁹ RSCSL Statute, Arts. 11(1) and (2).

The IRMCT Office of the Prosecutor shall be an independent separate organ of the Mechanism.⁸⁰ Similar to the start of the ad hoc Tribunals, the Prosecutor will be common to both branches of the Mechanism.⁸¹ After a nomination by the Secretary-General, the Security Council shall appoint the Prosecutor for a four-year term.⁸² The Office of the Prosecutor shall maintain a roster of experienced staff from the ICTY and the ICTR to enable it to recruit people quickly if the need arises.⁸³ The Prosecutor of the RSCSL shall be appointed by the Secretary-General, after consultation with the Government of Sierra Leone.⁸⁴ Similar to the President of the RSCSL, it is not envisaged that the Prosecutor will work on a full time basis. Rather, the Prosecutor will be present at the seat of the RSCSL only as required to conduct functions and shall be remunerated on a pro-rata basis.⁸⁵

Although each of the *ad hoc* tribunals currently has an independent Registry, the IRMCT will have a single Registry to provide administrative services to both of the branches of the Mechanism.⁸⁶ The Secretary-General shall appoint the Registrar who, similar to the President of the Mechanism, shall be present at either the ICTY branch of the Mechanism or the ICTR branch in order to carry out his or her duties.⁸⁷ Article 15 (4) authorises the Registrar to retain a small number of staff ‘commensurate with the reduced functions of the Mechanism’.⁸⁸ Also the Registrar is directed to maintain a roster of qualified staff with experience from the Tribunals to enable the rapid recruitment of staff as may be required to conduct its functions.⁸⁹ The Secretary-General, after consultation with the President of the RSCSL, shall appoint the Registrar.⁹⁰ The Registrar shall work on a permanent basis at the seat of the Court and shall recruit a small number of staff required to manage the residual functions.⁹¹

⁸⁰ IRMCT Statute, Art. 14(1).

⁸¹ *Ibid.*, Art. 4(b).

⁸² *Ibid.*, Art. 14(4).

⁸³ *Ibid.*, Art. 14(5).

⁸⁴ RSCSL Statute, Art. 14(1).

⁸⁵ *Ibid.*, Art. 14(5).

⁸⁶ IRMCT Statute, Art. 15.

⁸⁷ *Ibid.*, Arts. 15(2) and (3).

⁸⁸ IRMCT Statute, Art. 15(4).

⁸⁹ *Ibid.*, Art. 15(4).

⁹⁰ RSCSL, Art. 15(1).

⁹¹ *Ibid.*, Art. 15(4).

(3) FUNCTIONAL AND JURISDICTIONAL CONTINUITY BETWEEN THE TRIBUNALS AND THE MECHANISMS

Specific residual mechanisms were not set up after the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East completed their trials. Instead certain residual functions, for example the supervision of the enforcement of prison sentences, were delegated to the Allies. In 1947, the seven surviving persons convicted by the Nuremberg Tribunal were transferred to Spandau Prison in Berlin that was administered by officers from the American, Russian, British and French military.⁹² As Telford Taylor has remarked the convicted persons were ‘incarcerated in Spandau – seven men in a prison made for hundreds’.⁹³ After the death of the last prisoner Rudolf Hess in 1987, Spandau Prison was demolished.⁹⁴ The supervision of the enforcement of the prison sentences rendered by the Tokyo Tribunal was conducted by the United States and subsequently Japan.⁹⁵ In 1959, just eleven years after the Tokyo Judgment was delivered, all the Japanese major war criminals that were sentenced by the Tokyo Tribunal had been released.⁹⁶ Following the trial of the Nazi major war criminals, custody of the archives of the Nuremberg Tribunal was given to the International Court of Justice.⁹⁷ Nevertheless, the transition of the international tribunals to their respective residual mechanisms is not the first time in the history of international justice that an international court will transfer its functions to a successor institution. The International Court of Justice, the principal judicial organ of the United Nations, is a historical example.⁹⁸ Created in 1945 by the Charter of the United Nations and the Statute of the

⁹² Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993, p.615.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, p.618. Interestingly, Taylor has recorded that in discussions during the period that Rudolf Hess was incarcerated, when he was asked if Hess should be released, he replied that ‘such long-continued incarceration, especially in a huge prison where he was the sole inmate, was a crime against humanity’.

⁹⁵ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford: Oxford University Press, 2008, p.264.

⁹⁶ *Ibid.*, p.269.

⁹⁷ See generally: Guido Acquaviva, “‘Best Before Date Shown’: Residual Mechanisms at the ICTY”, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, p.511.

⁹⁸ Robert Y. Jennings, ‘The International Court of Justice After Fifty Years’, (1995) 89 *American Journal of International Law* 493, 493-505. For the International Court of Justice as the replacement of the Permanent Court of Justice, see also: Antonio Cassese, *International Law*, 2nd edn, Cambridge: Cambridge University Press, 2005, p.285.

Court, which forms an integral part of the Charter, the International Court of Justice is the successor of the Permanent Court of International Justice. To ensure continuity between the two Courts, Article 92 of the UN Charter states that the Court shall function in accordance with its Statute. The Statute is based on the Statute of the Permanent Court of International Justice. In addition, to ensure jurisdictional continuity, Article 36 (5) of the Statute provides that declarations between the parties made under the Statute of the Permanent Court of International Justice shall be deemed to be ‘acceptances of the compulsory jurisdiction of the International Court of Justice’.⁹⁹ Furthermore, Article 37 states that, whenever a treaty or convention gives jurisdiction to the Permanent Court of Justice, the matter shall be referred to the International Court of Justice.

Well in advance of the adoption of Resolution 1966 and the Agreement on the Residual Special Court, it was acknowledged that the constituent instruments of the future institutions should guarantee functional continuity between the Tribunals and the Mechanisms to ensure that the Mechanisms would take on the Tribunals’ rights and obligations under contracts and bilateral agreements with States.¹⁰⁰ To this extent, Paragraph 4 of Resolution 1966 provides that ‘all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism’.¹⁰¹ Although the RSCSL Agreement does not explicitly refer to obligations arising from contracts and agreements with States, Article 1(3) does provide that the Mechanism will continue the ‘rights and obligations’ of the Special Court.¹⁰²

Of course, distinct from the functional continuity between the Tribunals and the Mechanisms is the question of jurisdictional continuity between them. This in turn raises the question of the personal, temporal and territorial jurisdiction of the IRMCT and the RSCSL. The Security Council was previously advised that basing the future Mechanisms’ Statutes on amended Statutes of the *ad hoc* Tribunals would contribute to

⁹⁹ Statute of the International Court of Justice, (1945) 33 UNTS 993, Art. 36(5).

¹⁰⁰ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.100.

¹⁰¹ UN Doc. S/RES/1966 (2010), para.4.

¹⁰² RSCSL Agreement, Art. 1(3).

the continuity of jurisdiction between the institutions. Nevertheless, the Council was also advised by the Secretary-General to explicitly refer to this jurisdictional continuity in the resolution creating the Mechanisms.¹⁰³ Thus, Article 1 (1) of the IRMCT Statute declares: ‘the Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute, as well as the rights and obligations, of the ICTY and the ICTR, subject to the provisions of the present Statute.’¹⁰⁴ Likewise, according to Article 1(3) of the RSCSL Agreement, the court ‘shall continue the jurisdiction, functions, rights and obligations of the Special Court [...].’¹⁰⁵

Although the Statutes of the ICTY and the ICTR do not limit their personal jurisdiction in terms of the seniority of suspects, as an integral part of the completion strategy, the Security Council has repeatedly stated that the *ad hoc* Tribunals should concentrate on the trial of the most senior leaders suspected of being most responsible for the crimes within their jurisdiction. Considering the position of the Council regarding the seniority of the accused to be prosecuted and its acknowledgement of the need to create a temporary Mechanism to carry out the trial of high-level fugitives, it is unsurprising that a seniority criterion has been introduced in the IRMCT Statute. Under Article 1(2), the Mechanism has the authority to prosecute ‘persons indicted by the ICTY and the ICTR who are among the most senior leaders suspected of being the most responsible for the crimes...considering the gravity of the crimes charged and the level or responsibility of the accused.’¹⁰⁶ Nevertheless, the personal jurisdiction of the Mechanism is not wholly limited to the trial of senior leaders. As stated in Article 1(3), the Mechanism can prosecute persons indicted, who are not among the most senior leaders, after ‘it has exhausted all reasonable efforts’ to refer the case to a national jurisdiction.¹⁰⁷ It would seem that this provision may be designed with the ICTR rather than the ICTY in mind. Of the nine ICTR fugitives, only three are considered to be the most senior leaders of the

¹⁰³ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para. 100.

¹⁰⁴ IRMCT Statute, Art. 1.

¹⁰⁵ RSCSL Agreement, Art. 1(3).

¹⁰⁶ IRMCT Statute, Art 1(2).

¹⁰⁷ *Ibid.*, Art 1(3).

1994 genocide. In spite of the decision of the Appeals Chamber to refer a case to Rwanda for trial, if the ICTR does not successfully transfer its other cases to national jurisdictions or if it has to revoke a Rule 11bis order in the future, the ICTR branch of the IRMCT may have to prosecute mid-level offenders itself.

The seniority criterion included in the Special Court Statute is repeated in the RSCSL Statute. Article 1(2) states that the personal jurisdiction of the Residual Special Court is limited to the ‘persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.’¹⁰⁸ Later in the provision, it is specified that if the case of the remaining fugitive, Johnny Paul Koroma, is not referred to a competent national jurisdiction the RSCSL shall have the authority to try it.

One of the challenging policy questions that advisors on the set up of the IRMCT and the RSCSL faced was how long the Mechanisms of the respective Tribunals would be required to function. As noted in the 2008 Report on Residual Functions of the Special Court, the residual functions can be broadly divided into two categories: firstly, the “*ad hoc* functions” and, secondly, the “ongoing functions”.¹⁰⁹ The *ad hoc* functions are the obligations that may only be required from time to time and may, in practice, never be required at all, for example, review or contempt hearings. The ongoing functions are those that involve ongoing day-to-day responsibilities, for example, supervision of the enforcement of prison sentences and management of the archives. Thus, it is very difficult to determine when, and in some circumstances, if, the Mechanism will be needed.

The Security Council has decided not to set an end date for the operations of the IRMCT. Instead, Paragraph 17 of Resolution 1966 indicates that the Mechanism shall function for ‘an initial period of four years’ from 1 July 2012.¹¹⁰ Before the end of the initial period, the Council has decided to review the Mechanism’s work, including the progress made towards completing its functions and will continue to review progress

¹⁰⁸ RSCSL Statute, Art. 1(2).

¹⁰⁹ The “*ad hoc*” and “ongoing” residual functions criteria are adopted from the preparatory work for the Residual Issues Expert Group Meeting held in Freetown in February 2008. The criteria, rather than all of the ten critical residual functions, are referenced in the ‘Comprehensive Report prepared by the Special Court for Sierra Leone’, (February 20-21, 2008).

¹¹⁰ UN Doc. S/RES/1966 (2010), para.17.

every two years after that time. The Mechanism shall continue to operate for periods of two years after each review, until the Security Council decides otherwise. The Council has hinted, however, that the IRMCT may close before all its residual functions are completed. In Resolution 1966, the Council declared its intention to decide on the ‘modalities for the exercise of any remaining residual functions of the Mechanism upon the completion of its operation.’¹¹¹ The Agreement on the Residual Special Court does not prescribe a date for its closure. Rather, Article 16 of the Agreement prescribes that the treaty ‘shall be terminated by written agreement of the Parties.’¹¹²

Apart from addressing the personal, temporal and territorial jurisdiction of the Mechanisms, consideration must also be given to the future relationship of the IRMCT and the RSCSL with national courts. Arguably, the devastation of the criminal justice systems in the former Yugoslavia and Rwanda made the case for international tribunals with primacy over national courts persuasive at the time the ICTY and the ICTR were created. In fact, in the *Tadić* jurisdictional decision, the Appeals Chamber stated that when the ICTY was created, the Tribunal had to be endowed with primacy over national courts.¹¹³ Otherwise there would be a permanent risk of international crimes being characterised as “ordinary crimes” or national proceedings being manoeuvred to shield the accused from international accountability. The Security Council has decided that the Mechanism shall exercise primacy over the national courts of all States.¹¹⁴ Article 5(1) of the IRMCT Statute, entitled ‘Concurrent Jurisdiction’, states that the Mechanism and national courts shall have concurrent jurisdiction to prosecute persons indicted by the ICTY and the ICTR. Article 5(2) declares that the Mechanism shall have primacy over national courts – at any stage of proceedings against a person indicted by the Tribunals, the Mechanism may formally request the national courts to defer to its competence. Interestingly, although, pursuant to Article 1(2), the Mechanism has the power to prosecute persons who are among the most senior leaders and, pursuant to Article 1(3), persons who are not, Article 5(2) only refers to the authority of the Mechanism to request

¹¹¹ *Ibid.*, para.18.

¹¹² RSCSL Agreement, Art. 15.

¹¹³ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.58.

¹¹⁴ IRMCT Statute, Art. 5(2).

the deferral of a case involving a person considered to be among the most senior leaders suspected of being most responsible for the crimes committed in the respective conflicts.

Considering the residual phase of the Tribunals, there are a number of scenarios that may arise when the Mechanism may need to exercise its primacy. For example, despite the considerable developments in the field of judicial reform in the Balkans and Rwanda, it is apparent that the Security Council is not prepared to empower the *ad hoc* Tribunals or the IRMCT to refer the cases of fugitives, who are considered to be the most senior leaders, to national jurisdictions for trial. Instead, if arrested, the high-level fugitives will be brought to trial before the respective branch of the Mechanism. The possibility of conflicts of jurisdiction in relation to fugitive cases arising after the closure of the ICTY and the ICTR in December 2014 cannot be completely ruled out. Since the Mechanism has primacy over States, it will be in a position to resolve any future conflicts with States that might wish to shelter a fugitive from legitimate prosecution.

In addition, Article 6(6) of the IRMCT Statute adopts, in large part, the language of Rule 11bis of the Rules of Procedure and Evidence. Article 6(6) provides that after a referral order has been made by the *ad hoc* Tribunals or the Mechanism, and before the accused is found guilty or acquitted by a national court, the Mechanism is empowered to revoke the order and make a formal request for deferral if ‘it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice’ to do so.¹¹⁵ Since the ICTY has referred all of the cases it intended to and proceedings before national courts are mostly completed, the power of the Mechanism to revoke referral orders is of particular importance to the ICTR that secured its first referral order to Rwanda in 2011.¹¹⁶ As a security net to the referral process and to ensure that the ICTR branch of the Mechanism may formally request the deferral of proceedings to its jurisdiction, the IRMCT has primacy over national courts.

In accordance with the principle enshrined in Article 14(7) of the International Covenant on Civil and Political Rights, the rule against double jeopardy is incorporated

¹¹⁵ *Ibid.*, Art 6(6).

¹¹⁶ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

in the Statutes of the respective Tribunals.¹¹⁷ The *non-bis-in-idem* provisions in the Tribunals' and SCSL's Statutes have been incorporated into the IRMCT Statute and the RSCSL Statute. Article 7(1) declares: 'No person shall be tried before a national court for acts constituting serious violations of international humanitarian law...for which he or she has already been tried by the ICTY, the ICTR or the Mechanism.'¹¹⁸ Thus given the primacy of the Tribunals and the IRMCT, the principle of *non-bis-in-idem* precludes subsequent trials before a national court.¹¹⁹ Although it is unlikely, after the closure of the Tribunals, the possibility that a national court may try to prosecute a person who has already been tried by the ICTY, the ICTR, or the SCSL for the same offences cannot be eliminated. Presumably to give effect to Article 7 of the IRMCT Statute, the Mechanism's Rules of Procedure and Evidence will, similar to the existing Rules of Procedure and Evidence of the Tribunals, empower the Court to request that national proceedings are stopped. For example, pursuant to Rule 13 of the Rules of Procedure and Evidence of the *ad hoc* Tribunals, if the President is informed that criminal proceedings have been initiated before a national court against a person who has already been tried by the ICTY or the ICTR, a Trial Chamber is empowered to issue an order requesting a national court to discontinue its proceedings.¹²⁰ If the national court fails to stop the proceedings, the President may report the issue to the Security Council. The Special Court's President is authorised to issue a reasoned order or a request to a national court seeking the discontinuance of the duplicative proceedings.¹²¹

It would seem, as was the case when the *ad hoc* Tribunals were first created, the Security Council does not want a fugitive to evade international criminal responsibility as a result of national proceedings designed to shield the accused from the jurisdiction of the

¹¹⁷ See: International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 14. See also: ICTY Statute, Art. 10(1); ICTR Statute, Art. 9(1). Note: SCSL Statute, Art. 9(1) also provides that 'No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.'

¹¹⁸ IRMCT Statute, Art. 7(1). See also: Art. 9(1) of the RSCSL Statute.

¹¹⁹ See: ICTY Statute, Art. 9; ICTR Statute, Art. 8; and IRMCT Statute, Art. 5, which declare that the tribunals exercise concurrent jurisdiction and shall have primacy over national courts. At any stage of the national proceedings they may formally request national courts to defer to the competence of the Court in accordance with the Rules of Procedure and Evidence. The SCSL Statute refers to 'primacy over the national courts of Sierra Leone.'

¹²⁰ ICTY RPE, Rule 13; ICTR RPE, Rule 13. Note: SCSL RPE, Rule 13 differs in text and states that the President shall issue a reasoned order or request seeking permanent discontinuance of proceedings. If the court fails to do so, the President may take appropriate action.

¹²¹ SCSL RPE, Rule 13.

Mechanism.¹²² As reflected in the Tribunals' and the SCSL's Statutes, the *non-bis-in-idem* principle does not preclude a subsequent trial before the ICTY, the ICTR or the SCSL.¹²³ Likewise, under Article 7(2)(a) and (b) of the IRMCT Statute and Article 9(2) of the RSCSL Statute, a person who has been tried for serious violations of international law before a national court may be subsequently tried by the IRMCT or the RSCSL, only if: the act was characterised as an ordinary crime or the national proceedings were not impartial or independent or were intended to shield the accused from international criminal liability; or the case was not diligently prosecuted.¹²⁴ The ICTR still has a number of outstanding high-level fugitives who are earmarked for trial by the Mechanism rather than before domestic courts.¹²⁵ Therefore, like the Tribunals, the IRMCT shall have the authority to stop national proceedings and/or order the deferral of a fugitive's case to its jurisdiction for subsequent trial without offending the principle of double jeopardy.

Article 8 of the RSCSL Statute provides that the court and the national courts of Sierra Leone shall have concurrent jurisdiction. Unlike the IRMCT, the Residual Special Court shall have primacy only over Sierra Leonean courts.¹²⁶ Article 7 of the Statute sets out the grounds for the revocation of a referral order but it does not declare that the court has the power to formally request the deferral of a case. Most likely, this is because the RSCSL does not exercise primacy over all States.

B. THE RESIDUAL FUNCTIONS

(1) DEFINING THE RESIDUAL FUNCTIONS

¹²² 'Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/1993/25704, para.66.

¹²³ ICTY Statute, Art. 10(2); ICTR Statute, Art. 9(2); SCSL Statute, Art. 9. For a discussion on the double jeopardy principle, see: William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp.535-537; see also: Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, pp.68-69.

¹²⁴ IRMCT Statute, Arts. 7(2)(a) and (b).

¹²⁵ The three ICTR high-level fugitives for trial by the ICTR or the Mechanism are: Félicien Kabuga – *Kabuga* (ICTR-99-44-I), Indictment, 21 November 2001; Augustin Bizimana – *Bizimana* (ICTR-98-44-I), Indictment, 21 November 2001; and Major Protais Mpiranya – *Mpiranya* (ICTR-2000-56), Indictment, 25 September 2002.

¹²⁶ IRMCT Statute, Arts. 8 (1) and (2).

By creating the *ad hoc* Tribunals and the Special Court, the United Nations affirmed that ‘the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.’¹²⁷ In order to uphold international standards applied by the international Tribunals and to ensure the ongoing protection of the rights of the accused, convicted persons, as well as victims and witnesses, there are, however, certain legal and administrative obligations of the Tribunals which will not terminate upon the completion of all trials and appeals.¹²⁸ These residual functions will continue after the *ad hoc* Tribunals and the Special Court will close.¹²⁹ Article 1 (1) of the RSCSL actually lists the residual functions of the Special Court whereas the functions are referred to more generally in the IRMCT Statute. The functions include: the trial of high-level fugitives; the referral of cases to national jurisdictions including revocation of Rule 11bis orders; the review of judgments; the trial of contempt cases; the protection of witnesses; the maintenance of the archive; the provision of assistance to national jurisdictions; and the supervision of the enforcement of sentences.¹³⁰

(2) THE TRIAL OF HIGH-LEVEL FUGITIVES

The former President of the Yugoslavia Tribunal, Judge Fausto Pocar, once remarked that, if fugitives are not brought to justice, ‘the message and the legacy of the Tribunal that the international community will not tolerate impunity for serious violations of international humanitarian law will be dangerously undermined.’¹³¹ Out of the 161

¹²⁷ UN Doc. S/RES/1315 (2000).

¹²⁸ For the ICTR functions, see: Erik Møse, ‘The ICTR’S Completion Strategy-Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667, p. 667.

¹²⁹ See: Special Court for Sierra Leone ‘Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone’, December 2008, p.14; ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, paras.13-14. For a general discussion of the functions, see: Caitlin Reiger, International Centre for Transitional Justice Briefing, ‘Where To From Here for International Tribunals? Considering Legacy and Residual Issues’, September 2009. See also: Wayde Pittman, ‘The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation’, (2011) 9 *Journal of International Criminal Justice* 797.

¹³⁰ UN. Doc. S/PV.6134 (2009), p.15.

¹³¹ UN Doc. S/PV.5594 (2006), p.7.

persons originally indicted by the ICTY, one fugitive, Goran Hadžić, remains at large.¹³² As early as 2006, the ICTY Prosecutor asked the Security Council to send a strong message to the ICTY's fugitives to inform them that 'their trial can begin in The Hague at any time until 2010, and a mechanism will be established for them to be tried in The Hague after that date.'¹³³ The ICTR President has recalled that when the Tribunal was created, the Security Council determined that genocide, war crimes and crimes against humanity constituted a threat to international peace and security.¹³⁴ In Judge Dennis Byron's opinion, that proposition remains valid as long as the top-level ICTR fugitives remain at large. In fact, the President has opined that the ICTR will not accomplish its mandate until all the fugitives are apprehended and tried fairly.¹³⁵ The Rwanda Tribunal continues to call for greater State cooperation regarding the arrest and transfer of its nine remaining fugitives.¹³⁶ Three of the fugitives are considered to have orchestrated the 1994 Rwandan genocide. Consequently, Félicien Kabuga, Augustin Bizimana and Protas Mpiranya have been earmarked for trial at the ICTR or by its branch of the IRMCT.¹³⁷ The Special Court has one outstanding indictment against the former head of the Armed Forces Revolutionary Council, Johnny Paul Koroma. The Office of the Prosecutor is managing an ongoing investigation into the death of the fugitive, but, thus far, has been unable to confirm that he is deceased.¹³⁸

The Security Council has reaffirmed the necessity of bringing to justice persons who have been indicted by the ICTY and the ICTR, in particular the accused who fall into the category of most senior leaders.¹³⁹ The IRMCT Statute explicitly declares that the Mechanism shall have the authority to prosecute 'the persons indicted by the ICTY or

¹³² See: *Hadžić* (IT-04-75), Indictment, 21 May 2004. In 1991, Goran Hadžić was the President of the self-declared Serbian Autonomous District Slavonia, Baranja and western Serm. In 1992, Hadžić was elected President of the so-called Republic of Serbian Krajina.

¹³³ UN Doc. S/PV.5594 (2006), p.10.

¹³⁴ UN Doc. S/PV.6228 (2009), p.7.

¹³⁵ *Ibid.*

¹³⁶ *Kabuga* (ICTR-99-44-I), Indictment, 21 November 2001; *Bizimana* (ICTR-98-44-I), Indictment, 21 November 2001; *Mpiranya* (ICTR-2000-56), Indictment, 25 September 2002 ; *Kayishema* (ICTR-01-67), Indictment, 3 July 2001; *Ndimbatu* (ICTR-95-1), Indictment, 29 April 1996; *Ntaganzwa* (ICTR-96-9), Indictment, 1 December 1998; *Ryandikayo* (ICTR-95-1), Indictment, 29 April 1996; *Sikubwabo* (ICTR-95-1D), Indictment, 20 October 2000; *Munyarugarama* (ICTR-02-79).

¹³⁷ UN Doc. S/PV.6228 (2009), p.11; UN Doc. S/2011/317, p.11.

¹³⁸ See: the comments of the former Prosecutor Stephen Rapp, UN Doc. S/PV.6163 (2009), p.6. Witnesses in the Charles Taylor trial have testified to hearing that Koroma was killed in Liberia. The Prosecutor has not been able to find and identify his remains and rumours persist of his whereabouts in the sub-region.

¹³⁹ UN Doc. S/PRST/2008/47 (2008). See also: UN Doc. S/RES/1966 (2010), Preamble, para.6.

the ICTR who are among the most senior leaders suspected of being most responsible for the crimes [...] considering the gravity of the crimes charged and the level of responsibility of the accused.¹⁴⁰ Regarding suspects who do not fall into the category of most senior leader, according to Article 1(3) of the IRMCT Statute, the Mechanism may only conduct the trials of those accused after it has ‘exhausted all reasonable efforts’ to refer the case to a State which has jurisdiction and is willing and adequately prepared.¹⁴¹ The RSCSL shall have the power to try the remaining SCSL fugitive, Johnny Paul Koroma.¹⁴²

(3) THE REFERRAL OF CASES TO NATIONAL JURISDICTIONS

As discussed, the IRMCT will be able to prosecute the ICTY’s and the ICTR’s high-level fugitives if they are apprehended in the future.¹⁴³ Article 6 of the IRMCT Statute incorporates much of the language contained in Rule 11bis of the Tribunal’s Rules of Procedure and Evidence. It declares that the Mechanism shall have the authority to refer persons, who are not among the most senior leaders, to national authorities for trial. Moreover, the Mechanism is also empowered to refer contempt cases to national authorities for trial taking into account the interests of justice and expediency.¹⁴⁴ Interestingly, although the remaining Special Court fugitive is indicted as one of the persons most responsible for the crimes committed during the conflict in Sierra Leone, under Article 7 of the RSCSL Statute, the Residual Special Court ‘shall have the power, and shall undertake every effort, to refer the case’ to a national jurisdiction for trial.¹⁴⁵

At this stage in the work of the Tribunals, the power to refer cases to States is of most importance to the Rwanda Tribunal. Only three of the remaining nine ICTR fugitives are considered top-level. In an effort to meet the ICTR completion strategy timelines, in November 2010, Prosecutor Hassan Jallow filed applications under Rule 11bis for the referral of three cases to Rwanda.¹⁴⁶ In December 2011, the ICTR Appeals Chamber issued its decision in the Uwinkindi case. For the first time, the ICTR has

¹⁴⁰ IRMCT Statute, Art. 1(2).

¹⁴¹ IRMCT Statute, Art. 1(3).

¹⁴² RSCSL Statute, Art. 1(2).

¹⁴³ IRMCT, Art. 1(2).

¹⁴⁴ *Ibid.*, Art. 1(4)

¹⁴⁵ RSCSL Statute, Art. 7.

¹⁴⁶ UN Doc. S/2011/317, para. 48.

ordered the referral of a case under Rule 11bis to Rwanda.¹⁴⁷ Although the Prosecutor hopes that the positive decision will open the door for more referrals to Rwanda, there is no guarantee that this will happen before the ICTR completes its work. Thus, as noted under Article 6 of the IRMCT Statute, the ICTR branch of the Mechanism shall have the power to order the referral of a case to a national jurisdiction.

Bearing in mind that power to revoke cases is considered by the Tribunals to enhance the protection of the rights of the accused, in advance of the adoption of Resolution 1966 the Security Council was advised that the Mechanism should have the authority to revoke a Rule 11bis order.¹⁴⁸ Under Article 6(6) of the IRMCT Statute, before the accused is found guilty or acquitted by a national court, the Mechanism has the authority to revoke a referral order made by the ICTY, the ICTR or the IRMCT and formally request deferral of the case to its jurisdiction if ‘it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice’ to do so.¹⁴⁹ The grounds for revoking a referral decision are different for the Residual Special Court. Under Article 7(3) of its Statute an order shall only be revoked if the national jurisdiction is unwilling or unable to prosecute the accused; the proceedings are not impartial or independent; or the case is not diligently prosecuted.

(4) THE REVIEW OF JUDGMENTS

There is no provision in the Statutes or the Rules of Procedure and Evidence of the *ad hoc* Tribunals or the SCSL that prevents a person convicted by the Tribunals from initiating review proceedings at any point during the service of their sentence. Although none of the persons convicted by the SCSL has filed a request for the review of their judgment, numerous motions have been submitted before the Tribunals for the former Yugoslavia and Rwanda. The ICTY Appeals Chamber has dealt with 10 requests for

¹⁴⁷ *Uwinkindi* (ICTR-2001-75-AR11bis), Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

¹⁴⁸ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para. 74.

¹⁴⁹ IRMCT Statute, Art. 6(6).

review by convicted persons and one by the Prosecutor.¹⁵⁰ However, no judgment has been substantively reviewed. 11 requests for review proceedings have been filed before the ICTR. In *Barayagwiza*, the ICTR Appeals Chamber, in light of the new facts presented by the Prosecutor, granted the motion to reinstate the indictment against the accused.¹⁵¹

The ICTR Appeals Chamber noted in *Barayagwiza* that if new facts are discovered in a particular case and if those facts could have been a decisive factor the Court reaching its judgment, removing or limiting the right of the convicted person to review proceedings would result in a violation of the person's fundamental human rights by the Tribunals.¹⁵² In early policy discussions on residual functions, commentators remarked that, if exonerating evidence is discovered which could form the basis for review proceedings and possibly the reversal of a judgment, if the convicted person cannot have his/her case reviewed, this could result in a miscarriage of justice.¹⁵³ The ICTY, the ICTR and the SCSL have also emphasised the view that the review of judgments is an essential residual function which must be available to convicted persons after their closure.¹⁵⁴ The language of the IRMCT and RSCSL Statutes effectively mirrors the provisions of the *ad hoc* Tribunals' Statutes and Rules of Procedure and Evidence that regulate review proceedings. Article 24 of the IRMCT Statute and Article 22 of the RSCSL Statute provide that if a new fact is discovered which was not known during the proceedings before the ICTY, the ICTR or the SCSL and which could have

¹⁵⁰ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para. 32.

¹⁵¹ *Barayagwiza* (ICTR, 97-19-AR72), Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000. The Chamber reversed its decision, issued on 3 November 1999, that the prosecution against the accused be stayed due to abuse of process by the Prosecutor. In its March decision, the Chamber ruled that, if found guilty, the accused would be entitled to credit for the violation of his fundamental rights. If found not guilty, the Chamber directed that the accused would receive financial compensation. See also: William A. Schabas, ‘*Barayagwiza v. Prosecutor*’, (2000) 94 *American Journal of International Law* 638.

¹⁵² *Ibid.*, paras. 61 -70.

¹⁵³ See: Open Society Justice Initiative and International Criminal Law Services, Briefing Paper (marked draft), ‘The Residual Functions of the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and the Potential Mechanisms to Address Them’, January 2008.

¹⁵⁴ ‘Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals’, UN.DOC S/2009/258, para. 32.

'been a decisive factor in reaching the decision', the convicted person may apply to the IRMCT or the RSCSL for a review of the judgment.¹⁵⁵ Not every application will result in a judgment review. Instead, the IRMCT Statute provides that the judgment shall only be reviewed 'if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision.'¹⁵⁶ Under Article 22(2) of the RSCSL Statute, the President may reject an application if it is considered to be unfounded.

(5) THE TRIAL OF CONTEMPT CASES

Although the Statutes of the *ad hoc* Tribunals do not mention the authority of the institutions to deal with contempt cases, in *Tadić*, the ICTY Appeals Chamber declared:

The Tribunal does...possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by...Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice.¹⁵⁷

Therefore, the ICTY and the ICTR Rules empower the Tribunals to hold in contempt and punish any person who wilfully and knowingly interferes with its administration of justice.¹⁵⁸ Similarly, Rule 77 of the Special Court Rules of Procedure and Evidence refers to the inherent power of the Court to prosecute and punish persons found to be in contempt of the Tribunal.¹⁵⁹ The ICTY has initiated approximately 43 contempt cases.¹⁶⁰ Charges included interference with witnesses; refusal to answer questions in court; the

¹⁵⁵ IRMCT Statute, Art. 24; RSCSL Statute, Art. 22.

¹⁵⁶ IRMCT Statute, Art. 24.

¹⁵⁷ *Tadić* (IT-94-1-A-R77), Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para.13.

¹⁵⁸ ICTY RPE, Rule 77; ICTR RPE, Rule 77. In the ICTY, the maximum penalty that may be imposed on a person shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both. In the ICTR, the maximum penalty that may be imposed on a person shall be a term of imprisonment not exceeding five years, or a fine not exceeding 10,000 dollars, or both.

¹⁵⁹ SCSL RPE, Rule 77. In the SCSL, the maximum penalty that may be imposed on a person shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 2 million leones, or both.

¹⁶⁰ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.23.

disclosure of identify and/or testimony of protected witnesses; and failure to answer a subpoena.¹⁶¹ The ICTR has initiated contempt cases. In the closing years of the SCSL, there has been a marked increase in contempt proceedings as a result of persons allegedly bribing witnesses to recant their testimonies in a number of cases. Well in advance of the adoption of Security Council Resolution 1966 and the Agreement on the Residual Special Court, experts advised that the residual mechanisms would need the authority to receive and investigate allegations of interference with the administration of justice and, if necessary, to conduct contempt proceedings against those accused.¹⁶² The ICTY and the ICTR also advised the Council that a judicial capacity would be required after completion of their mandates to ensure the ongoing protection of victims and witnesses and the effective administration of justice.¹⁶³ Both the IRMCT and the RSCSL shall have the power to prosecute persons for contempt of court. Interestingly, unlike the ICTY and the ICTR Statutes, the IRMCT Statute specifically states that the Mechanism shall have the power to prosecute contempt. Article 1(4) declares that proceedings can be initiated against:

- (a) any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt; or

¹⁶¹ Šešelj (IT-03-67-R77.3), Public Redacted Version of Second Decision on Prosecutor's Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books), 4 February 2010. The Trial Chamber initiated contempt proceedings against the accused, Vojislav Šešelj, for having disclosed information on 11 protected witnesses, including their real names, occupations and addresses in a book he authored. Former staff of the ICTY have also been prosecuted for contempt. See, for example: Hartmann (IT-02-54-R77.5), Judgment Summary, 14 September 2009. The former Spokesperson of the ICTY, Prosecutor Florence Hartmann, was sentenced to a fine of 7,000 Euro for knowingly and wilfully interfering with the administration of justice by disclosing information, in violation of an order of the Appeals Chamber in the Slobodan Milošević trial, in her book, entitled *Paix et Châtiment* and published on 10 September 2007, and also in her article, entitled 'Vital Genocide Documents Concealed' and published by the Bosnian Institute on 21 January 2008. See also: Tabaković (IT-98-32/1-R77.1), Indictment, 30 October 2009. The indictment alleges that the accused was approached by Milan Lukić's defence case manager and subsequently signed a false statement of events he did not witness in exchange for money.

¹⁶² Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY', (2008) 6 *Journal of International Criminal Justice* 655, p.664.

¹⁶³ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.23.

- (b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.¹⁶⁴

Another notable innovation contained in the IRMCT Statute is the power of the Mechanism to refer contempt cases to national authorities for trial which the *ad hoc* Tribunals are not authorised to do under Rule 77 of their Rules of Procedure and Evidence. Article 1(4) of the IRMCT Statute explicitly states that before the Mechanism initiates contempt proceedings against a person, it shall ‘consider referring the case to the authorities of a State...taking into account the interests of justice and expediency.’¹⁶⁵

Although Article 1(1) of the RSCSL Statute states that the Court shall conduct contempt proceedings, there is no other reference to acts of contempt in the Statute.¹⁶⁶ Since Article 16 of the Statute states that the SCSL’s Rules of Procedure and Evidence shall apply *mutatis mutandis* to proceedings before the Residual Court, Rule 77 of the SCSL’s Rules shall regulate contempt proceedings.¹⁶⁷ The RSCSL will have the option to refer contempt cases to the authorities of Sierra Leone. Rule 77(C)(iii) of the SCSL Rules of Procedure and Evidence states that when a Trial Chamber has reason to believe that a person may be in contempt of Court, it is authorised to refer the matter to the appropriate authorities in Sierra Leone.¹⁶⁸

(6) WITNESS PROTECTION AND SUPPORT

More than 1400 ICTY witnesses and 2300 ICTR witnesses are subject to some form of protective measure.¹⁶⁹ Both the Special Court’s Residual Functions Report and the Secretary-General’s Residual Mechanism(s) Report clearly advised that the continued monitoring and protection of witnesses is an essential residual function. This was also identified by the prosecutors of the ICTR, the ICTY, the SCSL, the ECCC and the ICC who have committed themselves to taking the necessary steps to ‘establish a regime for

¹⁶⁴ IRMCT Statute, Arts. 1(4)(a) and (b).

¹⁶⁵ IRMCT Statute, Article 1(4).

¹⁶⁶ RSCSL Statute, Art. 1(1).

¹⁶⁷ SCSL RPE, Rule 77.

¹⁶⁸ SCSL RPE, Rule 77(c)(iii).

¹⁶⁹ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.28.

the protection and support of victims providing not only physical protection, but also medical and psychological support. Such a regime should continue to operate after the closure of the *ad hoc* tribunals.¹⁷⁰ Ultimately, the failure to provide adequate protection and support to persons who have testified before the Tribunals during the post-completion period could endanger lives and shatter the legacy of the Courts. From a broader perspective it could also discourage victims and witnesses from participating in proceedings before other international and hybrid courts.¹⁷¹

In accordance with the Statutes of the *ad hoc* Tribunals, all proceedings must be conducted with due regard for the protection of victims and witnesses.¹⁷² In addition, the Statutes dictate that the Tribunals' Rules of Procedure and Evidence shall include measures to protect witnesses including the conduct of *in camera* proceedings and the protection of the victim's identity.¹⁷³ The Rules of the *ad hoc* Tribunals and the Special Court stipulate that to safeguard the privacy and security of witnesses, a Chamber may order the names and identifying information of witnesses or persons connected with them to be expunged from the public records; the non-disclosure to the public of any records identifying the victim; the assignment of a pseudonym; and/or the giving of testimony through image- or voice- altering devices or closed circuit television.¹⁷⁴ Generally, the protective measures remain in force until an order is made by a Chamber to change them.¹⁷⁵ The IRMCT will have the same authority as the *ad hoc* Tribunals in terms of the ability of its judges to issue judicial protective orders. Article 20 of the IRMCT Statute, entitled 'Protection of Victims and Witnesses', provides that the Mechanism's Rules of Procedure and Evidence shall define measures for the protection of victims and witnesses of the ICTY, the ICTR and the Mechanism, including, but not limited to, the protection of a person's identity and the possibility to conduct proceedings *in camera*.¹⁷⁶ Likewise, Article 18 of the RSCSL Statute emphasises that protection measures for witnesses and

¹⁷⁰ See the: ICTY, ICTR, SCSL, ECCC, ICC Prosecutors Roundtable, 'Discussion on International Cooperation Agenda for Action', Arusha, Tanzania, 26-28 November 2008.

¹⁷¹ Open Society Justice Initiative and International Criminal Law Services, Briefing Paper (marked draft), 'The Residual Functions of the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and the Potential Mechanisms to Address Them', January 2008.

¹⁷² ICTY Statute, Art. 20; ICTR Statute, Art. 19.

¹⁷³ ICTY Statute, Art. 22; ICTR Statute, Art. 21.

¹⁷⁴ ICTY RPE, Rule 75; ICTR RPE, Rule 75; SCSL RPE, Rule 75.

¹⁷⁵ ICTY RPE, Rule 75(F); ICTR RPE, Rule 75(F); SCSL RPE, Rule 75(F).

¹⁷⁶ IRMCT Statute, Art. 20.

victims shall include the protection of a person's identity and the conduct of *in camera* proceedings.

Under the ICTY and the ICTR Rules of Procedure and Evidence, the Registrar is obliged to create and manage a 'Victims and Witnesses Section' to recommend protective measures in accordance with the provisions of the Statute.¹⁷⁷ Likewise, Article 16 (4) of the SCSL Statute directs the Registrar to establish a 'Witness and Victims Section'. The role of the Section is to recommend protective measures for witnesses and victims and to provide counselling and other appropriate assistance especially in cases of rape, sexual assault and crimes against children.¹⁷⁸ There are a variety of issues that the Mechanisms will have to deal with after the closure of the Tribunals and the SCSL, for example, the IRMCT and the RSCSL will need the capacity to respond to reported threats connected to the evidence given by the witnesses before the Tribunals.¹⁷⁹ No doubt this is why the United Nations and the Government of Sierra Leone have agreed that the Residual Special Court will have a branch in Sierra Leone for witness and victim protection and support. Since both the IRMCT Statute and the RSCSL Statute state that the Registry of the respective Mechanisms shall retain a small number of staff commensurate with the residual functions, it is foreseeable that witness protection and support personnel will continue their role in the residual mechanisms.

(7) THE PRESERVATION AND MANAGEMENT OF THE ARCHIVES

The archives of the *ad hoc* Tribunals and the Special Court for Sierra Leone are comprised of voluminous public and confidential records; evidence; artefacts; and data in paper, electronic, audio-visual, and other formats.¹⁸⁰ The future location and management of the archives of the ICTY, the ICTR and the SCSL has sparked some of the most heated debate on residual functions among the international tribunals and the affected communities. In relation to the ICTY archive, Bosniac victim groups argue a moral claim

¹⁷⁷ ICTY RPE, Rule 34; ICTR RPE, Rule 34.

¹⁷⁸ SCSL Statute, Art. 16(4); SCSL RPE, Rule 34.

¹⁷⁹ See generally: Cecile Aptel, Briefing Paper, 'Planning for Residual Issues and Mechanisms for International and Hybrid Criminal Tribunals', February 2007.

¹⁸⁰ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.43.

to the records derived from the fact that the majority of crimes committed during the war took place in the territory of Bosnia and Herzegovina.¹⁸¹ The groups have stated that they would like the archives to be located in Sarajevo or Srebrenica. However, Serbia and Croatia have expressed the opinion that the ICTY residual mechanism and archive should not be located in any single country in the region of the former Yugoslavia.¹⁸² The Rwandan Government has repeatedly expressed its desire to take full custody of the ICTR archive after its closure.¹⁸³ In 2009, the Rwandan representative explained to the Security Council that his Government's conviction is 'premised on the fact that these records constitute an integral part of our history, are vital to the preservation of the memory of the genocide and will play a critical role in educating future generations to ensure the prevention of genocide.'¹⁸⁴ In early discussions about the SCSL archive, the President of Sierra Leone indicated that, ideally, it would be preferred that the original documents be archived in Sierra Leone.¹⁸⁵ However, the Government has since agreed that the original archives shall be co-located with the RSCSL and the archives may be relocated to Sierra Leone in the future when there 'is a suitable facility for their preservation and sufficient security for maintaining the archives in accordance with international standards'.¹⁸⁶

Regarding ownership of the archives, the Secretary-General's Bulletin on United Nations Archives and Records Management declares that the 'archival records of the United Nations [...] include the archives of the United Nations Secretariat units away from Headquarters and subsidiary organizations of the United Nations.'¹⁸⁷ The Secretary-General's Residual Mechanism(s) Report thus notes that, since the Tribunals are

¹⁸¹ ICTY, 'Report of the President on the Conference Assessing the Legacy of the ICTY', 27 April 2010, para.7.

¹⁸² 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.213. Croatia supports the idea that the ICTY archive should be centralised, undivided and sited at one location, preferably in The Hague. The Croatian Government also opposes locating the archive in any single country in the region because the Government believes there are reasonable doubts as to whether access to archives would be equal for the populations of all affected countries.

¹⁸³ *Ibid.*, para.215.

¹⁸⁴ UN Doc. S/PV.6228 (2009), p.33.

¹⁸⁵ Introductory Remarks by President Ernest Bai Koroma, at the SCSL Residual Issues Expert Group Meeting, SCSL Freetown, 22 February 2008.

¹⁸⁶ RSCSL Agreement, Arts. 7(2) and (3).

¹⁸⁷ UN Doc. ST/SGB/242 (1991), para.3.

subsidiary organs of the Security Council, their archives are the property of the United Nations.¹⁸⁸ Any uncertainty about the ownership of the archives of the *ad hoc* Tribunals has been clarified by the IRMCT Statute. Article 27(1) states that ‘the archives of the ICTY, the ICTR and the Mechanism shall remain the property of the United Nations.’¹⁸⁹ Since the Special Court is not a subsidiary organ of the Security Council, the situation in relation to the ownership of its archive is not quite as clear-cut. The Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Court states that the ‘archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located by whomsoever held, shall be inviolable.’¹⁹⁰ However, the governing instruments of the Special Court do not specify the permanent custodian of the archive or whether the archive is the property of the United Nations or the Government of Sierra Leone. The Agreement on the Establishment of the Residual Special Court is less ambiguous in terms of the ownership of the archives. Article 7 declares that the ‘archives and other documents of the Special Court shall be the property of the Residual Special Court without prejudice to the rights of, and conditions imposed by, information providers and other third parties.’¹⁹¹

As previously noted, the future location of the archives of the international tribunals has been a very contentious subject. In examining this issue, the advisors to the *ad hoc* Tribunals and the SCSL on the future of their archives scrutinised two key issues: first, the value of the records and, second, the identification of who the future users of those records would be.¹⁹² In archival terms, ‘records have primary value for the creating

¹⁸⁸ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, paras.15 and 41.

¹⁸⁹ IRMCT Statute, Art. 27(1)

¹⁹⁰ ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’, Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II, Art. 8.3.

¹⁹¹ RSCSL Agreement, Art. 7.

¹⁹² In October 2007, the Registrars of the ICTY and the ICTR set up the Advisory Committee on Archives, chaired by Richard Goldstone, to provide advice on the future location and management of the *ad hoc* Tribunals’ archives. The Committee recommended different sites for the ICTY and the ICTR archives: a location in Europe for the ICTY, and one in Africa for the ICTR. See also: ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, paras.53-58. In addition see: Special Court for Sierra Leone ‘Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone’, December 2008.

institution and secondary value for everyone else. All records have primary value – that is, the value that records possess, by virtue of their contents, for the transaction of business.¹⁹³ Through the application of this archival principle to the Tribunals and the SCSL, the primary value of their records is recognised as judicial and will remain so for a considerable period after the closure of the ICTY, the ICTR and the SCSL. That is to say, the archives of the Tribunals and the SCSL will be required for the performance of the residual functions discussed in this chapter. As a result, there is a nexus between the IRMCT and the RSCSL and the records which have been generated by the ad hoc Tribunals and the Special Court that may be needed for the performance of the residual functions.¹⁹⁴ Thus, for example, with respect to the possible trials of fugitives or other residual proceedings involving convicted persons (review of convictions, contempt proceedings), judicial records, confidential records and evidence of the Office of the Prosecutor, and other records will be needed.¹⁹⁵ In any event, the Security Council has decided that the archives of the *ad hoc* Tribunals shall be co-located with the respective branches of the IRMCT.¹⁹⁶ The Tribunals have been advised that so long as the archives contain a considerable number of confidential records, they should not be transferred to Rwanda and the countries of the former Yugoslavia.¹⁹⁷ However, when there is no longer a substantial amount of confidential records in the archives, although the United Nations would retain ownership, consideration should be given to transferring the custody of the archives to a country in the former Yugoslavia or Rwanda.¹⁹⁸ Article 7(1) of the Residual

¹⁹³ Trudy Huskamp Peterson, ‘Temporary Courts, Permanent Records’, United States Institute of Peace Special Report, August 2006.

¹⁹⁴ The *ad hoc* Tribunals’ Advisory Committee on Archives, chaired by Justice Richard Goldstone, stressed that the Tribunals’ archives would be inextricably linked to the performance of residual functions by any residual institution created by the United Nations and advised that serious consideration should be given to the co-location of the archives with the institution that would manage the residual functions. See: ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.186.

¹⁹⁵ For the three main categories of the ICTY and the ICTR records, see: *ibid.*, paras.44-52.

¹⁹⁶ IRMCT Statute, Art. 27(3).

¹⁹⁷ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para.186.

¹⁹⁸ *Ibid.*, para.187. The ICTY does not support the recommendation that, when there is no longer confidential records in each of the archives, the UN should consider transferring their physical custody to a country in the former Yugoslavia or Rwanda. In the ICTY’s opinion, it would be logistically and politically

Special Court Agreement also provides that the archives shall be co-located with the RSCSL. However, the Article goes on to say that, at any time in the future, the United Nations and the Government of Sierra Leone may agree to re-locate the archives to Sierra Leone ‘when there is a suitable facility for their preservation and sufficient security for maintaining the archives in accordance with international standards.’¹⁹⁹

It shall be the responsibility of the IRMCT and the Residual Special Court to manage the archives and maintain the confidentiality of certain records.²⁰⁰ The Statute of the IRMCT and the Agreement establishing the RSCSL provide that, in managing access to the archives, the Residual Mechanisms ‘shall ensure the continued protection of confidential information, including information concerning protected witnesses, and information provided on a confidential basis’.²⁰¹ The provisions in the two Statutes reflect the wide consensus that the undertakings given by the *ad hoc* Tribunals and the Special Court to witnesses and other organisations that supplied information on the basis of confidentiality and the assurance that they would be protected in the long-term should be upheld. Information that may have been provided to the Office of the Prosecutor in the respective tribunals on a confidential basis is an example. Under Rule 70 (B), if the Prosecutor is in possession of information that was provided with a confidentiality restriction, the information and its source ‘shall not be disclosed by the Prosecutor without the consent of person or entity providing the initial information.’²⁰² In addition, the judges of the Yugoslavia Tribunal have decided that ‘judicial deliberations [...] should not be the subject of [...] exposure in any forum other than the proper forum of published reasons for decision in a particular matter.’²⁰³ There is also a lot of information that is covered by the protective measures ordered by the judges to ensure the wellbeing of witnesses. Any unauthorised disclosure of the confidential records could endanger

impossible to do so in the foreseeable future, because the archives would need to be copied in their entirety for each of the countries in the former Yugoslavia.

¹⁹⁹ RSCSL Agreement, Art. 7(3).

²⁰⁰ IRMCT Statute, Art. 27(2); RSCSL Agreement, Art. 7(4).

²⁰¹ IRMCT Statute, Art. 27(3); RSCSL Agreement, Art. 7(1).

²⁰² ICTY RPE, Rule 70(B); ICTR RPE, Rule 70(B); SCSL RPE, Rule 70(B).

²⁰³ See: *Delalić et al.* (ICTY IT-96-21-A), Order on Motion of the Appellant, for Permission to Obtain and Adduce further Evidence on Appeal, 7 December 1999, pp.4-5. For a discussion on what part of ICTY confidential record is covered by protective measures, see: Guido Acquaviva, “‘Best Before Date Shown’: Residual Mechanisms at the ICTY”, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, p.531.

persons who testified in trials. The complexity of managing access to the archives is clear and will be regulated. In fact, the Secretary-General has been requested to prepare the information security and access regime for the Tribunals' archives and the IRMCT before July 2012.

It is unquestionable that the evidence contained in the archives of the *ad hoc* Tribunals and the SCSL are deeply significant to the victims, witnesses, their families and the future generations of Rwanda, Sierra Leone and the States in the former Yugoslavia. It is broadly agreed that the records should be preserved to ensure that the atrocities committed during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone are not forgotten. In fact, discussions regarding the future ownership of and access to the archives have been linked to the process of national reconciliation in the affected countries. The Secretary-General has advised the Council that the archives are 'tools for fostering reconciliation and memory'.²⁰⁴ Moreover, the Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity, adopted by the Office of the High Commissioner for Human Rights, points towards the importance of, the maintenance of, and access to archives as a way to safeguard against future violations.²⁰⁵ As noted in Principle 3, the preservation of archives and other evidence concerning serious violations of humanitarian law can serve to protect the 'collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments'.²⁰⁶ The Special Court's Residual Functions Report and the Secretary-General's Residual Mechanism(s) Report have identified that long-term management of the archives will involve a balancing of the victims' right to know about the work of the Tribunals with the right of witnesses, governments, non-governmental organisations and other organisations to continue to be

²⁰⁴ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.201. The report analyses 14 potential locations for the Tribunals' archives and the residual ICTY and ICTR mechanisms, which include 13 United Nations offices and the International Criminal Court.

²⁰⁵ See generally: Updated Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity, adopted by the United Nations High Commission on Human Rights, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

²⁰⁶ *Ibid.*, Principle 3.

protected from damaging public disclosure by the institutions.²⁰⁷ Additionally, the indictments, judgments and transcripts are a rich research source for academics, lawyers and others who want to create educational materials. Thus, future users for secondary value (memorialising the conflict, research, education) will include victims, civil society activists, government officials, legal researchers, academic researchers and journalists, amongst others. The Secretary-General has noted that '[t]he primary value of the Tribunals' records will progressively diminish over time as the residual functions are no longer needed to be performed.'²⁰⁸ Subsequently, the secondary value of the archives will prevail.

Interestingly, the preservation of the integrity of the archives does not preclude the reproduction of all public records for use in a location separate from the original archive. As previously discussed the archives will be required for the performance of the residual functions of the Tribunals and the SCSL. Nevertheless, it is apparent that the experts have recognised that witnesses and victims, together with others affected by the conflict, should be given the widest possible access to the public records. Thus, for example, the Special Court's Residual Report has advised that, if the residual mechanism is the custodian of the SCSL archive but is not located in Freetown, there is a need to have a copy of the SCSL public records in the country. The Government of Sierra Leone and the United Nations have linked access to public records in the country to the preservation and promotion of the legacy of the Court. Article 7 (2) of the Agreement establishing the Residual Court states that the public in Sierra Leone shall have access to electronic and printed copies of the public records. The Special Court is now working towards the establishment of a Peace Museum to house a copy of the public records of the Court. Likewise, the Security Council has also been advised that even if the ICTY and the ICTR archives are located outside the territory of the former Yugoslavia and Rwanda, this does not preclude the establishment of information centres in the countries

²⁰⁷ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.202.

²⁰⁸ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.59.

to ensure access to copies of the public record.²⁰⁹ In Resolution 1966, the Tribunals and the IRMCT are directed to work with the States of the former Yugoslavia and with Rwanda to set up information and documentation centres.²¹⁰ The aim of the centres is to provide access to copies of the public records of the archives.

(8) THE PROVISION OF ASSISTANCE TO NATIONAL AUTHORITIES

The enhanced cooperation of the Tribunals with States is evidenced in particular by the Rule 11bis referral process as well as the referral of the so-called Category B dossiers to the states in the former Yugoslavia.²¹¹ In fact, to facilitate national trials, the ICTY judges went beyond amending the Rules of Procedure and Evidence to create the comprehensive referral process. In 2007, the judges of the Yugoslavia Tribunal amended Rule 75 to permit national authorities to directly petition the Tribunal to rescind, vary, or augment the protective measures ordered in previous proceedings.²¹² The purpose of the amendment was to improve judicial cooperation between the ICTY and courts in the region of the former Yugoslavia.²¹³

In addition to the transfer of cases, the *ad hoc* Tribunals also receive requests from national authorities for evidence and information to bolster domestic investigation efforts.²¹⁴ As the ICTY and the ICTR move towards the completion of their missions, the assistance given to national authorities by the Office of the Prosecutor of each tribunal has increased. For example, in the first quarter of 2011, the ICTR Office of the

²⁰⁹ *Ibid.*, para.245.

²¹⁰ UN Doc. S/RES/1966 (2010), para.15.

²¹¹ UN Doc. S/2007/323, para.35. The ICTR Prosecutor envisages giving the files involving 32 suspects to national jurisdictions for trial. The transfer of files is underway. Files in respect of 30 persons have already been transferred to Rwanda and the file of one suspect to Belgium. In addition to the Rule 11bis cases transferred on the basis of judicial decisions, the ICTY Office of the Prosecutor has handed over 17 investigative files involving 43 suspects to the authorities throughout the former Yugoslavia; see: UN Doc. S/PV.6228 (2009).

²¹² ICTY RPE, Rule 75(H). Judicial authorities in another jurisdiction may apply to the President of the Tribunal to seek the variation of protective measures ordered in proceedings before the Tribunal. The application shall be heard by the Chamber seized of the first proceedings; a Chamber seized of second proceedings; or, if no Chamber remains seized, to a newly constituted Chamber.

²¹³ UN Doc. S/2007/663, para.25. For comments on the number of applications received by the ICTY, see also: Fausto Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *Journal of International Criminal Justice* 655, p.662.

²¹⁴ In 2009, the ICTR Office of the Prosecutor received requests for assistance from 13 countries with regard to 44 targets under investigation for acts connected with the Rwandan genocide; see: UN Doc. S/PV.6228 (2009).

Prosecutor responded to 53 requests for mutual legal assistance from 24 Member States.²¹⁵ The future sharing of information and evidence with national authorities is regarded by the Tribunals as a residual function which will contribute to efforts by domestic courts to combat impunity for the atrocities committed during the conflicts in the Balkans and Rwanda.²¹⁶ In this regard, the IRMCT and the RSCSL will have to manage requests from national investigation and prosecution authorities for access to public and confidential records to support domestic judicial and administrative proceedings, including forfeiture proceedings, immigration and asylum cases.²¹⁷

Another situation in which the IRMCT and the RSCSL may need to provide assistance to national authorities is in relation to possible compensation claims by victims. The regulation, entitled ‘Compensation to Victims’, contained in the Tribunals’ Rules of Procedure and Evidence oblige the Registrar to transmit judgments finding an accused guilty of crimes that have caused injury to victims to the competent national authorities.²¹⁸ Rule 106 (B) of the *ad hoc* Tribunals stipulates that ‘[p]ursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.’²¹⁹ In addition, pursuant to Article 45 of the Special Court Agreement, 2002 (Ratification) Act, any victim of a crime within the jurisdiction of the SCSL may claim compensation under the national Criminal Procedure Act if the Court has found a person guilty of that crime.²²⁰ The *ad hoc* Tribunals and Special Court Rules state that for the purposes of such a claim, ‘the judgement of the Court shall be final and binding as to the criminal responsibility of the convicted person for such injury.’²²¹ Article 1 (1) of the RSCSL

²¹⁵ UN Doc. S/2011/317, para.52.

²¹⁶ For comments of the ICTR Prosecutor, see: UN Doc. S/PV.6228 (2009), p.12.

²¹⁷ ‘Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals’, 21 May 2009, UN Doc. S/2009/258, para. 40. See also: Article 1(1) of the RSCSL Statute that refers to the authority of the Residual Court to respond to requests for access to evidence by national prosecution authorities.

²¹⁸ ICTY RPE, Rule 106; ICTR RPE, Rule 106; SCSL RPE, Rule 105.

²¹⁹ ICTY RPE, Rule 106(B); ICTR RPE, Rule 106(B).

²²⁰ Special Court Agreement, 2002 (Ratification) Act, Art. 45.

²²¹ ICTY RPE, Rule 106(C); ICTR RPE, Rule 106(C); SCSL RPE, Rule 105(C).

Statute makes reference to the Court responding to requests from national authorities regarding victims claims for compensation.²²²

²²² RSCSL Statute, Art. 1(1).

(9) THE SUPERVISION OF SENTENCES: EARLY RELEASE, PARDON OR COMMUTATION OF SENTENCE

Sentences imposed by the ICTY and the ICTR are served in States which agree to accept convicted persons.²²³ Article 22 of the SCSL Statute creates a positive obligation in favour of service of sentence within Sierra Leone stating that ‘[i]mprisonment shall be served in Sierra Leone’ but permits that imprisonment may be served in a State that concludes an agreement with the Court ‘[i]f circumstances so require’.²²⁴ In the Secretary-General’s report on the draft SCSL Statute, ‘the security risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory’ was cited as an example of such a circumstance.²²⁵ The Rules of Procedure and Evidence of the Tribunals and the SCSL declare that the President shall designate the place of imprisonment for each convicted person and that transfer to the enforcing State shall be carried out as soon as possible after the time limit for appeal has lapsed.²²⁶ Entering into a sentence enforcement agreement is a voluntary undertaking by a State rather than an obligation defined under the Tribunals’ Statutes.²²⁷ Although States are not compelled to accept custody of persons convicted by the Tribunals, their willingness to do so can be viewed as a positive response to the call on all States to cooperate with the *ad hoc*

²²³ ICTY Statute, Art. 27 ; ICTR Statute, Art. 26.

²²⁴ SCSL Statute, Art. 22.

²²⁵ ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’, UN Doc. S/2000/915, para.49.

²²⁶ ICTY RPE, Rule 103; ICTR RPE, Rule 103; SCSL RPE, Rule 103. The Presidents of the *ad hoc* tribunals and the SCSL have adopted Practice Directions on the procedure for the designation of the State in which a convicted person is to serve their sentence. See generally, for example: ICTY, ‘Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve his Sentence of Imprisonment’, 9 July 1998.

²²⁷ For a general discussion in relation to enforcement, see: Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, pp.401-402. See also: ICTY Statute, Art. 29 and ICTR Statute, Art. 28, entitled ‘Cooperation and Judicial Assistance’. States’ duty to cooperate in the investigation and prosecution of cases is explicitly laid down under the Statutes and States shall comply without undue delay with any request for assistance or an order, including but not limited to: the identification and location of persons; the taking of testimony and the production of evidence; the service of documents; the arrest or detention of persons and the surrender or transfer of persons to the Tribunals. In the ‘Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’, Freetown, 16 January 2002, UN Doc. S/2002/246, Appendix II, Article 17 stipulates that the Government of Sierra Leone will comply with requests rather than States.

Tribunals and the SCSL, as urged by the Council in Resolution 827, Resolution 955 and Resolution 1470.²²⁸

Essentially, pursuant to the enforcement agreements, a sentence is served in accordance with the law of the enforcing state, subject to supervision by the Tribunals.²²⁹ The key supervisory duty is the inspection of the conditions of imprisonment. Pursuant to Rule 104 of the Rules of Procedure and Evidence all sentences shall be supervised by the *ad hoc* Tribunals or an alternative entity designated by the institutions to inspect the conditions of imprisonment.²³⁰ In many enforcement agreements, the International Committee of the Red Cross is designated as the supervisory authority.²³¹ Likewise, the Special Court enforcement agreements provide for monitoring by the SCSL, the International Committee of the Red Cross or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.²³² The supervision of the enforcement of sentences is a residual function that will extend in some cases for decades following the closure of the Tribunals and the SCSL. For example, in 2007, in the Armed Forces Revolutionary Council trial, the Special Court convicted Santigie Borbor Kanu to a term of imprisonment of 50 years.²³³ If this sentence is not reduced, the term of imprisonment will run until 2053. The ICTY and the ICTR consider that applications for commutation of sentence, pardon or early release can be expected until at least 2027 in the case of the ICTY and until approximately 2030 in the case of the ICTR.²³⁴ Thus, it is not surprising that the Statutes of the IRMCT and the RSCSL provide that the Mechanisms shall have the power to supervise the enforcement of sentences, including the implementation of the sentence enforcement agreements. After

²²⁸ UN Doc. S/RES/827 (1993), para.4; UN Doc. S/RES/955 (1994), para.2; UN Doc. S/RES/1470 (2003), para.11.

²²⁹ See: David Tolbert, ‘Reflections on the ICTY Registry’, (2004) 2 *Journal of International Criminal Justice* 480, pp.482. See also: ICTY Enforcement Agreements: Greece; Romania; Hungary; Croatia; United Kingdom; Austria; Belgium; Switzerland; Australia; New Zealand; Germany; Bosnia; France; Denmark; Sweden; Norway; Spain; The Netherlands; Finland; United States; and Italy ; see also ICTR Agreements with Mali; Benin; Switzerland; France; Italy; Sweden and Rwanda.

²³⁰ ICTY RPE, Rule 104; ICTR RPE, Rule 104.

²³¹ *Ibid.*

²³² See: ‘Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone’, 16 September 2009; ‘Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone’, 9 July 2007.

²³³ *Brima et al.* (SCSL-04-16-T), Sentencing Judgment, 19 July 2007.

²³⁴ *Ibid.*, para.102.

all, if problems are encountered in relation to enforcement, then the IRMCT and the RSCSL Registry will need to work with the enforcing State to resolve any difficulties.²³⁵

There is also a judicial dimension to this residual function derived from the authority of the Tribunals to grant pardon, commutation of sentence or early release.²³⁶ As previously noted, imprisonment is served in accordance with the applicable law of the state concerned. However, the enforcing State cannot modify the length of the Tribunals' sentence. The Mechanisms' Statutes provide that if, pursuant to the law of the State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State concerned shall notify the IRMCT or the RSCSL.²³⁷ Article 26 of the IRMCT Statute and Article 24 of the RSCSL Statute provide that the President will decide on pardon or commutation of sentence on the basis of the interests of justice and general principles of law.²³⁸ Under the current Rules of the ad hoc Tribunals and the SCSL, in determining whether pardon or commutation is appropriate, the President shall consider the gravity of the crimes for which the prisoner was convicted, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.²³⁹ Finally, convicted persons who have served their sentences, or even persons who have been acquitted by the Tribunals, may need assistance to obtain travel documents, authorisation to return to their home countries or support in seeking asylum.²⁴⁰

²³⁵ See: 'Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone', 16 September 2009; 'Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone', 9 July 2007.

²³⁶ 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', 21 May 2009, UN Doc. S/2009/258, para.37 notes that, thus far, the ICTY President has received 39 applications for early release and granted 22. All six ICTR requests for early release have been denied. The SCSL has not yet received any applications for early release.

²³⁷ ICTY Statute, Art. 28; ICTR Statute, Art. 27; SCSL Statute, Art. 23.

²³⁸ ICTY Statute, Art. 28 and RPE, Rules 123-125; ICTR Statute, Art. 27 and RPE, Rules 124-126; SCSL Statute, Art. 23 and RPE, Rules 123-124.

²³⁹ ICTY RPE, Rule 125; ICTR RPE, Rule 126; SCSL RPE, Rule 124.

²⁴⁰ UN Doc. S/PV.6228 (2009), p.7. For example, in 2009, the ICTR acquitted two accused, Hormisdas Nsengimana and Protais Zigiranyirazo. Together with two other persons who were previously acquitted they live in safe houses in Arusha. The Registrar is seeking countries for relocation. As stated by the ICTR President, 'it is of fundamental importance and in the interests of fair justice that Member States be ready and prepared to accept the relocation of acquitted persons to their territory.'

CONCLUSION

Almost fifteen years after the creation of the ICTY and the ICTR the Security Council begun to earnestly think about the functions of the Tribunals that would not end after the conclusion of all trials and appeals. The other critical question facing the Member States of the Council was how these functions would be managed. To tackle the issues related to the post-closure period, similar to when the ICTY Completion Strategy was developed, policy makers once again examined the Tribunals' relationship with States and other international organisations from the perspective of transferring work to them. To decrease the workloads of the Residual Mechanisms the transfer of some of the tribunals' residual functions to national jurisdictions was examined. In spite of the success associated with the case referral process, including the enhanced cooperation between the *ad hoc* tribunals and the authorities in the former Yugoslavia and Rwanda, during the policy discussions on the closure of the ICTY and the ICTR it became apparent that the referral of residual functions, in particular those stemming from the tribunals' proceedings, to national courts would not be the best solution. Although the Secretary-General explored the notion of transferring some of the functions to national courts the concept never really gained traction in the Security Council. Therefore, instead of devolving authority for the management of the tribunals' residual functions to national jurisdictions or other international organisations the Security Council decided to create a new International Residual Mechanism for Criminal Tribunals. The United Nations and the Government of Sierra Leone have also agreed to create the Residual Special Court for Sierra Leone. Consequently the ICTY, the ICTR and the Special Court will be the first international tribunals in history to close and transfer their residual functions to legal entities that have been specifically created to assume responsibility for those tasks.

The creation of the IRMCT and the RSCSL prompts a keen awareness of the fact that although the international tribunals are temporary courts, the obligations that stem from their core business of trying and in most cases punishing war criminals have considerably longer term implications. Although the Security Council has declared in Resolution 1966 that the IRMCT should be a 'small, temporary and efficient structure', the Council has not defined when the Mechanism will end its work. Doubtless this is

because the Member States of the Council cannot definitively say at which point in the future it will no longer be necessary to manage the residual functions of the tribunals. Therefore, the Council has decided that the Mechanism shall operate for an initial period of four years and for subsequent periods of two years thereafter.²⁴¹ It is clear, however, that other tribunals backed by the United Nations will complete their work in the future. For example, the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia will face the same challenges as the *ad hoc* tribunals and the Special Court in terms of completing their mandates and managing their residual functions. In this regard, the IRMCT and the RSCSL will provide guidance for the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia.

In terms of the *ad hoc* tribunals and the Special Court completing their mandates the establishment of the Residual Mechanisms is a very positive development. Considering the vast achievements of the international tribunals, it is reassuring that the member States of the Security Council have accepted that although they created temporary courts many years ago, there are obligations stemming from the work of the ICTY, the ICTR and the SCSL that they must support for many more years to come. This is a new and interesting dimension of the legacy of the Courts.

²⁴¹ UN Doc. S/RES/1966 (2010), para.17

CONCLUSION

The legacy of the *ad hoc* Tribunals and the Special Court for Sierra Leone has been identified as a broad concept – encapsulating a variety of ideas depending on how the word is applied.¹ For example, the former President of the Rwanda Tribunal, Judge Dennis Byron, has pointed towards the ICTR’s ‘impact on the world, on history, and on the development of international criminal law’ as issues to be explored when assessing the legacy of the court.² Others consider the proper completion of proceedings before the Yugoslavia Tribunal together with the establishment of a viable residual mechanism as a ‘*sine qua non* for a positive long-term legacy of the ICTY.’³ Some observers have, rather ambitiously, linked the Special Court’s legacy to the restoration of the rule of law in Sierra Leone noting that the reform of the national judiciary and the restoration of civil society are essential ‘for the long-term impact of the court to be felt beyond the narrow group of individuals said to bear the greatest responsibility’.⁴ Yet, the legacy of the Court has also been visualised in more concrete terms. For example, a former Registrar noted that the Special Court may leave to Sierra Leone physical infrastructure, trained staff and organisational structures.⁵

Although perhaps many elements of the legacy of the ICTY, the ICTR and the Special Court will only unfold in future years, the international tribunals can already identify concrete results and the historic milestones that they have reached. Many of the senior figures responsible for the war in Sierra Leone and the Rwandan genocide have been brought to trial by the SCSL and the ICTR. To this extent, at least, victims of the

¹ See: Erik Møse, ‘The ICTR’S Completion Strategy – Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667, p. 675. For an analysis of the legacy carried by personnel of the ICTR who will be ‘re-dispersed’ around the world after closure, see: Nigel Eltringham, “‘A War Crimes Community?’: The Legacy of the International Criminal Tribunal for Rwanda Beyond Jurisprudence”, (2008) 14 *New England Journal of International and Comparative Law* 309, p.311.

² Dennis C. M. Byron, ‘Looking at Legacy and Looking Back on the Legacy Symposium’, (2008) 14 *New England Journal of International and Comparative Law* 319, p.319.

³ ‘Report of the President on the Conference Assessing the Legacy of the ICTY’, 27 April 2010, para. 11(i).

⁴ Vincent O. Nmehielle and Charles Chernor Jalloh, ‘The Legacy of the Special Court for Sierra Leone’, (2006) 30 *Fletcher Forum of World Affairs* 107, p.111.

⁵ Chandra Lekha Sriram, ‘Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone’, (2006) 29 *Fordham International Law Journal* 472, p.500.

conflicts have seen their tormentors held accountable for their crimes.⁶ With the arrest of the ICTY fugitives, Ratko Mladić and Goran Hadžić, in 2011, no person indicted by the Tribunal remains at large. In particular, the transfer of Mladić to the ICTY prompted some Governments to publicly reaffirm their commitment to international justice. No doubt, the arrest also shifted the focus of member States of the Security Council, albeit briefly, away from the closure of the ICTY to the trial of the most senior military leader allegedly responsible for the barbaric crimes committed in Bosnia. As the President of the United States of America, Barak Obama, remarked following the arrest of Ratko Mladić:

Today is an important day for the families of Mladić's many victims, for Serbia, for Bosnia, for the United States, and for international justice. While we will never be able to bring back those who were murdered, Mladić will now have to answer to his victims, and the world in a court of law. From Nuremberg to the present, the United States has long viewed justice for war crimes, crimes against humanity, and genocide as both a moral imperative and an essential element of stability and peace[...] Those who have committed crimes against humanity and genocide will not escape judgment. May the families of Mladić's victims find some solace in today's arrest, and may this deepen the ties among the people of the region.⁷

The term ‘global legacy’ has been used to describe the impact of the *ad hoc* Tribunal’s jurisprudence on the growth of international criminal law.⁸ For instance, the Tribunals have made considerable advances in the prosecution of rape and others forms of sexual violence. In the landmark *Akayesu* judgment, the ICTR became the first international criminal tribunal to recognise rape and sexual violence as acts constituting genocide as long as they were committed with the specific intent to destroy, in whole or in part, a particular group.⁹ The Trial Chamber declared in the *Akayesu* Judgment that ‘[s]exual violence was a step in the process of destruction of the Tutsi group – destruction

⁶ See generally: Timothy Gallimore, ‘The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda’, (2008) 14 *New England Journal of International and Comparative Law* 239.

⁷ The White House Office of the Press Secretary, ‘Statement by the President on the Arrest of Ratko Mladić’, 26 May 2011.

⁸ ‘Report of the President on the Conference Assessing the Legacy of the ICTY’, 27 April 2010, para.12.

⁹ *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para.731.

of the spirit, of the will to live, and of life itself.¹⁰ Turning to the Balkan wars, it has been noted that, despite the indignation expressed by the international community at the commission of rape and sexual violence during the conflict, at the time of the creation of the Yugoslavia Tribunal, ‘it remained to be seen how effective the Tribunal would be in finally providing a legal framework for and judicial response to a crime which, up to that point, had been significant only in its absence from international prosecutions.’¹¹ As the ICTY moves towards the completion of its mandate it is clear that the Tribunal has made progress in terms of the prosecution of sexual violence as a war crime, a crime against humanity and genocide. For example according to a Trial Chamber, in *Furundžija*, rape may be prosecuted as a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide.¹² Moreover in *Delalić*, for the first time by an international court, the ICTY ruled that rape can be qualified as a form of torture under the Geneva Conventions related to grave breaches.¹³ As a result of its jurisprudence, the Special Court has also had its moments in the limelight. By recognising forced marriage as a distinct crime against humanity, the court has been applauded by many for expanding the body of law related to gender crimes.¹⁴ The decisions and judgments of the Tribunals are already in use in national and international courts.¹⁵ As noted by the renowned scholar and President of the ICTY, Judge Theodor Meron, their contribution to

¹⁰ *Ibid.*, para.732. For a discussion on *Akayesu*, see: Alice Leroy-Hajee, ‘Prosecuting Sexual Violence at the ICTR’, in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Leiden: Martinus Nijhoff Publishers, 2010, pp.185- 196. See also: Inés Weinberg de Roca, ‘Prosecuting Gender Based and Sexual Crimes Against Women: The Role of the International Courts and Criminal Tribunals’, in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Leiden: Martinus Nijhoff Publishers, 2010, pp.229-235. See also: Christine Chinkin, ‘Gender-related Violence and International Criminal Law and Justice’, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, 2009, pp.73-81.

¹¹ See: Niamh Hayes, ‘Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals’, in Darcy and Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford: Oxford University Press, 2010, pp.130-131.

¹² *Furundžija* (ICTY-95-171-T), Judgment, 10 December 1998, para.172. See: Kelly D. Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’, (2003) 21 *Berkeley Journal of International Law* 288.

¹³ *Delalić et. al.* (ICTY IT-96-21-T), Judgment, 16 November 1998, paras. 494-497.

¹⁴ See: *Brima, Kamara and Kanu* (SCSL 2004-16-A), Judgment, 22 February 2008; *Sesay, Kallon and Gbao* (SCSL-04-15-T), Judgment, 2 March 2009. For a discussion challenging the SCSL definition of forced marriage as a new crime, see: Jennifer Gong-Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’, 2009 8 *Northwestern Journal of International Human Rights Law* 53.

¹⁵ Dennis C. M. Byron, ‘Looking at Legacy and Looking Back on the Legacy Symposium’, 2008 14 *New England Journal of International and Comparative Law* 319, p.321.

international humanitarian law is ‘an important foundation upon which other criminal tribunals, both international and national [...] can build as they join in the common mission of bringing the long era of impunity for mass atrocities to an end.’¹⁶

A novel approach towards examining the legacy of the Tribunals is to expand the analysis of the impact of the Courts’ work beyond their operations and jurisprudence to include an investigation of the consequences of their closure. The overarching topic of this work is the Completion Strategies of the ICTY, the ICTR and the SCSL. The enhanced cooperation between the *ad hoc* Tribunals and national courts as a result of their closure and the lessons that the ICC, other international tribunals and national jurisdictions can garner from this process have also been explored. Critically the Rule 11bis referral process which was designed to accelerate the closure of the *ad hoc* Tribunals has in many respects had positive effects on both the prosecution strategies of the ICTY and ICTR as well as judicial reform efforts in both Bosnia and Herzegovina and, increasingly, Rwanda. As William Schabas has pointed out, one of the laudable results of the referral process has been the complete elimination of the death penalty in Rwanda.¹⁷ In the context of the former Yugoslavia, the decision to close the ICTY prompted the creation of the War Crimes Chamber which in turn facilitated not only the transfer of accused persons from the ICTY to the Chamber for trial but in addition triggered the indictment and trial of many perpetrators by the Bosnian authorities. Of course establishing and maintaining working relationships between international and national Courts that result in the trial of accused persons at both levels will present an array of complex problems that should be resolved jointly by international actors and their national counterparts. Each conflict is unique and the justice response to the carnage committed should be adapted to meet the demands of a given situation. In this regard the words of the distinguished judge and scholar, Professor Antonio Cassese should resonate with all international criminal lawyers in the future. He once wrote:

[...] [R]esort to national courts is not free from deficiency, any more than are the other available means of reacting to atrocities and other gross violations of human rights,

¹⁶ Theodor Meron, ‘Procedural Evolution in the ICTY’, (2004) 2 *Journal of International Criminal Justice* 520, p.520.

¹⁷ William A. Schabas, ‘Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda’, (2009) 13 *Max Planck Yearbook of United Nations Law* 39, p.39.

namely the establishment of Truth and Reconciliation Commissions, of international criminal tribunals, or of mixed or ‘internationalized’ courts. None of these avenues is flawless. Probably the best response to atrocities lies in a prudent and well-thought-out combination of the various approaches, seen not as alternatives but as a joint reaction to the intolerable suffering we are obliged to witness every day.¹⁸

National justice sector reform is not the responsibility of the international tribunals. In spite of the Tribunals’ valuable contribution to ongoing judicial reform initiatives in the affected countries, as they head towards closure and transition to their respective residual mechanisms, it appears that the institutions are increasingly fostering relationships with other United Nations agencies and civil society to preserve their legacies. As the ICTY has correctly pointed out ‘while goals such as reconciliation and capacity building are connected to the ICTY’s mandate, the Tribunal is and remains a criminal court. It should focus on its key expertise and make use of the possibility of cooperating with other actors who are best positioned to assist it.’¹⁹ This reflects the latest approach of the ICC Office of the Prosecutor to positive complementarity which has indicated that the Office will encourage genuine national trials, by working with its various networks of cooperation ‘but without involving the Office directly in capacity building or financial or technical assistance.’²⁰ The impetus for this study is to impart experience and knowledge that may contribute to the future enforcement of international criminal law by both international and national courts. By presenting the various approaches taken by the ICTY, the ICTR and the SCSL towards the trial of perpetrators from their inception to closure; a model of positive complementarity in practice; and a means to responsibly end the work of international tribunals the intention is that a broad spectrum of actors may extract relevant lessons that will contribute to our common goals of bringing the perpetrators of mass atrocities to trial and preserving the legacy of the courts that do so well into the future.

¹⁸ Antonio Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003, p.458.

¹⁹ ‘Report of the President on the Conference Assessing the Legacy of the ICTY’, 27 April 2010, para.11(iv).

²⁰ International Criminal Court, ‘Office of the Prosecutor Prosecutorial Strategy 2009-2012’, 1 February 2010, para.17.

BIBLIOGRAPHY

MONOGRAPHS

Arendt, Hannah, *Hannah Arendt, Karl Jaspers: Correspondence, 1926-1969*, Florida: Harcourt Brace & Company, 1992.

Bass, Gary Jonathan, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press, 2000.

Boister, Neil and Cryer, Robert, *The Tokyo International Military Tribunal*, Oxford: Oxford University Press, 2008.

Cassese, Antonio, *International Criminal Law*, Oxford: Oxford University Press, 2003.

Cassese, Antonio, *International Law*, 2nd edn., Oxford: Oxford University Press, 2005.

Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005.

Drumbl, Mark A., *Atrocity, Punishment, and International Law*, Cambridge: Cambridge University Press, 2007.

Glueck, Sheldon, *War Criminals: Their Prosecution and Punishment*, New York: Alfred A. Knopf, 1944.

Gutman, Roy, *A Witness to Genocide*, New York: Macmillan Publishing Company, 1993.

Holbrooke, Richard, *To End A War*, New York: Random House, Inc., 1998.

Klabbers, Jan, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2009.

Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford: Oxford University Press, 2008.

Kochavi, Arie J., *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC: University of North Carolina Press, 1998.

Lincoln, Jessica, *Transitional Justice, Peace and Accountability: Outreach and the Role of International Courts after Conflict*, Abingdon, Oxon: Routledge Publishers, 2011.

Marrus, Michael R., *The Nuremberg War Crimes Trial 1945-46, A Documentary History*, Boston: Bedford Books, 1997.

Meron, Theodor, *War Crimes Law Comes of Age*, Oxford: Oxford University Press 1998.

Morris, Virginia and Scharf, Michael P., *The International Criminal Tribunal for Rwanda*, New York: Transnational Publishers, 1998.

Power, Samantha, 'A Problem from Hell': *America and the Age of Genocide*, New York: Harper Perennial, 2003.

Roling, B.V.A and Cassese, Antonio, *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993.

Schabas, William A., *An Introduction to the International Criminal Court*, 4th edn., Cambridge: Cambridge University Press, 2011.

Schabas, William A., *Genocide in International Law: The Crime of Crimes*, 2nd edn., Cambridge: Cambridge University Press, 2009.

Schabas, William A., *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006.

Scharf, Michael P., *Balkan Justice: The Story behind the First International War Crimes Trial Since Nuremberg*, Durham, North Carolina: Carolina Academic Press, 1997.

Silber, Laura and Little, Alan, *The Death of Yugoslavia*, London: Penguin Books, 1996.

Smith, Bradley F., *The Road to Nuremberg: How the Allies Finally Agreed to Try the Nazi Leaders Rather than Summarily Shoot Them*, London: Andre Deutsch, 1981.

Steiner, Henry J. and Alston, Philip, *International Human Rights in Context: Law, Politics and Morals*, 2nd edn., Oxford: Oxford University Press, 2000.

Taylor, Telford, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, London: Bloomsbury Publishing, 1993.

Williams, Paul R. and Scharf, Michael P., *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, Maryland: Roman & Littlefield Publishers, 2002.

Willis, James F., *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982.

Zahar, Alexander and Sluiter, Goran, *International Criminal Law*, Oxford: Oxford University Press, 2008.

CHAPTERS IN EDITED VOLUMES

Acquaviva, Guido, “‘Best Before Date Shown’: Residual Mechanisms at the ICTY”, in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, pp.507-536.

Bainter, Ric, ‘The Elephant in the Room: Defense Reform in Bosnia and Herzegovina’, in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, Aldershot, Hampshire: Ashgate Publishers, 2008, pp.235-256.

Bassiouni, M. Cherif, ‘Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights’, in Bassiouni (ed.), *Post-Conflict Justice*, New York: Transnational Publishers, 2002, pp.3-54.

Donlon, Fidelma, ‘Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina’, in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, Aldershot, Hampshire: Ashgate Publishers, 2008, pp.257-285.

Donlon, Fidelma, ‘The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals’, in Darcy and Powderly, (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford: Oxford University Press, 2010, pp.353-381.

Donlon, Fidelma, ‘Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal’s Evidence in the Srebrenica Trials before the War Crimes Chamber’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge: Cambridge University Press, 2011, pp.920-952.

Donlon, Fidelma, ‘Hybrid Tribunals’, in Schabas and Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Abingdon, Oxon: Routledge Publishers, 2011, pp.85-106.

El Zeidy, Mohamed, ‘Origin and Genesis of Complementarity’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp.69-142.

Fomete, Jean-Pele, ‘Countdown to 2010: A Critical Overview of the Completion Strategy of the International Criminal Tribunal for Rwanda (ICTR)’, in Decaux, Dieng and Sow (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, The Hague: Martinus Nijhoff Publishers, 2007, pp.346-400.

Guariglia, Fabricio, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, pp.209-218.

Hall, Christopher Keith, ‘Developing and Implementing an Effective Positive Complementarity Prosecution Strategy’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, pp.219 -228.

Hayes, Niamh, ‘Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals’, in Darcy and Powderly, (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford: Oxford University Press, 2010, pp.129-155.

Jallow, Hassan B., ‘Challenges of Investigating and Prosecuting International Crimes’, in Decaux, Dieng, and Sow (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, The Hague: Martinus Nijhoff Publishers, 2007, pp.437-459.

Moreno-Ocampo, Luis, ‘A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp.21-33.

Philpott, Charles and Williams, Rhodri C., ‘The Dayton Dialectic: The Significance of Property Deprivation and Repossession in the Context of Ethnic Cleansing’, in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, Aldershot, Hampshire: Ashgate Publishers, 2008, pp.149-178.

Schabas, William A., ‘Prosecutorial Discretion and Gravity’, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, pp.229- 246.

Schabas, William A., ‘The Rise and Fall of Complementarity’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp.150-165.

Schabas, William A., ‘The Rwanda Case: Sometimes It’s Impossible’, in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, New York: Transnational Publishers, 2002, pp.449-520.

Schabas, William A., ‘Complementarity in Practice: Creative Solutions or a Trap for the Court’, in Politi and Gioia (eds.), *The International Criminal Court and National Jurisdictions*, Aldershot, Hampshire: Ashgate Publishers , 2008, pp.25 -48.

Shraga, Daphna, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions in Internationalized Criminal Courts and Tribunals, Sierra Leone, East Timor, Kosovo and Cambodia', in Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts*, Oxford: Oxford University Press, 2004, pp.15-39.

Stahn, Carsten, 'Introduction: Bridge over Troubled Waters?', in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp.1-17.

Stahn, Carsten, 'Taking Complementarity Seriously', in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp. 233-283.

Stegmiller, Ignaz, 'Interpretative Gravity under the Rome Statute', in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge: Cambridge University Press, 2011, Vol.1, pp. 603-642.

Tolbert, David and Kontic, Aleksandar, 'The ICTY: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers 2009, pp.135-162.

Wenzel, Thomas, 'Survival in the Camp – Survival and Life After the Camp', in Filipović (ed.), *I Begged them to Kill Me, Crimes Against the Women of Bosnia-Herzegovina*, Centre for Investigation and Documentation of the Association of Former Prison Camp Inmates in Bosnia and Herzegovina, 1999.

Whiting, Alex, 'The ICTY as a Laboratory of International Procedure', in Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, pp.83-107.

Williams, Sarah, 'The Completion Strategy of the ICTY and the ICTR in International Criminal Justice A Critical Analysis of Institutions and Procedure', in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, London: Cameron May, 2007, pp.153-237.

ARTICLES

Acquaviva Guido, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?', (2011) 9 *Journal of International Criminal Justice* 793.

Akhavan, Payam, 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order', (1993) 15 *Human Rights Quarterly* 262.

Akhavan, Payam, ‘The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond’, (1996) 18 *Human Rights Quarterly* 259.

Akhavan, Payam, ‘The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’, (1996) 90 *American Journal of International Law* 501.

Alvarez, José. E., ‘Crimes of Hate/Crimes of State’, (1999) 24 *Yale Journal of International Law* 365.

Aptel, Cecile, ‘Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues’, (2008) 14 *New England Journal of International and Comparative Law* 169.

Arbour, Louise, ‘The Crucial Years’, (2004) 2 *Journal of International Criminal Justice* 396.

Arbour, Louise, ‘The Prosecution of International Crimes: Prospects and Pitfalls’, (1999) 1 *Washington University Journal of Law and Policy* 13.

Badar, Mohamed Elewa, “Just Convict Everyone!” Joint Perpetration: From *Tadić* to *Stakić* and Back Again’, (2006) 6 *International Criminal Law Review* 293.

Barria, Lilian A., and Roper, Steven D., ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’, (2005) 9 *International Journal of Human Rights* 349.

Bassiouni, M. Cherif, ‘Combating Impunity for International Crimes’, (2000) 71 *Colorado Law Review* 409.

Bassiouni, M. Cherif, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, 59 *Law and Contemporary Problems* 9.

Bassiouni, M. Cherif, ‘World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System’, (2002) 30 *Denver Journal of International Law and Policy* 244.

Bassiouni, M. Cherif and Wahid Hanna, Michael, ‘Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein’, (2006-2008) 39 *Case Western Reserve Journal of International Law* 21.

Bathurst, M.E., ‘The UN War Crimes Commission’, (1945) 39 *American Journal of International Law* 565.

Brown, Bartram S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, (1998) 23 *Yale Journal of International Law* 383.

Burke-White, William W., ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo’, (2004) 18 *Leiden Journal of International Law* 557.

Burke-White, William W., ‘Implementing A policy of Positive Complementarity in the Rome System of Justice’, (2008) 19 *Criminal Law Forum* 59.

Burke-White, William W., ‘The Domestic Influence of International Criminal Tribunals: The International Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina,’ (2008) 46 *Columbia Journal of Transnational Law* 279.

Byron, Dennis C. M., ‘Looking at Legacy and Looking Back on the Legacy Symposium’, (2008) 14 *New England Journal of International and Comparative Law* 319.

Cassese, Antonio, ‘The ICTY: A Living and Vital Reality’, (2004) 2 *Journal of International Criminal Justice* 585.

Cohen, David, ““Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future”, (2007) 43 *Stanford Journal of International Law* 1.

Crane, David M., ‘Terrorists, Warlords, and Thugs’, (2005-2006) 21 *American University International Law Review* 505.

Crane, David M., ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts’, (2005-2006) 37 *Case Western Reserve Journal of International Law* 1.

Cryer, Robert, ‘A “Special Court” for Sierra Leone?’, (2001) 50 *International and Comparative Law Quarterly* 435.

D’Amato, Anthony, ‘Peace vs. Accountability in Bosnia’, (1994) 88 *American Journal of International Law* 500.

Del Ponte, Carla, ‘Prosecuting the Individuals Bearing the Highest Level of Responsibility’, (2004) 2 *Journal of International Criminal Justice* 516.

Dennis, Catherine, ‘Critical Overview of the “Residual Functions” of the Mechanism and its Date of Commencement (Including Transitional Arrangements)’, (2011) 9 *Journal of International Criminal Justice* 819.

deGuzman, Margaret M., ‘Gravity and the Legitimacy of the International Criminal Court’, (2009), 32 *Fordham International Law Journal* 1400.

de Sampayo Garrido, Dorothee, ‘Problems and Achievements As Seen From the Viewpoint of the Registry’, (2004) 2 *Journal of International Criminal Justice* 474.

Dickinson, Laura A., ‘The Promise of Hybrid Courts’, (2003) 97 *American Journal of International Law* 295.

El Zeidy, Mohamed M., ‘From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the ad hoc Tribunals’, (2008) 57 *International and Comparative Law Quarterly* 403.

El Zeidy, Mohamed M., ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, (2001-2002) 23 *Michigan Journal of International Law* 869.

Ellis, Mark S., ‘Bringing Justice to an Embattled Region – Creating and Implementing the “Rules of the Road” for Bosnia and Herzegovina’, (1999) 17 *Berkeley Journal of International Law* 1.

Eltringham, Nigel, ““A War Crimes Community?”: The Legacy of the International Criminal Tribunal for Rwanda Beyond Jurisprudence”, (2008) 14 *New England Journal of International and Comparative Law* 309.

Gaeta, Paola, ‘Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?’, (1998) 9 *European Journal of International Law* 174.

Gallimore, Timothy, ‘The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda’, (2008) 14 *New England Journal of International and Comparative Law* 239.

Garms, Ulrich, and Peschke, Katharina, ‘War Crimes Prosecution in Bosnia and Herzegovina (1992-2002): An Analysis through the Jurisprudence of the Human Rights Chamber’, (2006) 4 *Journal of International Criminal Justice* 2.

Goldstone, Richard ‘A View from the Prosecution’, (2004) 2 *Journal of International Criminal Justice* 380.

Goldstone, Richard, ‘Assessing the Work of the UN War Crimes Tribunals’, (1997) 33 *Stanford Journal of International Law* 4.

Goldstone, Richard, ‘Conference Luncheon Address’, (1997) 7 *Transnational Law and Contemporary Problems* 2.

Goldstone, Richard, ‘Historical Evolution – From Nuremberg to the International Criminal Court’, (2007) 25 *Penn State International Law Review* 763.

Goldstone, Richard, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’, (1996) 6 *Duke Journal of Comparative and International Law* 5.

Jallow, Hassan B., ‘Prosecutorial Discretion and International Criminal Justice’, (2005) 3 *Journal of International Criminal Justice* 145.

Jennings, Robert Y., ‘The International Court of Justice After Fifty Years’, (1995) 89 *American Journal of International Law* 493.

Johnson, Larry ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 *American Journal of International Law* 158.

Knoops, Geert-Jan Alexander, ‘Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective’, (2004) 15 *Criminal Law Forum* 365.

Kritz, Neil J., ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, (1996) 59 *Law and Contemporary Problems* 127.

Lauth, Mechtild, ‘Ten Years after Dayton: War Crimes Prosecutions in Bosnia and Herzegovina’, (2005) 16 *Helsinki Monitor* 253.

Lee, Roy S., ‘The Rwanda Tribunal’, (1996) 9 *Leiden Journal of International Law* 37.

Lekha Sriram, Chandra, ‘Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone’, (2006) 29 *Fordham International Law Journal* 472.

Manuell, Janet, and Kontic, Aleksander, ‘Transitional Justice: The Prosecution of War Crimes Cases in Bosnia and Herzegovina under the “Rules of the Road”’, (2002) 5 *Yearbook of International Humanitarian Law* 331.

McDonald, Gabrielle Kirk, ‘Reflections on the Contributions of the International Criminal Tribunal for the former Yugoslavia’, (2001) 24 *Hastings International and Comparative Law Review* 155.

Megret, Frederic, ‘Global or Local Justice: Who Should Try Ousted Leaders? In Defense of Hybridity, Towards a Representational Theory of International Criminal Justice’, (2005) 38 *Cornell International Law Journal* 725.

Meron, Theodor, ‘Procedural Evolution in the ICTY’, 2004 2 *Journal of International Criminal Justice* 520.

Meron, Theodor, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, (2006) 100 *American Journal of International Law* 551.

Morris, Madeline H., ‘The Trials of Concurrent Jurisdiction: The Case of Rwanda’, (1997) 7 *Duke Journal of Comparative and International Law* 349.

Møse, Erik, ‘The ICTR’S Completion Strategy-Challenges and Possible Solutions’, (2008) 6 *Journal of International Criminal Justice* 667.

Mundis, Daryl A., ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’, (2005) 99 *American Journal of International Law* 142.

Nmehielle, Vincent O., and Jalloh, Charles Chernor, ‘The Legacy of the Special Court for Sierra Leone’, (2006) 30 *Fletcher Forum of World Affairs* 107.

Oosterveld, Valerie, ‘International Criminal Justice, Politics and the Special Court for Sierra Leone’, (2008) 102 *American Society of International Law Proceedings* 19.

Oosthuizen, Gabriël and Schaeffer, Robert, ‘Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL’, (2008) 3 *Hague Justice Journal* 48.

Pocar, Fausto, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *Journal of International Criminal Justice* 655.

Raab, Dominic, ‘Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals’, (2005) 3 *Journal of International Criminal Justice* 82.

Reydam, Luc, ‘The ICTR Ten Years On – Back to the Nuremberg Paradigm?’, (2005) 3 *Journal of International Criminal Justice* 977.

Robertson, Geoffrey, ‘Ending Impunity: How International Criminal Law Can Put Tyrants on Trial’, (2005) 38 *Cornell International Law Journal* 649.

Schabas, William A., ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’, (2004-2005) 11 *U.C. Davis Journal of International Law and Policy* 145.

Schabas, William A., ‘Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda’, (2009) 13 *Max Planck Yearbook of United Nations Law* 39.

Schabas, William A., ‘Barayagwiza v. Prosecutor’, (2000) 94 *American Journal of International Law* 638.

Schabas, William A., ‘Complementarity in Practice: Some Uncomplimentary Thoughts’, (2008) 19 *Criminal Law Forum* 5.

Schabas, William A., 'First Prosecutions at the International Criminal Court', (2006) 27 *Human Rights Law Journal* 25.

Schabas, William A., 'Justice, Democracy, and Impunity in Post-Conflict Rwanda: Searching for Solutions to Impossible Problems', (1996) 7 *Criminal Law Forum* 523.

Scharf, Michael P., 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', (1999-2000) 49 *DePaul Law Review* 925.

Scheffer, David J., 'Three Memories from the Year of Origin, 1993', (2004) 2 *Journal of International Criminal Justice* 353.

Shraga, Daphna and Zacklin, Ralph, 'The International Criminal Tribunal for Rwanda', (1996) 7 *European Journal of International Law* 501.

Stahn, Carsten, 'Complementarity: A Tale of Two Notions', (2008) 19 *Criminal Law Forum* 87.

Swaak-Goldman, Olivia Q., 'The ICTY and the Right to a Fair Trial: A Critique of the Critics', (1997) 10 *Leiden Journal of International Law* 215.

Szasz, Paul C., 'The Dayton Accord: 1997 The Balkan Peace Agreement', 30 *Cornell International Law Journal* 759.

Pittman, Wayde, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation', (2011) 9 *Journal of International Criminal Justice* 4.

Tolbert, David, 'Reflections on the ICTY Registry', (2004) 2 *Journal of International Criminal Justice* 480.

Wald, Patricia M., 'ICTY Judicial Proceedings: An Appraisal from Within', (2004) 2 *Journal of International Criminal Justice* 466.

Wippman, David, 'The Costs of International Justice', (2006) 100 *American Journal of International Law* 861.

Wood, Michael C., 'Security Council Working Methods and Procedure: Recent Developments', (1996) 45 *International and Comparative Law Quarterly* 150.

Zacklin, Ralph 'The Failings of Ad Hoc International Tribunals', (2004) *Journal of International Criminal Justice* 541.

CASES

COURT OF BOSNIA AND HERZEGOVINA

Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al., First Instance Verdict, 29 July 2008.

Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al., Appellate Verdict, 9 September 2009.

Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić, Decision on the Motion of the Prosecutor's Office of Bosnia and Herzegovina dated 29 October 2007 for the Acceptance of Previous Accused Questioning Records and the Records from the Trials before ICTY, 18 January 2008.

Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić, Judgment, 16 October 2009.

Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić, Second Instance Verdict, 21 October 2010.

Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković et al., Decision on the Prosecutor's Motion to Admit Transcripts of ICTY Testimony, 19 February 2009.

EUROPEAN COURT OF HUMAN RIGHTS

Doorson v. The Netherlands, Judgment, 26 April 1996, [1996] 22 EHRR 330.

Kostovski v. The Netherlands, Judgment, 20 November 1989, [1990] 12 EHRR 234.

Murray v. United Kingdom, Judgment, 8 February 1996, [1996] 22 EHRR 29.

Saunders v. United Kingdom, Judgment, 17 December 1996, [1996] 23 EHRR 313.

INTERNATIONAL CRIMINAL COURT

Lubanga (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

Ntaganda, (ICC-01/04-02/06-20), Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest', 13 July 2006.

INTERNATIONAL COURT OF JUSTICE

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Akayesu (ICTR-96-4-T), Judgment, 2 September 1998.

Bagaragaza (ICTR-2005-86-R11bis), Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006.

Bagaragaza (ICTR-2005-86-11bis), Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11 bis (F) & (G), 17 August 2007.

Bucyubaruta (ICTR-2005-85-I), Decision on the Prosecutor's Request for Referral of Laurent Bucyubaruta's Indictment to France, 27 November 2007.

Gatete (ICTR-2000-61-R11bis), Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008.

Hagegekimana (ICTR-00-55B-I), Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDA, and ADAD for Leave to Appear and make Submissions as *Amici Curiae*, 4 December 2007.

Hagegekimana (ICTR-00-55B-R11bis), Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hagegekimana to Rwanda, 19 June 2008.

Hagegekimana (ICTR-00-55B-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 4 December 2008.

Kayishema (ICTR-2001-67-I), Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

Kayishema (ICTR-01-67-R11bis), Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 16 December 2008.

Kanyarukiga (ICTR-2002-78-R11bis), Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008.

Kanyarukiga (ICTR-2002-78-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008.

Munyakazi (ICTR-1997-36-I), Decision on the Request of Human Rights Watch for Leave to Appear as *Amicus Curiae* Rules 11bis and 74 of the Rules of Procedure and Evidence, 10 March 2008.

Munyakazi (ICTR-97-36-R11bis), Decision on the Prosecutor's Request for the Referral of the Case to the Republic of Rwanda, 28 May 2008.

Munyakazi (ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008.

Ntuyahaga (ICTR-98-40-I), Decision on the Review of the Indictment, 29 September 1998.

Ntuyahaga (ICTR-98-40-T), Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

Munyakazi (ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008.

Munyeshyaka (ICTR-2005-87-I), Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France, 20 November 2007.

Niyitegeka (ICTR-96-14-A), Judgment, 9 July 2004.

Rutaganda (ICTR-96-3-A), Judgment, 26 May 2003.

Uwinkindi (ICTR-2001-75-R11bis), Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011.

Uwinkindi (ICTR-2001-75-AR11bis), Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Ademi and Norac (IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005.

Aleksovski (IT-95-14/1-A), Judgment, 24 March 2000.

Blagojević (IT-02-60-A), Judgment, 9 May 2007.

Delalić et al. (IT-96-21-A), Judgment, 20 February 2001.

Furundžija (IT-95-17/1-T), Judgment, 10 December 1998.

Janković (IT-96-23/2-PT) , Decision on Referral of Case Under Rule 11bis, 22 July 2005.

Janković (IT-96-23/2-AR11bis.2), Decision on Rule 11bis Referral, 15 November 2005.

Jelisić (IT-95-10-A), Judgment, 5 July 2001.

Kovačević (IT-01-42/2-I), Decision on Referral of Case Pursuant to Rule 11bis, 17 November 2006.

Krstić (IT-98-33-T), Judgment, 2 August 2001.

Krstić (IT-98-33-A), Judgment, 19 April 2004.

Krajišnik (IT-00-39-T), Judgment, 27 September 2006.

Kunarac et al. (IT-96-23 &23/1), Judgment, 12 June 2002.

Kupreškic (IT-95-16-T), Judgment, 14 January 2000.

Kvočka et al. (IT-98-30/1-T), Judgment, 2 November 2001.

Kvočka et al. (IT-98-30/1-A) Judgment, 28 February 2005.

Ljubičić (IT-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis, 12 April 2006.

Lukić and Lukić (IT-98-32/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 5 April 2007.

Lukić and Lukić (IT-98-32/1-AR11bis.1), Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007.

Mejakić et al. (IT-02-65-PT), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005.

Mejakić et al. (IT-02-65-AR11bis), Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006.

Milošević (IT-98-29/1-PT), Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005.

Milošević (IT-02-54-AR73.4), Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Admissibility of Evidence-In-Chief in the form of Written Statements, 31 October 2003.

Mrkšić et al. (IT-95-13/1-PT), Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment Under Rule 11bis, 30 June 2005.

Mrkšić et al. (IT-95-13/1-A), Judgment, 5 May 2009.

Nikolić (IT-02-60/1-S), Judgment, 2 December 2003.

Popović et al. (IT-05-88-T), Judgment, 10 June 2010.

Raševic and Todović (IT-97-25/1-AR11bis.1), Decision on Rule 11bis Referral, 23 February 2006.

Stanković (IT-96-23-/2-PT), Decision on Referral of Case under Rule 11bis, 17 May 2005.

Stanković (IT-96-23-/2-AR11bis), Decision on Rule 11bis Referral, 1 September 2005.

Stakić (IT-97-24-A), Judgment, 22 March 2006.

Sikirica et al. (IT-95-8-S), Sentencing Judgment, 13 November 2001.

Tadić (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Tadić (IT-94-1-D), Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the matter of Duško Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), 8 November 1994.

Tadić (IT-94-1-A), Judgment in Sentencing Appeals, 26 January 2000.

Trbić (IT-05-88/1-PT), Decision on Referral of Case under Rule 11bis, 27 April 2007.

SPECIAL COURT FOR SIERRA LEONE

Brima et al. (SCSL-04-16-A), Judgment, 22 February 2008.

Fofana (SCSL 2004-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004.

Fofana and Kondewa (SCSL-04-14-A), Judgment, 28 May 2008.

Kallon and Kamara (SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

Sesay et al. (SCSL-04-15-A), Judgment, 26 October 2009.

Taylor (SCSL-2003-01-I), Decision on Immunity from Prosecution, 31 May 2004.

REPORTS AND PUBLICATIONS

Declaration of the Peace Implementation Council, Madrid, Annexed document: The Peace Implementation Agenda, Reinforcing Peace in Bosnia and Herzegovina – The Way Forward, 16 December 1998.

International Criminal Tribunal for the Former Yugoslavia, Report of the President on the Conference Assessing the Legacy of the ICTY, 27 April 2010.

International Criminal Tribunal for the Former Yugoslavia, Biannual Completion Strategy Reports and Annual Reports, 2004-2011.

International Criminal Tribunal for Rwanda, Biannual Completion Strategy Reports and Annual Reports, 2004-2011.

International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, 42 vols.

Open Society Justice Initiative and International Criminal Law Services, Briefing Paper (marked draft), ‘The Residual Functions of the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and the Potential Mechanisms to Address Them’, January 2008

Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, ‘War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles’, March 2005.

Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), (UN Doc. S/1994/1125).

Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, (UN Doc. S/2000/597).

Report of the Commission to the Preliminary Peace Conference, 29 March 1919.

Report of the Office of Internal Oversight Services on the Review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and for the former Yugoslavia, (UN Doc. A/58/677).

Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), (UN Doc. S/1993/25704).

Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, (UN Doc. S/2000/915).

Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals', (UN.DOC S/2009/258).

Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, (UN Doc. S/2002/678).

Special Court for Sierra Leone, Fidelma Donlon, 'Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone', December 2008.

INTERNATIONAL CONVENTIONS AND INSTRUMENTS

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal (IMT), Annex, 1951 82 UNTS 279.

Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

Convention for the Prevention and Punishment of the Crime of Genocide, 1948 78 UNTS 1021.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 213 UNTS 222.

International Covenant on Civil and Political Rights, 1976 999 UNTS 171.

Moscow Declaration, 'Declaration of the Four Nations on General Security', 30 October 1943

Rome Agreement (Rules of the Road Agreement), 18 February 1996.

The General Framework Agreement for Peace in Bosnia and Herzegovina (The Dayton Peace Agreement), December 1995.

Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919.